Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples

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<1>Introduction

The goals of this article are to assess the importance of contextual sentencing for Aboriginal offenders within the context of section 718.2(e) of the Canadian *Criminal Code,* which mandates consideration of the unique circumstances of Aboriginal offenders in imposing fit sentences.[1] Section 718.2(e) has been interpreted as empowering sentencing judges to consider background and systemic factors relating to Aboriginal offenders and also to consider the imposition of culturally appropriate, community-based sanctions grounded in Aboriginal justice traditions.[2] These reforms are seen to have better chances of rehabilitation, the reduction of recidivism, and the promotion of a just, peaceful, and safe society. They can also be perceived as having a decolonizing potential.[3] However, the focus on restorative sentences must be balanced against

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[1] Section 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. c-46, states that sentencing judges must consider "all available sanctions other than imprisonment that are reasonable in the circumstances ... for all offenders, with particular attention to the circumstances of aboriginal offenders."

[2] I recognize that there is no single Aboriginal conception of justice, justice tradition, and values or how best to respond to wrongdoing. These may vary from group to group. References to these concepts in this article are intended to denote the way in which particular communities engaged in a criminal issue perceive these matters. As well, traditional Aboriginal conceptions of justice and justice traditions are not intended to mirror pre-contact notions and/or practices. Rather, they are meant to demonstrate how the group perceives these concepts in contemporary times and in ways that might work better for them than the dominant system.

[3] These developments are consistent with the broader movement towards alternative dispute resolution and problem-solving approaches that promote substantive equality and a safer society through the criminal justice process. See David Wexler, "Therapeutic Jurisprudence and the Culture of Critique" (1999) 10 Journal of Contemporary Legal Issues 263. Cultural sensitivity in the criminal justice system can occur at the front end through diversion, whereby offenders are processed in alternative, non-judicial, usually restorative (and, sometimes, community-based) programs that may mirror Aboriginal justice traditions and values. However, there are limits to cases that can be diverted, and,

the interests of victims of Aboriginal offenders who are predominantly Aboriginal women and children, and community safety as a whole, in order to ensure that the potential benefits of contextual sentencing are not undermined by the re-victimization of Aboriginal women and children.[4] Is there a potential for gendered racism[5] in the application of this provision?

The article examines some of the potential tensions determining fit sentences for Aboriginal offenders using the principles articulated by the Supreme Court of Canada in *R. v.*

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in any event, diversion may not be realistic in all cases. See *Criminal Code, supra* note 1 at sections 717 and 717.1. Diversion may be considered appropriate where the offender accepts responsibility, consents to the process, and it would not be inconsistent with the protection of society to have the offender go through a non-judicial process. For examples of some community justice projects supported by the Department of Justice across Canada, see Programs and Initiatives, Department of Justice <http://www.justice.gc.ca/en/ps/ajs/programs.html>. For Alternative Measures and Community Justice programs in Saskatchewan, see Saskatchewan Justice, Community Services, <http://www.saskjustice.gov.sk.ca/Comm_Services/restor-justice.shtml>. For an indepth examination of one renowned community-initiated healing program, see Four Circles of Hollow Water, Doc. APC 15 CA (1997), Aboriginal People's Collection, <http://ww2.psepc-sppcc.gc.ca/publications/abor_corrections/199703_e.pdf#search=%22Hollow%20Waters%22>.

[4] See Emma Cunliffe and Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organisation of Criminal Justice" in this volume. The authors note that a review of judicially convened sentencing circles does not support the restorative claims made by advocates of sentencing circles. Specifically, the needs of survivors of intimate violence are rarely addressed in these processes.

[5] Gendered racism arises where the effects of a particular principle or policy discriminate against, or are detrimental to, the interests of a racialized group, and women within that group bear the brunt of the discrimination, among other things, because of internal power imbalances between men and women. In the context of sentencing, the concern is that if contextual sentencing is applied in relation mostly to Aboriginal offenders and results in "lenient" sanctions compared to the sentencing of non-Aboriginal offenders, then the new sentencing regime could be racist because the victims of Aboriginal offenders tend to be other Aboriginal people. This raises the possibility that restorative processes and 'lenient' sentences devalue the lives, interests, and rights of Aboriginal people because their victimization is treated less seriously than the victimization of non-Aboriginals. The potential racism entailed in the application of contextualized sentencing is heightened for Aboriginal women because of the prevalence of violence against them, mostly at the hands of Aboriginal men. Hence, the concern about gendered racism. For example, see Wendy Stewart, Audrey Huntley, and Fay Blaney, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* (Ottawa: Law Commission of Canada, 2001) at 38–43.

Gladue[6] and the promotion of a safer society, including respect for victims, especially women and children. It situates sentencing reform in the context of decolonization by which Aboriginal people are seeking: (1) to reclaim authority over determining their own affairs; (2) respect for, and recognition of, the legitimacy of Aboriginal values and traditions; and (3) space (institutional and otherwise) to realize these goals.[7] This article also explores tensions in balancing long-term communal benefits of restorative justice processes and the immediate interests and safety of

[6] *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*].

[7] See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London and New York: Zed Books, 1999) at 23. Integrating Aboriginal communities and justice traditions into the Euro-Canadian criminal justice system is a far cry from the demands of Aboriginal people for institutional autonomy over the administration of justice as part of self-government. Reforms within the Euro-Canadian justice system have been perceived by some as assimilationist and an inadequate solution to the problem of Aboriginal over-representation in the criminal justice system, among other things, because it relies on colonial structures to solve problems created by that system, essentially trying to dismantle the master's house with the master's own tools. See Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," in Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, NY: Crossing Press, 1984) at 110. For examples of this critique, see Royal Commission on Aboriginal Peoples (RCAP), *Bridging the Cultural Divide: A Report on Aboriginal Peoples and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996) at 40–2; Patricia Monture-Angus, "Standing against Canadian Law: Naming Omissions of Race, Culture and Gender," in Elizabeth Comack, ed., *Locating Law: Race/Class/Gender Connections*, 2nd edition (Halifax: Fernwood Press, 2006), 73 at 77–9; Murray Sinclair, "Aboriginal Peoples, Justice and the Law," in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994), 173. See also Heather Douglas, "Customary Law, Sentencing and the Limits of the State" (2005) 20 Canadian Journal of Law and Society 141 at 156, who refers to the practice of judges in the Northern Territory of Australia that recognizes Aboriginal customary law in sentencing as limited/weak pluralism, among other things, because it occurs within the mainstream and is subject to the supervision/scrutiny of non-Aboriginal authorities. This article does not address the issue of separate criminal justice system(s) for Aboriginal peoples. Rather, it focuses on reform within the Euro-Canadian criminal justice system to improve the engagement of Aboriginal people with this system. This focus is not necessarily inconsistent with the goal of a separate Aboriginal criminal justice systems. Among other things, given the considerable convergence that has developed between the Aboriginal and non-Aboriginal systems through colonization, linkages between the two systems are inevitable and Aboriginal people will have to continue engaging with the Euro-Canadian system until full institutional autonomy for Aboriginal justice systems becomes a reality. Mary Ellen Turpel, "Reflections on Thinking Concretely about Criminal Justice Reform," in *Continuing Poundmaker and Riel's Quest*, *supra* note 7, 206 at 208–10.

victims and the community. Finally, the article explores whether considerations of restorative models in sentencing have the potential to undermine victims' rights and safety, in particular, the protection needs of Aboriginal women and children.

<1>*Purpose of Section 718.2(e) of the* Criminal Code

Contrary to the Foucauldian prediction that the use of prisons would abate in modern societies,[8] Aboriginal and other marginalized people continue to experience high rates of incarceration: "Today, the prisons of ... North America are exploding with surplus populations that cannot be off-loaded to a penal colony ... the prisons resemble the slave plantations and the penal colonies given the increasing disproportionate warehousing of minority individuals behind their walls."[9] The over-incarceration of Aboriginal[10] and other marginalized people reflects the legacies of colonization and is also evidence of their continuing victimization at the hands of the dominant white society.[11] The ineffectiveness of incarceration creates a cycle of victimization, which is partly manifested in the over-incarceration of Aboriginal people.

Contextual sentencing is aimed at a holistic approach to criminal justice that is attentive to the needs of offenders, victims, and communities.[12] The use of incarceration and/or the length of incarceral sentences are to be reconsidered in the search for fit sentences in particular circumstances. Courts must consider alternatives to incarceration that are reasonable in the circumstances, especially when dealing with Aboriginal offenders.[13] These initiatives are aimed

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[8] Jeannine Purdy, "The Emperor's New Clothes," in Eve Darian-Smith and Peter Fitzpatrick, eds., *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999), 203 at 210–16. See Michael Foucault, *Discipline and Punish: The Birth of the Prison* (London: A. Lane, 1977) at 306.

[9] Biko Agozino, *Counter-Colonial Criminology: A Critique of Imperialist Reason* (London: Pluto Press, 2003) at 35.

[10] Aboriginal people make up about 3 per cent of the general Canadian population but about 20 per cent of the prison population. Statistics Canada, "Collecting Data on Aboriginal People in the Criminal Justice System: Methods and Challenges," *The Daily* (10 May 2005), <http://www.statcan.ca/Daily/English/050510/d050510b.htm>.

[11] Agozino, *supra* note 9 at 231; and Purdy, *supra* note 8 at 214–16.

[12] See Bria Huculak, "From the Power to Punish to the Power to Heal" (Fall 1995) Exploring Justice as Healing: A Newsletter on Aboriginal Concept of Justice, <http://www.usask.ca/nativelaw/publications/jah/huculak.html>.

[13] Section 718.2(e) of the *Criminal Code*, *supra* note 1. The direction to exercise restraint in the use of incarceration and to explore alternative sanctions also applies when sentencing

at ending the revolving-door justice[14] and the *juridogenic* effect of incarceration (causing harm in an attempt to right wrongs), at least in relation to Aboriginal offenders.[15]

The holistic approach to sentencing and the consideration of contextual factors constitute a shift from the rights-based individualistic focus of traditional liberal legal frameworks with its emphasis on formal equality.[16] In addition, they mark a departure from the criminal justice system's "preoccupation with punishment of offenders" and the supposed protection of victims and society, which sometimes end up victimizing offenders.[17] Sentencing reform can therefore be perceived as part of the broader movement to use therapeutic interventions in the criminal justice system to, among other things, improve offenders' engagement with the system and reduce recidivism while promoting a safe society.[18] Within this framework, the over-representation of Aboriginal offenders in the criminal justice system is situated in broader structural and systemic processes, specifically the legacies of colonialism and neo-colonialism, rather than simply being due to their individual moral failings or some inherent predisposition to criminality. In this way, the criminal justice system, at least at the sentencing stage, can be perceived as a mechanism for redressing some of the legacies of colonization, a site for

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young offenders. See the *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 38(2)(d). Courts have also recognized the need to consider background and systemic factors when sentencing non-Aboriginal offenders who are also marginalized in Canadian society such as Black Canadians. *R. v. Hamilton and Mason* (2004), 186 C.C.C. (3d) 129 (Ont. C.A.) [*Hamilton*].

[14] See David Wexler, "Therapeutic Jurisprudence" (2004–5) 20 Touro Law Review 353 at 354.

[15] Similar initiatives have been implemented in other jurisdictions. For example, although not explicitly required to do so, the *Sentencing Act* (Northern Territory), s. 5(2) (f) and (s), requires sentencing judges in the Northern Territory of Australia to consider "the presence of any aggravating or mitigating factor" and "any other relevant circumstance" of the offender in determining appropriate sentences. Courts in the Northern Territory recognize the importance of restorative justice principles in sentencing Aboriginal offenders as a means of protecting the interests of the community and supporting a peaceful society, bearing in mind that the root causes of crimes are often the effects of years of colonization, racism, and domination. See Douglas, *supra* note 7.

[16] See RCAP, *supra* note 7 at 70.

[17] Agozino, *supra* note 9 at 19.

[18] See David B. Wexler, "Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore" (2004) Future Trends in State Courts 87, National Center for State Courts, <http://www.ncsconline.org/WC/Publications/Trends/SpeProTherapTrends2004.html>. See also Wexler, *supra* note 14 at 355.

promoting social justice, and, hence, possibly a system that is consistent with the decolonization of Aboriginal peoples.

According to *Gladue*, contextual sentencing is to be considered for all Aboriginal offenders whether they live on or off the reserve.[19] Incarceration is to be considered as a "penal sanction of last resort ... only where no other sanction or combination of sanctions is appropriate" in the circumstances.[20] Sentencing reform is not intended to be a panacea for the causes of criminality or, for that matter, Aboriginal criminality.[21] Rather, it provides an opportunity to move away from a focus on law and order to examine the underlying historical, social, and structural processes that contribute to the over-representation of Aboriginal people in the criminal justice system.[22] It also provides an opportunity to consider effective alternatives to incarceration that have more potential to address the root causes of anti-social behaviour.[23]

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[19] In *Gladue, supra* note 6, the appellant, a Cree woman, pleaded guilty to manslaughter for stabbing her common law husband to death. The sentencing judge failed to consider *Gladue*'s status as an Aboriginal person within the context of section 718.2(e) because she was living in an urban centre and not on a reserve at the time of the offence. She was sentenced to three years' imprisonment. On appeal to the Supreme Court of Canada, the Court held that the trial judge had erred in concluding that section 718.2(e) did not apply to off-reserve Aboriginal offenders. However, the Court dismissed her appeal because the three-year sentence was not unreasonable in light of the seriousness of her crime. Further, she had already been released on parole after serving six months of her custodial sentence.

[20] *Ibid.* at para. 36. See also *R. v. Laliberte* (2000), 143 C.C.C. (3d) 503 at para. 57 (Sask. C.A.), where the court noted that in appropriate cases the goals of restorative justice should be given significant weight in sentencing Aboriginal offenders. The emphasis on non-incarceral sentences is not to suggest that force, coercion, and custodial sentences will always be inappropriate for Aboriginal offenders. However, fundamentally, these forms of punishment remain at odds with Aboriginal conceptions of justice. For example, see Wanda D. McCaslin, "Introduction: Reweaving the Fabrics of Life," in Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, MN: Living Justice Press, 2005), 87 at 87–8.

[21] See *Gladue, supra* note 6 at para. 65.

[22] For an example of the discussion of the importance of drawing connections between social history, power relations, and crime, see Agozino, *supra* note 9 at chapter 9.

[23] Agozino notes that the perception of the criminal justice system as a mechanism for promoting peaceful relationships and communities is characteristic of anti-imperialist systems. See *ibid.* at 38. A return to traditional, non-imperialist systems of criminal justice is therefore part of the decolonization process and is perceived as having a more realistic chance of offender rehabilitation and promoting safer communities and society. This view was affirmed by the RCAP, *supra* note 7 at 70–4.

In *Gladue,* the Supreme Court of Canada noted that given the restorative justice focus of traditional Aboriginal sentencing practices, contextual sentencing will often require the imposition of non-custodial, community-based sanctions that reflect restorative justice principles.[24] Thus, contextual sentencing in part adopts a culturalist approach in searching for fit sentences for Aboriginal offenders as part of redressing the legacies of colonization. Sentencing reform, therefore, plays the dual role of acknowledging both the oppressive role of the criminal justice system and its liberatory potential through the recognition and legitimization of Aboriginal justice traditions. It also rejects the hegemony of Euro-Canadian justice traditions.[25] This approach avoids a purely cultural understanding of the problem of Aboriginal over-representation in the criminal justice system. Rather, it is attentive to the historical, systemic, and structural processes rooted in colonialism that influence the material conditions of many Aboriginal people and their socio-economic marginality today and, in turn, contribute to their over-representation in the criminal justice system in complex ways.[26]

The search for fit sentences is not limited to programs with a specific cultural component but, rather, is focused on programs that are reasonable in the circumstances and meet the needs of offenders and other stakeholders. An automatic reduction of a sentence or imposition a non-custodial sentence for Aboriginal offenders does not result in all cases. For instance, contextual sentencing may not be appropriate in serious and violent crimes or for some offenders, although the term of the sentence may be reconsidered in light of the offender's Aboriginal status.[27] In

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[24] *Gladue, supra* note 6 at paras. 70 and 74.

[25] See Boaventura de Sousa Santos, "State, Law, and Community in the World System: An Introduction" (1992) 1 Social and Legal Studies 132 at 138–9.

[26] See the RCAP, *supra* note 7 at 42; and Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) 26 University of British Columbia Law Review 147 at 153.

[27] *Gladue, supra* note 6 at paras. 78–9. In *R. v. Wells,* [2000] 1 S.C.R. 207, an Aboriginal man was convicted of sexually assaulting an eighteen-year-old Aboriginal woman in her own bedroom. Wells appealed his twenty-month custodial sentence, arguing that, as an Aboriginal man, he should have been entitled to a non-custodial sentence. In dismissing his appeal, the Supreme Court of Canada affirmed the trial judge's characterization of the offence as a serious crime and noted that for such crimes, the principles of deterrence and denunciation are important considerations in devising appropriate sentences and that the custodial sentence in this case was not unreasonable. In *R. v. Pangman,* the Manitoba Court of Appeal held that consideration of section 718.2(e) does not arise in serious offences. In this case, the court found that not only is conspiracy to traffic in cocaine a serious offence deserving severe punishment but also that the offenders' gang

addition, evidence of a causal link between an offender's Aboriginal or marginalized status and the commission of the offence in question is required for contextual sentencing consideration.[28] The causal requirement ensures consistency with the individualized and contextualized approach to sentencing that pays attention to the particular circumstances of offenders.[29] Further, the individualized nature of contextual sentencing avoids race essentialism and makes it compatible with the liberal underpinnings of the criminal justice system.[30]

<1>*Sentencing Reform as Part of the Decolonization Process*

> "[P]ostcolonialism is now the main mode in which the West's relation to its "other" is critically explored, and law has been at the forefront of that very relation."[31]

Postcolonial theory is about contesting Western imperialism and fracturing and destabilizing hegemonic epistemology, colonial structures, and domination. Decolonization is therefore a process of disengaging from, and the dismantling of, hegemonic colonial structures,

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memberships were aggravating factors and further justification for terms of imprisonment. *R. v. Pangman* (2001), 154 C.C.C. (3d) 193 at 207–9 (Man. C.A.) [*Pangman*]. See also *R. v. Spencer* (2004), 186 C.C.C. (3d) 181 (Ont. C.A.), leave to appeal to Supreme Court of Canada dismissed [2005] S.C.C.A. No. 4; and *Hamilton, supra* note 13 at para. 140.

[28] See *Gladue, supra* note 6 at paras. 80 and 93. See also *R. v. Auger* (2000), 263 A.R. 1 at para. 88 (Q.B.) [*Auger*].

[29] In *Gladue,* the Supreme Court of Canada cautioned that contextual sentencing should not be perceived as reverse discrimination. Rather, it is an acknowledgment of the historical processes and current realities of colonization, racism, and discrimination that have culminated in the marginalization of Aboriginal people. Consistent with the principle of substantive equality, contextual sentencing acknowledges that courts cannot continue to treat Aboriginal offenders the same way as non-Aboriginal offenders. Disregarding the potential effect of their Aboriginality on their criminal behaviour has produced serious race-based inequities, which is no longer tenable. *Gladue, supra* note 6 at paras. 86–8. See also *Pangman, supra* note 27 at para. 39.

[30] Notwithstanding its claim to neutrality and equality of treatment of its citizens regardless of their differences, liberal theory conceives of the possibility of legitimizing different conceptions of the good for particular groups or sub-groups within the modern liberal state, provided such differences in treatment can be rationally justified. See Sandra Harding, "Gender, Development, and Post-Enlightenment Philosophies of Science" (1998) 13 Hypatia 146 at 151.

[31] Peter Fitzpatrick and Eve Darian-Smith, "Laws of the Postcolonial: An Insistent Introduction," in Darian-Smith and Fitzpatrick, eds., *supra* note 8, 1 at 4.

institutions, and the legacies of colonialism. It is aimed at shifting the dominant ways in which Western culture and society construct the "other," with a corresponding devaluation of non-Western values, norms, and traditions.[32] The process of decolonization therefore calls for recognition and respect for diverse ways of life, institutions, values, and cultures and an end to paternalism that has characterized the relationship between colonizers and the colonized. It gives colonized people the right to live in accordance with their own legal, cultural, and religious traditions. This approach constitutes a shift from the assumed universality of Western ideologies and traditions to a reconstructed worldview that includes the perspectives and justice traditions of historically marginalized groups.[33] Thus, the process of decolonization involves challenges to the supposed certainty, orthodoxy, and sufficiency that have been perceived to characterize Western traditions, including legal traditions and the relationship between colonizers and the colonized. Instead, it envisions a diverse and dynamic system that is capable of responding, and being extended, to situations and perspectives excluded in the colonial process.[34]

The undermining and outlawing of Aboriginal traditions, values, and institutions, including the administration of justice based on assumptions of racial inferiority, were central to colonialism.[35] As Jonathan Rudin notes, "[t]he impact of colonialism was to take away first the right, and then often the ability, of Aboriginal communities to maintain order. Taking away this vital function (along with the other functions essential to governance) the colonial experience told individual Aboriginal people that they were not worthy and they were not capable of looking

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[32] See Robert J.C. Young, *Postcolonialism: A Very Short Introduction* (Oxford: Oxford University Press, 2003) at 2–3; Ania Loomba, *Colonialism/Postcolonialism* (New York: Routledge, 2005) at 16 and 21; Prasenjit Duara, "Introduction: The Decolonization of Asia and Africa in the Twentieth Century," in Prasenjit Duara, ed., *Decolonization: Perspectives from Now and Then* (New York: Routledge, 2004), 4. See also Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: UBC Press, 1997), 75 at 77.

[33] The Royal Commission on Aboriginal Peoples emphasized the need for an expansive view of legal pluralism beyond the Eurocentric focus of the common and civil law traditions to include Aboriginal justice traditions. RCAP, *supra* note 7 at 18.

[34] Fitzpatrick and Darian-Smith, *supra* note 31 at 2–4; and Colin Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration of the Rights of Indigenous Peoples," in Darian-Smith and Fitzpatrick, eds., *supra* note 8, 19 at 20.

[35] See J.R. Miller, "The Historical Context of the Drive for Self-Government," in *Continuing Poundmaker and Riel's Quest, supra* note 7, 41 at 42–3.

after themselves."[36] The disempowerment of Aboriginal people was achieved in part by according hegemonic status to Western legal traditions based on a supposed universality, rationality, and objectivity of the Eurocentric system while denigrating the justice traditions of the colonized "other" as "inferior," "uncivilized," or "barbaric." This othering, in turn, provided a justification for undermining justice traditions of colonized peoples and imposing Western legal traditions on them.[37] Part of the attraction and claim to superiority of the Eurocentric system is its "Portia" model of justice,[38] which applies the law to legal subjects without regard to their personal circumstances and background. Yet this approach has been revealed to be exclusionary, repressive, and a means of social control of "others."[39] Among other things, it prevents recognition of non-Western justice traditions as valid and worthy of consideration as systems of justice,[40] with disastrous consequences for colonized peoples.[41]

The criminal justice system, in particular, has been used as a mechanism for social control and the consolidation of imperialist hegemony. The over-representation of Aboriginal people in the criminal justice system has been characterized as a reflection of "the persistence of the colonial relationship between Aboriginal peoples and the Canadian ... state"[42] as well as of

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[36] Jonathan Rudin, "Aboriginal Justice and Restorative Justice," in Elizabeth Elliot and Robert Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland, OR: Willan, 2005), 89 at 95. See also Winona LaDuke, "Foreword," in Bartholomew Dean and Jerome M. Levi, eds., *At the Risk of Being Heard: Identity, Indigenous Rights, and Postcolonial States* (Ann Arbor, MI: University of Michigan Press, 2003) at ix.

[37] See Turpel, *supra* note 7 at 208; and Fitzpatrick and Darian-Smith, *supra* note 31 at 1–2. See also RCAP, *supra* note 7 at 14–16.

[38] Frances Heidensohn, "Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice" (1986) 14 International Journal of the Sociology of Law 287, cited in Agozino, *supra* note 9 at 65.

[39] Alan Norrie, "From Law to Popular Justice: Beyond Antinomianism," in Darian-Smith and Fitzpatrick, eds., *supra* note 8, 249 at 263–4. In the submission of the Independent First Nations Alliance (IFNA) to the RCAP, the IFNA laments the loss of social control experienced by the Big Trout Lake people with the imposition of Euro-Canadian justice system. RCAP, *supra* note 7 at 24–5.

[40] RCAP, *supra* note 7 at 12.

[41] Agozino, *supra* note 9 at 22–4. See also Turpel, *supra* note 7 at 212. Agozino notes that the flaws inherent in the Portia model of criminal justice were also manifested in dealing with young offenders and the mentally ill who lacked "free will, rationality and liberty." Agozino, *supra* note 9 at 93.

[42] Kirsten Kramer and David Sealy, "Cultural Difference and Criminal Sentencing: Critical Reflections on *R. v. Gladue* and *R. v. Hamilton*," in Elizabeth Comack, ed., *supra* note 7,

their continuing socio-economic marginality resulting from the legacies of colonialism.[43] Given the centrality of criminal law in the colonization process, attention to the legacies of colonialism, including the over-involvement of Aboriginal people in the criminal justice system resulting in part from their socio-economic marginalization, should be a serious consideration.[44] Recognition and attention to these issues, and the integration of Aboriginal justice traditions and values in sentencing Aboriginal offenders, can be seen as important elements of the decolonization process and of the cultural revitalization for indigenous people generally.[45]

Attention to background and systemic factors in dealing with Aboriginal offenders recognizes that the causes of Aboriginal criminality have deep roots stretching far beyond the criminal justice system. It acknowledges that addressing Aboriginal over-representation in the criminal justice system cannot be achieved without first recognizing and redressing racism and the legacies of colonialism that have contributed to this phenomenon. In this sense, section 718.2(e) may be understood as being aimed at substantive equality and social justice more broadly because the vision of justice embedded in the provision goes beyond a call for equal treatment of Aboriginal offenders and offenders from dominant backgrounds. Rather, it recognizes their differential engagement with the criminal justice system and explores how to dispense justice to them in ways that will be fair, given the root causes of their over-involvement in the system.

Contextual/alternative sentencing for Aboriginal offenders often relies on elements in Aboriginal cultures and traditions to fashion appropriate sentences aimed at remedying some of the traumatic experiences arising from colonization that contribute to the causes of Aboriginal

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123 at 124. See also the RCAP, *supra* note 7 at xi and 26–8. Similarly, Purdy notes that from the perspective of the colonized and marginalized the idea that we are now in a post-colonial era does not reflect their lived experiences as they continue to experience colonization in its different manifestations, for example, because of their race/ethnicity or socio-economic position. Purdy, *supra* note 8 at 205–8.

[43] RCAP, *supra* note 7 at 46–53.

[44] *Ibid.* at x and 42–53.

[45] See Kramer and Sealey, *supra* note 42 at 137–42. In their submission to the Royal Commission on Aboriginal Peoples, the IFNA affirmed Aboriginal peoples' quest for cultural and institutional revitalization as a means for regaining control over their lives and communities. RCAP, *supra* note 7 at 25.

criminality.[46] By recognizing the legitimacy of Aboriginal legal traditions and values and placing them on an equal footing with Euro-Canadian legal traditions and values, contextual sentencing entails respect for diversity and, hence, reflects legal pluralism.[47] It also challenges the Enlightenment philosophy with its claim to rationality, objectivity, and universality of legal rules.[48] Contextual sentencing is consistent with post-colonial discourse because it recognizes differences while affirming the legitimacy of "others," specifically Aboriginal people, and the rationality of their cultural values and practices. In addition, it decentres the hegemonic Eurocentric, culture-specific, and liberal conceptions of Western justice traditions in favour of contextualized, diverse, and sometimes oppositional views of justice.[49] Further, it avoids the dualistic hierarchy that was used to justify the colonization of Aboriginal people and the hegemony of Western values and practices and promotes the "democratisation of civil society."[50]

Contextualized and culturally appropriate sentences for Aboriginal offenders do not necessarily mean resorting to pre-contact Aboriginal justice traditions and practices. Like all cultural traditions and practices, Aboriginal cultural practices have not remained static. They have evolved over time, through exposure to, and interaction with, the settler society. In addition to the dynamic nature of culture, Aboriginal traditions have unfortunately also been eroded by colonization and assimilation. The resulting cultural and social disruption means that what may truly be characterized as traditional and, hence, justice traditions may sometimes be questionable.[51] Given the current residential patterns, realities, and diversity of many Aboriginal

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[46] See James [sákéj] Youngblood Henderson, "Exploring Justice as Healing" (Spring 1995) Exploring Justice as Healing, Native Law Centre of Canada <http://www.usask.ca/nativelaw/publications/jah/henderson2.html>.

[47] See Santos, *supra* note 25 at 133–4. Contrary to the argument that legal recognition of diversity in state institutions and legal pluralism creates divisiveness, Zion notes that they have and continue to be key elements of Western legal traditions, democracy, and the future of humanity. James W. Zion, "The 'One Law for All' Myth," in McCaslin, ed., *supra* note 20, 73 at 79–80. See also Sally Engle Merry, "Legal Pluralism" (1988) 22 Law and Society Review 869 at 872–4; and Luke McNamara, "The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines" (2000) 18 Windsor Yearbook of Access to Justice 60 at 113–4.

[48] See Agozino, *supra* note 9 at 21–2.

[49] See Howard Zehr, "Evaluation and Restorative Justice Principles," in Elliot and Gordon, eds., *supra* note 36, 296 at 302.

[50] Agozino, *supra* note 9 at 212.

[51] Jane Dickson-Gilmore and Carol La Prairie note that although there are still some core Aboriginal justice traditions such as healing, these may no longer be considered unique to

people (a substantial number of Aboriginal people live in urban areas and even those who live on reserves are not immune to Western influences), some have questioned the appropriateness and relevance of traditional Aboriginal justice traditions for many Aboriginal people.[52] Not all Aboriginal people are aware of, understand, or choose to live in accordance with their Aboriginal traditions.[53] There is therefore a risk that Aboriginal cultural revival could constitute neo-colonization, at least for those who have no such desire.

These factors beg the question of what counts as culturally appropriate sanctions that may be resorted to for the purposes of section 718.2(e). It is unrealistic to expect a return to pre-contact cultural practices. In fact, as Kwame Gyekye notes, the process of decolonization does not necessarily call for a total rejection of all colonial structures, institutions, and practices. Aboriginal people can retain aspects of the Euro-Canadian criminal justice system that they find appropriate and necessary as part of their cultural evolution and consistent with the historical phenomenon of cultural borrowing.[54] However, to be a meaningful part of the decolonization process, any adaptation must be voluntary. Aboriginal people themselves must determine "what

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Aboriginal traditions since they have been incorporated into some mainstream justice initiatives. Jane Dickson-Gilmore and Carol La Prairie, *Will the Circle Be Unbroken?* (Toronto: University of Toronto Press, 2005) at 107.

[52] For example, see Philip Stenning and Julian V. Roberts, "Empty Promises: Parliament, the Supreme Court and the Sentencing of Aboriginal Offenders" (2001) 64 Saskatchewan Law Review 137 at 162–3; and Dickson-Gilmore and La Prairie, *supra* note 51 at 125–6.

[53] This may be particularly true of Aboriginal youth and possibly of some urban residents who have little or no contact with their cultural heritage. Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, ON: Octopus Publishing Group, 1992) at 183. Aboriginal people who dissociate themselves from their cultural heritage or do not seem to be aware of it should not, of course, be blamed for this dissociation, nor should dissociation be interpreted as a lack of interest in their cultural heritage. One of the effects of colonization and forced assimilation has been the denigration of Aboriginal traditions and cultural practices. The hegemonic pressures of the Euro-Canadian cultural practices and values have left some Aboriginal people confused and ashamed of their own heritage to the point where they do not want to be associated with it. There is evidence that this is beginning to change with the recognition of Aboriginal ways of life as being equally valid and their incorporation into the Canadian mainstream as, for instance, the introduction of Aboriginal elements into the criminal justice system. This has been well received by some Aboriginal people who have had no prior exposure to Aboriginal cultural practices.

[54] Kwame Gyekye, "Philosophy, Culture, and Technology in the Postcolonial," in Emmanuel Chukwudi Eze, ed., *Postcolonial African Philosophy: A Critical Reader* (Cambridge, MA: Blackwell, 1997), 25 at 25.

they wish to adopt, what they must adapt to, and what they must either retain or restore to its original purity,"[55] based on their current realities[56] and as part of the process of cultural evolution in particular communities.

<1>*Gendered Effects of the* Gladue *Sentencing Principles: Aboriginal Women and Restorative Justice*

As already noted, contextual sentencing often results in the imposition of culturally appropriate community-based sanctions which focus on restorative justice. The appeal of these programs lies in their emphasis on healing and the restoration of offenders, victims, and their communities:[57]

> <Q>Restorative justice has been defined as the creation of a positive environment for change, healing and reconciliation for offenders, victims and communities. It is a condemnation of criminal actions rather than perpetrators and an integration of offenders into the community rather than a stigmatization or marginalization of them. Within this framework the offender is encouraged to accept responsibility and to make reparations to the community. The restorative approach defines crime as a violation of one person by another and focuses on problem solving and the repair of social injury.[58]<Q>

Restorative justice approaches therefore constitute a departure from the individualistic basis of the Euro-Canadian criminal justice system with its narrow focus on offenders and/or victims.

Victims' needs for healing and renewal are equally important elements of restorative justice processes and Aboriginal justice traditions generally.[59] In addition, restorative justice

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[55] Ross, *supra* note 53 at 185.

[56] Ross Gordon Green, *Justice in Aboriginal Communities* (Saskatoon: Purich, 1998) at 29–30.

[57] See John Braithwaite, "Restorative Justice and Social Justice" (2000) 63 Saskatchewan Law Review 185. See also RCAP, *supra* note 7 at xii.

[58] *Laliberte, supra* note 20 at para. 48. See also *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 at para. 18 (SCC); *Gladue, supra* note 6 at para. 81; see John Borrows, Dawnis Kennedy, and Maureen Maloney, *An Assessment of the Interrelationship between Economic and Justice Strategies in Urban Aboriginal Communities, Final Report*, volume 1 (Victoria, BC: Institute for Dispute Resolution, University of Victoria, 2005) at 135–6.

[59] See Ada Pecos Melton, "Indigenous Justice Systems and Tribal Society," in McCaslin, ed., *supra* note 20, 108 at 108; Chief Justice Robert Yazzie, "Healing as Justice: The Navajo Response to Crime," in McCaslin, ed., *supra* note 20, 121 at 123; Russel L. Barsh,

programs are said to hold better promise for promoting offender responsibility and accountability compared to the conventional criminal justice approach.[60] The focus of restorative approaches on crime prevention and healing rather than on punishment creates greater potential to empower and improve conditions for victims, which is consistent with the underlying goal of feminism to empower and remedy victimization.[61] Further, it is believed that non-punitive approaches to criminal justice can have a transformative potential—engendering a greater likelihood for healing and long-term crime prevention.[62] The credibility and effectiveness of restorative justice initiatives must therefore be tested by reference to victims' satisfaction. The promise of equality, mutual respect, reciprocity, and reconciliation between victims, offenders, and their community must be real.[63]

One goal of contextual sentencing is, then, to promote not just the needs and interests of victims but also to reconcile these with the interests and long-term survival of the community generally. Aboriginal over-representation in the criminal justice system has two dimensions: Aboriginal people are over-involved in the system both as offenders and victims.[64] In addition, a significant number of offences stem from interpersonal violence directed against family members, many of whom are women and children.[65] Although restorative justice initiatives and

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"Evaluating the Quality of Justice," in McCaslin ed., *supra* note 20, 167 at 168; and LaRocque, *supra* note 32 at 83.

[60] For example, see Public Safety and Emergency Preparedness Canada, "Restorative Justice," Public Safety Canada, <http://www.psepc-sppcc.gc.ca/prg/cor/res_justice-en.asp>. Offender responsibility is also emphasized in therapeutic jurisprudence as holding better prospects of rehabilitation. See also David Wexler, "Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer" (2005) 17 St. Thomas Law Review 743.

[61] Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Canadian Journal of Law and Society 75 at 77. See also Dianne Martin, who notes that the punitive model is not a useful feminist criminal justice reform strategy. Dianne Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall Law Journal 151.

[62] Snider, *supra* note 61 at 103.

[63] See Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004) at 18 and 27–45.

[64] See RCAP, *supra* note 7 at xi.

[65] See the information obtained by the RCAP regarding violence in Cree communities. RCAP, *supra* note 7 at 35. Although the RCAP does not specify the identities of the victims of interpersonal violence, it acknowledges elsewhere that Aboriginal victims of crime are often women and children (at 39). See also Anne McGillivray and Brenda Comaskey,

the process of decolonization more broadly have the potential to empower marginalized people and promote social justice, they can also replicate or produce social injustice for others within those communities.[66] It is therefore important to examine the effects of restorative justice-based sentences within communities rather than automatically accepting them as being more just because they are more legally pluralistic or culturally appropriate.

There appears to be a gendered dimension to many restorative justice initiatives because many of the victims tend to be women.[67] The process and outcome can be influenced by community politics in ways that undermine their transformative potential.[68] Concerns that women's interests and their need for protection might be compromised in some restorative justice initiatives threaten to undermine their alleged goals since women's interests may be subordinated to the interests of offenders and perceived community harmony. Thus, even advocates of restorative justice warn that it must be embraced with caution. The impact on victims and offenders must be carefully assessed as well as how best to harness the benefits of these processes.[69]

Feminists have questioned the appropriateness of restorative justice programs for gendered harms such as domestic violence and sexual assault because of the lack of adequate safeguards for victims' safety and the potential for victim blaming. There is a potential to compromise victims' safety in a limited vision of the problem and a focus on offender rehabilitation.[70] In the context of gendered, raced, or classed crimes, there may not be adequate opportunities to identify and redress the structural disadvantage of victims *vis-à-vis* offenders

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Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System (Toronto: University of Toronto Press, 1999) at 8–11; and Dickson-Gilmore and La Prairie, *supra* note 51 at 112–14. The same picture emerges in statistics on violence against women a decade after the RCAP. See Statistics Canada, *Measuring Violence against Women: Statistical Trends 2006* (Catalogue No. 85–570-XIE) at 64–9, <http://www.statcan.ca/english/research/85–570-XIE/85–570-XIE2006001.pdf> [*Measuring Violence against Women 2006*].

[66] Braithwaite, *supra* note 57 at 188.

[67] See Acorn, *supra* note 63 at 44.

[68] See Gilmore and La Prairie, *supra* note 51 at 104; and McGillivray and Comaskey, *supra* note 65 at 143.

[69] See Public Safety and Emergency Preparedness Canada, *supra* note 60.

[70] See Cunliffe and Cameron, *supra* note 4; and Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18(2) Canadian Journal of Women and the Law [forthcoming].

that creates opportunities for such offences, and the future vulnerability of the particular victim and/or others similarly situated.[71]

Restorative models often involve victim participation and are based on an ethic of forgiveness. It is questionable whether it is always appropriate for victims to assume this responsibility, rise to the higher moral ground required by the process, and expend their time and energy to forgive the perpetrator and to heal themselves and their offenders.[72] In any event, the expected healing of victims may be superficial and transient, and it might exacerbate their vulnerability to violence by the perpetrators and others.[73] Moreover, expectations of restorative processes to improve offender behaviour may not be attainable or realistic, for instance, due to the inherent limitations in the process, such as the offender's subjective belligerence notwithstanding their formal admission of responsibility or feigning remorse.[74] Further, there may be a risk of blaming victims who refuse to engage in restorative justice processes and/or who insist on retribution, which might result in coerced participation and/or forgiveness and might undermine expected benefits from the process.[75] In cautioning a reliance on restorative processes in response to violent and gendered harms, Emma LaRocque notes:

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[71] See McGillivray and Comaskey, *supra* note 65 at 117; LaRocque, *supra* note 32 at 86; Stewart et al., *supra* note 5 at 39; and Julie Stubbs, "Restorative Justice, Domestic Violence and Family Violence" (2004) Australian Domestic and Family Violence Clearinghouse, Issue Paper 9 at 6–7, <http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issues_Paper_9.pdf>.

[72] See Acorn, *supra* note 63 at 12; Dickson-Gilmore and La Prairie, *supra* note 51 at 127, citing Rupert Ross, "Victims and Criminal Justice: Exploring the Disconnect?" (paper prepared for the twenty-seventh Annual Conference of the National Organization for Victim Assistance, Edmonton, 22 August 2001). See also LaRocque, *supra* note 32 at 81. LaRocque casts doubt on the role of forgiveness by victims and a focus on offender rehabilitation in Aboriginal justice traditions, arguing that it is more a reflection of Christianity and patriarchy and is neither Aboriginal nor therapeutic. She notes that an attribution of these values to Aboriginal justice traditions is evidence of neo-colonization of Aboriginal people (at 85–6).

[73] Acorn, *supra* note 63 at 69–74.

[74] See *ibid.* at 60–9. This will likely fail to elicit in the offender compassion for the victim's suffering and undermine the objective of mutual compassion (at 142–50).

[75] Stubbs notes that the evidence of willingness by victims to participate in alternative processes and victim satisfaction is unclear. Stubbs, *supra* note 71 at 4–5. See also Jennifer Koshan, "Aboriginal Women, Justice and the Charter: Bridging the Divide" (1998) 32 University of British Columbia Law Review 23 at 40. Concern about not being blamed, at least in part, for missed opportunity to redress Aboriginal over-representation or improve the general well-being of individual offenders and the community might influence whether

> <Q>Given ... the severity of harm to victims; given that no one has established that rehabilitating rapists is possible or even definable; and given that no one has established that subordinating victim rights to the collective is healing either for the victim or the community, one must further explore why "culturally appropriate" advocates persist with their lines of defence.[76]<Q>

Some Aboriginal women have expressed concerns about alternative justice initiatives being a site for perpetuating power imbalances in their communities resulting from years of colonization and oppression. The legacies of colonialism in Aboriginal communities operate within a patriarchal system that subordinates the interests and safety of Aboriginal women.[77] Taiaiake Alfred has observed that

> <Q>[m]any [men] have added to Native women's oppression by inflicting pain on their wives, daughters, mothers, and sisters. Once we fully understand the idea of oppression, it doesn't take much further insight to see that men's inability to confront the real source of their disempowerment and weakness leads to compound oppression for women ... In many indigenous men, however, rage is externalized, and some ... take out their frustration on women and children ... the violence perpetrated by Native men on Native women constitutes a further subjugation.[78]<Q>

Inequalities in the status of offender and victim, coupled with pressures to conform to social expectations, undermine the perceived equality between offenders and victims and may threaten to weaken potential healing for victims, resulting in their re-victimization. Commenting on the disadvantaged position of Aboriginal women victims of domestic violence in circle sentencing, Rashmi Goel notes that "[a]s victims of colonial policies and as victims of domestic violence,

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and how victims participate in restorative processes. This undermines voluntary and meaningful participation and could end up being more detrimental to women's needs for protection.

[76] LaRocque, *supra* note 32 at 86.

[77] See Stewart et al., *supra* note 5 at 38–43; Borrows et al., *supra* note 58 at 158–9, citing Isobel Findlay and Warren Weir, "Aboriginal Justice in Saskatchewan: 2002–2021—The Benefits of Change," in *First Nations and Métis Peoples and Justice Reform,* Volume 1: *Legacy of Hope, An Agenda for Change* (Regina: Commission on First Nations and Métis Peoples and Justice Reform, 2004) at 72; and *Measuring Violence against Women 2006*, *supra* note 65 at 67.

[78] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 1999) at 35.

these Aboriginal women come to the circle dually disadvantaged and dually discriminated against. Consequently, it is impossible for them to assume their rightful place in the circle as equals."[79]

Interpersonal violence, mostly involving the victimization of women, the elderly, and children is widespread in many Aboriginal communities.[80] However, not everyone in every Aboriginal community may consider family violence or sexual assault to be a pressing social problem, and still others will have a vested interest in denying its existence or blaming the victim. Community harmony may therefore be emphasized at the expense of community safety. An emphasis on healing and restoration may excuse violence against women, perpetuate their subordination and victimization, and undermine the need for at least some measure of retribution. In the context of Aboriginal communities, LaRocque notes that an emphasis on the collective good is often interpreted as avoiding incarceration and keeping offenders in the community, yet the focus on restorative justice and egalitarianism in Aboriginal cultures is not intended to undermine the interests of victims and individual rights.[81] Retribution, and, in particular, its ineffectiveness in guaranteeing the security and safety of women, may be out of sync with the general tenor of feminism, but not all advocates of women's rights feel that retribution has no place in sentencing, especially in relation to those who commit violent crimes such as violence against women. Expectations of forgiveness by the victim should not replace the importance of retribution.[82] Anne McGillivray and Brenda Comaskey observe that although the Aboriginal women victims they interviewed were interested in the healing of their abusive partners, they also emphasized the need for retribution even if its efficacy is questionable: "Jail means punishment, and punishment means the possibility that the offender—and the

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[79] Rashmi Goel, "No Women at the Center: The Use of Canadian Sentencing Circle in Domestic Violence Cases" (2000) 15 Wisconsin Women's Law Journal 293 at 328.

[80] See note 65 in this article and the accompanying text.

[81] LaRocque, *supra* note 32 at 81 and 87; Mary Ellen Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (1999) 43 Criminal Law Quarterly 34 at 49. LaRocque notes that the emphasis on collective rights that Aboriginal peoples have used as a strategy in making claims against the Canadian state should not be applied in relation to victimization of individuals.

[82] See Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998) at 15–17; Kathleen Daly, "Restorative Justice in Diverse and Unequal Societies" (2000) 17(1) Law in Context 167 at 169; and McGillivray and Comaskey, *supra* note 65 at 117–24 and 142–5.

community—will recognize the wrongfulness of the act. The symbolic function of jail as punishment or *payback*, as public denunciation of the conduct and as a lesson taught to the offender, was important to respondents."[83]

The desire for retribution and deterrence in punishing offenders is not necessarily inconsistent with Aboriginal justice, especially in relation to very serious offences,[84] although these principles may take different forms in Aboriginal and non-Aboriginal traditions. Specifically, the emphasis on restorative processes and healing should not undermine the need for justice for victims and others affected by the offender's conduct.[85] In *Gladue,* the Supreme Court of Canada cautioned that the need to consider contextual sentencing in relation to Aboriginal offenders is not intended to subordinate traditional sentencing principles such as deterrence, denunciation, and separation to principles of restorative justice.[86] Rather, retribution and restoration are both legitimate goals of criminal justice, and the two should co-exist.[87] The need for punishment must not be sacrificed for expectations of restorative outcomes: "Mere change for the better [restoration] would not be enough to displace the need for punishment."[88] For some offenders, restorative approaches might be inappropriate because of the likelihood that sanctions will be ineffective or not serious enough to address the problem of violence against women. Although "retribution and restoration ... are not mutually exclusive ... the experience of

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[83] McGillivray and Comaskey, *supra* note 65 at 119–20.

[84] For example, justice practices of the Ojibwa people emphasize non-punitive responses to crime but would impose punishment in relation to very serious offences that threaten community harmony where rehabilitative efforts have proved futile. RCAP, *supra* note 7 at 21. Similarly, in Inuit traditions, in extreme cases, the leaders could impose a death penalty on recalcitrant offenders who refuse to amend their ways or follow the directions of the leaders (at 23). Turpel also cautions that the emphasis on traditional Aboriginal justice traditions such as healing, restoring harmony, and a holistic approach to justice may be inadequate to respond to challenges facing Aboriginal communities today. Turpel, *supra* note 7 at 210.

[85] LaRocque notes that Aboriginal justice traditions are not necessarily non-punitive and that where the emphasis on "healing" offenders compromises victims' interests, then the practice cannot be a legitimate Aboriginal justice tradition. LaRocque, s*upra* note 32 at 83–5 and 90.

[86] *Gladue, supra* note 6 at para. 78. See also *Auger, supra* note 28 at paras. 84–90.

[87] Clayton C. Ruby et al., *Sentencing,* 6th edition (Markham, ON: LexisNexis Canada, 2004) at 1–4; Kent Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671 at 713–14; Daly, *supra* note 82 at 169; and Minow, *supra* note 82 at 21.

[88] See Acorn, *supra* note 63 at 69.

punishment in the restorative approach depends upon the [offender's] emotional state, personality, connection with the victim, and so on."[89] Notwithstanding his preference for a shift towards crime prevention and restorative models in response to crime, Kent Roach concedes that there will be a continuing need for retribution in serious cases. Ultimately, he realizes that the legitimacy of any criminal justice reform will depend on the extent to which it remains attentive to the interests of victims and its crime prevention potential.[90]

Similarly, in *R. v. John,*[91] the Saskatchewan Court of Appeal conceded that although non-custodial sentences may satisfy the goals of deterrence and denunciation in some cases, especially when accompanied by stringent conditions, incarceration will often provide more denunciation than conditional sentences.[92] Victim perception and satisfaction should be important indicators of the effectiveness of restorative models. Annalise Acorn warns against a romantic view of restorative approaches in response to criminal wrongdoing:

> <Q>The seductive vision of restorative justice seems ... to lie in a skilful deployment ... of cheerful fantasies of happy endings in the victim-offender relation, emotional healing, closure, right-relation, and respectful community. Yet ... the fantasies that lure us in tend to be very different from the realities that unfold ... the grandness of the idealism in these restorative fantasies ... ought to give us pause.[93]<Q>

Sentencing reforms and restorative justice initiatives must also be placed in the broader context of anti-colonial struggles against all forms of imperialism. Feminists have been wary of liberation struggles generally because of their tendency to perpetuate and reinforce patriarchal values and power structures characteristic of imperialist systems while seemingly supporting

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[89] Rob White, "Restorative Justice and Social Inequality," in Bernard Schissel and Carolyn Brooks, eds., *Marginality and Condemnation: An Introduction to Critical Criminology* (Halifax: Fernwood, 2002), 381 at 384.

[90] Roach, *supra* note 87 at 713–16.

[91] *R. v. John* (2004), 241 Sask. R. 268 (C.A.) [*John*].

[92] *Ibid.* at paras. 55–6. See also *R. v. Logan* (1999), 139 C.C.C. (3d) 57 (Ont. C.A.) [*Logan*], where the Ontario Court of Appeal stated that a conditional sentence will "not adequately reflect ... denunciation" in most cases of impaired driving causing death. However, given the unique circumstances of this case, a restorative sentence was found appropriate (at para. 58).

[93] Acorn, *supra* note 63 at 6–9 and 16.

women's participation in public life in ways that were not possible under imperialism.[94] There is often resistance to changes, usually those relating to the position of women, their human rights, and protection needs. These changes are perceived to pose threats to traditional power structures within the cultural group. The protection of women's rights in the decolonization process or post-colonial societies may be left in the same precarious condition as it was under imperialism, or even worsened, as some of the protections enjoyed previously may be removed. Post-colonial feminists have therefore been vigilant in ensuring that women's perspectives and interests are reflected in the decolonizing process and in post-colonial societies.[95]

There are also concerns that resorting to culturally appropriate sanctions can result in cultural imperialism. Offending behaviour and/or a fit sentence is rationalized in racial or cultural terms and based on historical factors, especially the legacy of colonization. What is considered "culture" or "tradition" and, more generally, what is in the best interests of the community can be influenced by political factors or merely reflect the views of a powerful minority within a community. To the extent that attention to culturally appropriate traditions in sentencing may not be attentive to the reality of violence against Aboriginal women and children, this process romanticizes Aboriginal culture.[96] In addition, a single focus on tradition or culture is essentialist. LaRocque points out that arguments about "social harmony" and the need to sacrifice an individual victim's interests for the collective good of the community often arise in cases of particular concern to women, including violence against them. In rejecting this approach as discrimination against Aboriginal women, she also casts doubt on the legitimacy of the practice as a valid Aboriginal tradition:

> <Q>With respect to violence, the argument for community is transparently a case of favouring one individual (offender) over another (victim), elevating the offender's interests to "collective rights" while reducing the victim's interests to "individual rights." It remains a puzzle how offenders, more than victims, have come to represent "collective rights." Besides disregarding all contemporary discourse on justice and ethics, the premise that individual rights should be

[94] See, for example, Loomba, *supra* note 32 at 18–19.

[95] See Ofelia Schutte, "Cultural Alterity: Cross-Cultural Communication and Feminist Theory in North-South Contexts," in Uma Narayan and Sandra Harding, eds., *Decentering the Center: Philosophy for a Multicultural, Postcolonial and Feminist World* (Bloomington, IN: Indiana University Press, 2000), 47 at 49.

[96] See Stewart et al., *supra* note 5 at 41.

> sacrificed for the supposed good of the community has no substantiation. It is as if individuals are not part of the collective good, as if the only way to ensure "collective" rights is to subvert individual ones, or at least those of certain individuals ... it cannot be good for the collective to disregard individual rights or well-being.[97]<Q>

In any event, what constitutes community interests would often be contested, depending on factors such as gender, social location, relationship with the parties, and so on.

Deference to cultural difference is often evoked in relation to intra-racial or intra-cultural issues, usually involving violence against women such as sexual assault or domestic violence. Resort to cultural difference in these instances tends to validate the marking of Aboriginal women and other racialized women and their cultures as "others," "inferior," and "less developed" *vis-à-vis* the dominant culture and values.[98] For the most part, references to cultural context and cultural preservation assume fixed notions of particular cultures that are immune to changes in society over time.[99] Attention to cultural context and the preservation of particular cultural traditions and values sometimes means subordinating particular interests of victims, usually women, to the allegedly broader and long-term interests of the entire community. Alternative sentences could be more centred on the offender and community than they are on the victim. Women may be made to bear the burden of cultural preservation/revitalization in ways that render their humanity, interests, and victimization invisible and that subordinate their security interests and rights to seemingly more important communal interests. Women are therefore made the objects for the transmission of culture rather than agents capable of producing culture.[100] This pattern constitutes gendered racism.[101]

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[97] LaRocque, *supra* note 32 at 80–1.

[98] Pascale Fournier, "The Ghettoisation of Difference in Canada: 'Rape by Culture' and the Danger of a 'Cultural Defence' in Criminal Law Trials" (2002) 29 Manitoba Law Journal 81 at 82–4.

[99] See Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism," in Narayan and Harding, eds., *supra* note 96, 80 at 88.

[100] See Schutte, *supra* note 96 at 53.

[101] For example, see the statement by an Aboriginal woman survivor of sexual assault who feels unfairly burdened by expectations that she acts like an Aboriginal person in the face of her victimization. Among other things, she perceives the need to be concerned about the offender's need for healing as compromising her own needs as a victim. LaRocque, *supra* note 32 at 88.

Concerns about the potentially negative effects of *Gladue* on Aboriginal female victims must be placed in the larger context of discussions about race, sexual assault, violent crime, and the "cultural defence" that has sometimes been used as a mitigating factor in sentencing offenders in intra-racial violence and the resulting gendered racism.[102] Although these concerns pre-date section 718.2(e), contextual or alternative sentencing can exacerbate these problems because of the possibility of Aboriginal women's victimization being "excused" in the name of culture and the legacies of colonialism. Offenders, usually men, are perceived as victims of colonization and/or troubled backgrounds such as sexual, physical, and emotional abuse in Indian residential schools, which is also a product of colonization. Hence, their criminal behaviour may be "rationalized" through the lens of colonization and/or social adversity as per *Gladue,* thereby influencing what are considered fit sentences in particular circumstances. As the *Gladue* framework suggests, this process could result in sentences different from what would be considered appropriate in relation to other offenders. Focusing on decolonization or reversing the legacies of colonization could thus render women's victimization (both from colonization itself and the resulting social disintegration) invisible. Although it is important during sentencing to recognize the disadvantaged background of Aboriginal offenders that may have contributed to their commission of the offence in question, the harmful effects of the victimization of Aboriginal women (who are also obviously disadvantaged as victims of colonization) must not be trivialized. A tension may thus appear to arise between the collective interest in decolonization and the immediate interests of victims and the public to see and feel that "justice" has been done in the situation.[103] However, the protection needs of Aboriginal women must be an equally important part of the decolonization process if it is to be a just one. To demand less would condone violence against Aboriginal women.[104]

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[102] Teressa Nahanee, "Sexual Assault of Inuit Females: A Comment on 'Cultural Bias,'" in Julian V. Roberts and Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994), 192; Margo L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa Law Review 71; and Fournier, *supra* note 99.

[103] Bayda C.J. (Saskatchewan) identifies some of the dilemmas that sentencing judges face in trying to balance the competing interests in retributive and restorative justice. Chief Justice E.D. Bayda, "The Theory and Practice of Sentencing: Are They on the Same Wavelength?" (1996) 60 Saskatchewan Law Review 317 at 325–6.

[104] Notwithstanding concerns expressed by the participants in the focus group in the Stewart, Huntley, and Blaney study regarding the protection needs of Aboriginal women and

<1>*Post*-Gladue *Case Law*

Since the issues at stake in implementing the *Gladue* sentencing regime are complex, it is important to examine post-*Gladue* case law to see in what direction the sentencing provisions have led courts and Aboriginal communities thus far. How have courts reconciled the concept of individual responsibility with the need for contextual sentencing? How have they balanced the demand for restorative justice with the demands for retribution, denunciation, and deterrence, especially in cases of gendered and interpersonal violence? One of the concerns with contextual sentencing is that it might result in non-custodial sentences that are "lenient" based on the offender's Aboriginal status. Post-*Gladue* case law has confirmed that contextual sentencing and commitment to restorative processes do not necessarily point to the imposition of a particular sanction, leniency, and/or non-incarceral sentences. Nor does it undermine deterrence.[105] Rather, restorative initiatives give rise to flexibility in sentencing, bearing in mind the principles of sentencing and the social and cultural circumstances that are engaged in the particular case.[106] Contextual sentencing that may also incorporate elements of some Aboriginal justice traditions does not necessarily suggest non-punitive sentences. Rather, it calls on judges to be attentive to the causes of Aboriginal criminality and to use the sentencing process, to the extent possible, to devise meaningful and effective sanctions that have a better chance of reducing recidivism and promoting safer communities. This process has occurred against the backdrop of the goals of

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children survivors of violence, they also recognised the potential of restorative processes to address crime in ways that have not been possible with the dominant criminal justice system. However, they emphasized that victims' safety concerns must be addressed in concrete ways before adopting any restorative process. Stewart, Huntley, and Blaney, *supra* note 5 at 41–2.

[105] The ineffectiveness of deterrence as a justification for carceral sentences is now well known. Deterrence in this regard must be conceived in broader terms as resulting from an offender's engagement with the criminal justice system, from arrest to conviction and punishment, and not solely in terms of the nature and/or duration of sanctions.

[106] See *Gladue*, *supra* note 6 at para. 81; and UN Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, Doc. E/2002/INF/2/Add.2 (2002), at 54–9, <http://www.pficjr.org/programs/un/ecosocresolution>. Although the resolution adopted by the UN Economic and Social Council is principally on diversion programs, the insight on the inter-relationship between the criminal justice system and restorative processes is equally applicable at the sentencing stage.

sentencing, bearing in mind the importance of respect for the law and the victims' and community's safety.

A survey of the jurisprudence shows that *Gladue* is routinely considered in cases involving Aboriginal offenders. However, background and systemic factors that may often predispose a person to coming into conflict with the law do not automatically affect the nature and/or duration of sentences in particular cases. Whether factors that have had a negative impact on the accused should be considered in the search for a fit sentence is contingent upon a number of factors, such as evidence of a causal link between the offender's unique circumstances and the commission of the offence in question and his or her prior criminal record.[107]

Courts have not always been satisfied about the nexus between the offenders' adverse life circumstances that may have predisposed them to being in conflict with the law and the commission of the offence at issue.[108] Judges are balancing the remedial purposes of section 718.2(e) and the concept of individual responsibility and free will on which the criminal justice system is premised. Other relevant factors that have been considered are the willingness of the defendants' communities to support them, the availability of resources, and the likelihood of restorative outcomes. Courts also consider whether non-custodial sentences will adequately achieve the goals of deterrence and denunciation and whether restorative sentences will compromise public safety.

Whether and to what extent systemic and background factors will influence the sentencing of Aboriginal offenders also depends on the nature of the offence. Consistent with the violent/serious offences exception recognized in *Gladue* and affirmed in *R. v. Wells*,[109] subsequent cases have affirmed that deterrence and retribution may not always be inconsistent with the aims of restorative approaches. Consideration of systemic and background factors will

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[107] For example, in *R. v. Dorian*, [2003] O.J. No. 1415 (Sup. Ct. Jus.) (QL) [*Dorian*], involving a young Aboriginal man, the court found that the defendant's severely disadvantaged background enhanced the likelihood of him being in conflict with the law. The court therefore concluded that the range of sentences for similar offences would not be appropriate in his situation. See also *R. v. Elliot (A.A.)*, 2000 BCCA 220 [*Elliot*].

[108] For examples, see *R. v. Gladue* (1999), 46 M.V.R. (3d) 183 (Alta. C.A.) at 184–5; *R. v. Poucette* (1999), 250 A.R. 55 (C.A.); *R. v. T.K.* (2004), 357 A.R. 18 (C.A.); *R. v. S.M.W.*, [2003] B.C.J. No. 2511 at para. 71 (Prov. Ct. Crim. Div.) (QL) [*S.M.W.*]; *R. v. Ear* (1999), 248 A.R. 110 at para. 34 (Prov. Ct. Crim. Div) [*Ear*]; and *R. v. Noltcho*, [1999] S.J. No. 833 at para. 12 (Q.B.) (QL) [*Noltcho*].

[109] *Wells, supra* note 27.

not necessarily lead to different outcomes or non-custodial sentences, particularly in cases of violent crimes. As Justice Robert Riopelle stated in *R. v. Fireman,*[110] in such cases restorative and deterrent approaches "will often coincide: denunciation, separation from society and deterrence become culturally acceptable options."[111] These offenders often have prior criminal records and are at risk to re-offend if left in the community. In such cases, courts often emphasize the appropriateness of incarceration to achieve deterrence and denunciation of the offences in question as well as the community's sense of justice.[112] Determinations of what constitutes a community's sense of justice, or what is in the best interests of a particular community, may be susceptible to patronizing and paternalistic assessments from the decision maker's perspective. This approach may be contrary to the community's interests and may constitute a re-colonization of Aboriginal people or the particular community in question. Thus, such determinations should be made with caution and, preferably, be based on some sense of what community members themselves see as being in their interest, provided it is reasonable and not inconsistent with the protection of society and victims.

Deterrence and denunciation necessitating an incarceral sentence is sometimes emphasized even when a non-custodial restorative sentence is unlikely to compromise public safety.[113] In addition, the protection of community and public safety and the need for offenders

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[110] *R. v. Fireman,* [2001] O.J. No. 4731 (Sup. Ct. Jus.) (QL).

[111] *Ibid.* at para. 7. This statement suggests that punitive measures and deterrence are not foreign to Aboriginal conceptions of justice, but it could also reflect an unwillingness to allow cultural and/or contextual considerations to trump the need for deterrence and retribution in relation to serious and violent offences. Seen in this light, Riopelle J.'s statement does not necessarily reflect an Aboriginal conception of justice. Rather, it will be an indication of how tensions between attentiveness to context and culturally appropriate sanctions, and the goals of sentencing as set out in s. 718 of the *Criminal Code,* should be resolved. This is consistent with Chief Justice Bayda's comments that restorative justice should eventually be substituted for retribution in sentencing for certain kinds of offences, not including violent crimes: Bayda, *supra* note 104 at 330–1.

[112] See *R. v. Carriere* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.), where the court noted that given the seriousness of the offence in question (second degree murder), and the offender's long criminal record, he was a public safety risk. Hence, a longer period of incarceration was warranted notwithstanding consideration of his Aboriginal background as mandated under section 718.2(e).

[113] See, for example, *R. v. Carratt (L.D.*) (1999), 185 Sask. R. 221 (Q.B.). Although the accused had overcome his substance abuse problem and had not engaged in any violent conduct for two years, the court still felt that a non-custodial sentence would be inappropriate given the seriousness of the assault and the resulting injury to the victim.

to obtain professional help in secured environments are sometimes emphasized to justify incarceration for considerable periods without much regard to background and systemic factors that may have affected offenders.[114] Consideration of the factors in *Gladue* does, however, sometimes result in the imposition of restorative sentences with no period of incarceration. Factors that favour alternatives to incarceration include the offenders' need for community support to address their problems and the community's willingness to assist the offenders. Further, courts look for evidence of the availability of resources within the community and whether it can provide realistic restorative opportunities to help the offender as well as the likelihood of success.[115]

An important consideration for courts in determining the appropriateness of non-custodial sentences is evidence that public safety would not be jeopardized if the accused served their sentence in the community. Some of the factors that favoured the imposition of a non-incarceral sentence in *R v. Skani*[116] were that the accused had taken steps to address his addictions, which had contributed to the commission of the offence, and, more importantly, that he enjoyed the support of his Aboriginal community to assist with the rehabilitation.[117] Justice Sheila Greckol noted that where the offender's community "is prepared to step forward and take responsibility

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[114] See, for example, *R. v. Wilson,* [2001] B.C.J. No. 2546 at para. 49 (S.C.) (QL), where the defendant was found to be in need of rehabilitation, which could have been available in the community. Yet an incarceral sentence was considered appropriate because the accused did not respond well to community supervision. See also *Noltcho, supra* note 109 at para. 17; and *R. v. Machiskinic (S).* (2004), 253 Sask. R. 80 at paras. 79–87 (Q.B.). In *Machiskinic,* the court considered the unique systemic background circumstances common to Aboriginal offenders and the particular circumstances of this manslaughter and concluded that a non-custodial sentence would not satisfy the interest of justice or protect the safety of the community.

[115] For instance, in *John, supra* note 91 at para. 33, the court noted that a restorative sentence was appropriate, among other things because the offender's community had the logistics to implement the terms of the sentence, and he had agreed to participate in appropriate programs. The court observed that the community had a justice committee and a justice coordinator. The committee was able to undertake healing circles and offer traditional holistic approaches to restorative justice. It could also provide other services beneficial to the offender and victims. In contrast, in *R. v. F.L.*, [2002] O.J. No. 1989 (Sup. Ct. Jus.) (QL), the court said that it could not consider restorative alternatives for the accused because, among other things, there was no representation from the offender's community. Hence, the court could not consider the types of community-based procedures and sanctions that might be appropriate in the case at bar.

[116] *R. v. Skani* (2002), 331 A.R. 50 (Q.B.) [*Skani*].

[117] *Ibid.* at para. 49.

for his successful rehabilitation, there is a powerful argument that the Court should take heed of this."[118] A non-incarceral sentence was considered appropriate in this case notwithstanding the possibility that the accused might re-offend. The court focused more on the positive signs of hope, noting also that incarceration in the present circumstances might actually exacerbate the risk of recidivism.[119] Another factor that favoured the imposition of a non-incarceral sentence in *R. v. C.L.C.*[120] was that the defendant had already made significant progress towards rehabilitation, and the court felt that this progress would be undermined by a term of imprisonment.[121]

Gauging community support and resources and the potential for rehabilitation to determine fit sentences could run the risk of subordinating victims' concerns and rights under the allegedly broader community interests. There is also the possibility of what is perceived as community interests being susceptible to power dynamics and favouritism for offenders who are well connected in the community. Thus, the balancing of competing interests must be done in a sensitive manner, bearing in mind the needs of victims and community safety in general.

Courts have not lost sight of particular community interests in making sentencing decisions under a *Gladue* regime, including the possible benefits or detrimental impacts of non-custodial sentences on the community. In addition to the pledge of community support to implement the terms of the conditional sentence imposed in *R. v. John*[122] for criminal negligence causing the death of his wife, the offender was found to be a considerable resource to his community. An incarceral sentence in accordance with traditional principles of sentencing was

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[118] *Ibid.* at para. 50. See also *John, supra* note 91 at paras. 33 and 35, where the community's support for a restorative sentence and availability of community resources to deliver the alternative measures were significant factors in favour of a non-custodial sentence. In this regard, *Skani, supra* note 116, and *John* may be contrasted with *Noltcho*, where an incarceral sentence was imposed, among other things, because the offender's community declined to support a conditional sentence for him. *Noltcho, supra* note 109 at para. 19.

[119] *Skani, supra* note 117 at para. 51.

[120] *R. v. C.L.C.* (2001), 154 Man. R. (2d) 140 (Q.B.). This case involved a thirty-two-year-old Aboriginal woman convicted of manslaughter of her neighbour. The court held that an incarceral sentence was not necessary in the circumstances notwithstanding her history of involvement in criminal behaviour. The accused was found to be an "excellent candidate for rehabilitation" (at para. 25).

[121] See also *R. v. Healy* (1999), 237 A.R. 195 (C.A.); *R. v. Ross*, [2000] S.J. No. 561 (Prov. Ct.) (QL); *R. v. Knowlton* (2001), 297 A.R. 264 at paras. 31–6 (Prov. Ct. Crim. Div.) [*Knowlton*]; and *R. v. T.D.P.* (2004), 250 Sask. R. 3 (Prov. Youth Ct.) (QL).

[122] *John, supra* note 91.

therefore unnecessary in this case, among other things, because the community would be impoverished with the incarceration of the accused.[123] Similarly, in *R. v. Logan,*[124] the defendant was the primary provider for his family and contributed enormously to the social and spiritual life of his Aboriginal community. His community members supported a non-custodial sentence to be served in the community because removal of the accused from the reserve would be detrimental for the accused, his family, and the community. Though careful not to diminish the seriousness of the offence, the court noted that the conditional sentence of twenty months to be served in the community would achieve the goals of denunciation and restorative justice in the circumstances of this particular case. More importantly, a community-based sentence would not endanger community safety.[125]

On the other hand, in *R. v. Auger,*[126] it was held that, despite strong community support, a non-custodial sentence would not always be appropriate for all offenders. In this case, two brothers were convicted of drug trafficking in an Aboriginal community. The judge found that, while a non-custodial sentence was preferable for one brother, the other brother, who was more heavily involved in trafficking cocaine, had 'crossed a line' from rehabilitation to deterrence.[127] Although there was no evidence of the unique systemic and background factors that brought the brothers in conflict with the law, the court accepted evidence of conditions of extreme poverty in their community that could easily lure some people into the lucrative business of drug trafficking. However, the court felt that the communal interests in ensuring a safer community and the protection needs of vulnerable members should not be subordinated to the welfare of Aboriginal offenders. Protecting vulnerable Aboriginal communities from the stresses associated

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[123] The accused in this case was a commercial fisherman who supported himself and his family by traditional means. The victim's children would have been left without support should he be incarcerated. He also provided traditional food, resources, and services to the elders of the reserve and was a valuable resource of knowledge of the local area for the provincial Ministry of Environment. He kept an eye on and reported illegal activities and forest fires in the area to ministry staff. *John, supra* note 91 at para. 18.

[124] *Logan, supra* note 92. In this case, an Aboriginal man was convicted of impaired driving causing death to one person and serious bodily injury to another. The accused had no alcohol dependency problem and had not consumed alcohol since the incident in question. He had no prior criminal record other than assaulting a peace officer on one occasion.

[125] *Ibid.* at paras. 58–9.

[126] *Auger, supra* note 28.

[127] *Ibid.* at para. 87.

with drug trafficking also deserves consideration in sentencing Aboriginal offenders. Justice Donald Lee noted that section 718.2(e) is intended to remedy the conditions of Aboriginal people in the sentencing process and that it would be ironic for courts to give more consideration to the interests of Aboriginal offenders than the welfare of Aboriginal communities victimized by the offenders. The court noted that the overall welfare of the community to rid itself of the pervasiveness of illicit drugs should be given pre-eminence over the consideration of systemic and background factors relating to the offenders that may point to non-custodial sentences.[128] Deterrence and denunciation must remain the paramount objectives for sentencing offenders in these circumstances.[129]

Denunciation and deterrence continue to be relevant sentencing goals even when *Gladue* factors are successfully considered in sentencing Aboriginal offenders. Where a court deems it appropriate not to impose an incarceral sentence, deterrence and denunciation may be achieved through the imposition of stringent conditions in non-custodial sentences.[130] In addition, having to serve a sentence under the watchful eyes of one's community may be sufficiently deterrent and, in some cases, more so than incarceration. In *John,* Justice of Appeal WilliamVancise, speaking for a unanimous court, noted:

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[128] *Ibid.* at para. 89.

[129] *Ibid.* at para. 92. About one-third of the community members signed petitions in support of non-custodial sentences for the defendants. The court noted that this level of support should be considered a mitigating factor in sentencing and that the community's pledge of support made it unlikely that the defendants would re-offend. However, the court concluded that principles of deterrence and denunciation should trump the need for restoration in this case. While perhaps appropriate in this case, emphasizing community safety and victims' interests over restorative, culturally appropriate sanctions could create the appearance of a tension between the need for decolonization and protection of vulnerable individuals and communities. This tension must be resolved in ways that benefit all stakeholders and the community generally. Further, apparent community support for non-custodial, community-based sentences must be carefully assessed to avoid the sentencing process becoming a site for replicating the power structures and tensions within particular communities. For example, in *R. v. Morris,* [2004] B.C.J. No. 476 (Prov. Ct.) (QL), the position of the accused within the community skewed submissions on appropriate sentencing, resulting in what the Court of Appeal found to be a lenient sentence in the circumstances. See note 138 in this article and the accompanying text.

[130] See, for example, *John, supra* note 91 at paras. 53–6.

> <Q>The public nature of the sentence in a small community is a constant reminder of the offender's conduct and the consequences of such conduct, and in my opinion is a more effective deterrent than a prison sentence served in some distant community. Sanctions other than imprisonment may be at least as onerous as a prison sentence. A person who serves the sentence in the community still carries a societal stigma of being a convicted offender serving a criminal sentence. Deterrence, to the extent that it is effective, can be satisfied by the imposition of a community based sentence.[131]<Q>

Periods of incarceration may be reduced in recognition of systemic and background factors that may have negatively affected the defendant and played a role in the commission of the offence in question, the likelihood of the defendant experiencing racism in prison, and the fact that a longer period of incarceration is not necessary to achieve the goals of deterrence and denunciation. For instance, in *R. v. Dorian*, the court took account of the "horrendous" personal circumstances of the defendant, which the court found to have influenced the commission of the offence in question, in order to justify a reduced sentence.[132] Notwithstanding the defendant's very difficult and unfortunate circumstances, it was agreed by all involved in the case that the seriousness of the offences—robbery and assault causing bodily harm in the context of a home invasion on an eighty-six-year-old woman and her niece—warranted a period of incarceration, even considering the factors of *Gladue*.[133] Although the defendant had prior criminal convictions, the court noted that the nature of the offences in this particular case was out of character for the defendant and specific and/or general deterrence was unnecessary in this case. In the end, the court felt that a

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[131] *Ibid.* at para. 57.

[132] *Dorian, supra* note 108 at paras. 5 and 29. For a discussion of the defendant's difficult circumstances and how this contributed to the commission of the offence, see paras. 5–7, and 23–5. Among other things, the court noted that the defendant had grown up without parental love, affection, and guidance. His mother was murdered when he was ten years old, and he had little or no contact with his family members. He was removed from his parents at the age of five because they were both alcoholics, and he lived in several foster and group homes where he was physically and sexually abused. The abuse continued on the reserve where he subsequently went to live. He started abusing alcohol and drugs at the age of thirteen as a coping mechanism for the abuse. Alcohol was a factor in the commission of the offence in question. The court noted that although the alcohol factor cannot be used as a mitigating factor, it still provides a context for understanding how the defendant's unfortunate circumstances contributed to the commission of this offence.

[133] *Ibid.* at para. 18.

denunciatory sentence requiring a period of incarceration was justified, although the term was informed by the defendant's extremely difficult and abusive background.[134]

Reduced periods of incarceration may also be influenced by evidence that a defendant's disadvantaged background has raised the probability of him or her engaging in criminal behaviour.[135] As well, where a court concludes that incarceration is necessary in a particular case, evidence that Aboriginal offenders will be subject to discrimination in prison because of their Aboriginal status, coupled with the fact that the prison environment is often culturally inappropriate for them, may justify considerations for reduced periods of incarceration.[136]

As was noted earlier, both Aboriginal and non-Aboriginal women have expressed concern that the *Gladue* framework not be used to subvert women's rights and make their victimization invisible in an effort to address the legacies of colonization and/or remedy the ineffectiveness of the dominant criminal justice system with its over-reliance on incarceration. The case law suggests some optimistic signs that women's interests will be protected within a *Gladue* sentencing regime. Some courts have shown sensitivity that gendered racism might arise and have declined to consider the systemic and background factors that may have affected Aboriginal offenders, mostly men, in cases of domestic violence in the determination of fit sentences. The importance of custodial sentences in such cases has not been diminished in favour of idealized notions of restoring community harmony in the face of violence against women. Some courts have been attentive to community dynamics and power structures that could be detrimental to Aboriginal women's interests in determining fit sentences to ensure their

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[134] *Ibid.* at paras. 27–8, 35, and 41–2. The court concluded that given the systemic and background factors that had plagued the defendant's life and the direct link between those circumstances and the commission of the offence in question, the usual range of sentences for similar offences was not appropriate because they are too long (at para. 40). See also *R. v. Sackanay* (2000), 47 O.R. (3d) 612 at paras 10–11, 13 (C.A.), where the Ontario Court of Appeal held that the sentences for aggravated sexual assault and aggravated assault should be served concurrently as opposed to consecutively as held by the trial judge, among other things, because of the hardships that the Aboriginal offender had suffered.

[135] For example, see *Elliot*, *supra* note 109, where the court reduced twelve-year sentences imposed on the defendants for criminally negligent manslaughter for the death of a child and bodily harm to another to ten years, in consideration of systemic and background factors that adversely affected the defendants (at paras. 19 and 21). See also *R. v. S.R.M.*, [2004] B.C.J. No. 925 (Prov. Ct. Crim. Div.) (QL).

[136] See *Dorian*, *supra* note 108 at para. 33.

protection needs are met and also to avoid the potential for gendered racism.[137] Specifically, some courts have stated that all women are entitled to the same protection against violence regardless of racial background and have emphasized the importance of ensuring gender equality between Aboriginals and non-Aboriginals. For instance, in *R. v. S.G.N.*, the court stated that "it is particularly important that all the protections of the criminal law be extended to First Nations women and that this new provision in the Criminal Code should not be permitted to do anything towards lessening the protection that they must be accorded."[138]

Thus, there is a tendency for denunciation to trump systemic and background factors that may have negatively affected Aboriginal offenders in cases of violence against women, especially domestic violence. This tendency has resulted in a preference for incarceration for substantial periods, as opposed to restorative and community-based sentences. For instance, in *R. v. Chalifoux,*[139] where the defendant pleaded guilty to the fatal stabbing of his estranged spouse, the court recognized that his difficult upbringing—growing up in an adoptive non-Aboriginal family—may have exacerbated his anxiety over the possible break-up of his own family. This factor was found relevant to his degree of responsibility under a *Gladue* regime. However, the court felt that it would be irresponsible not to impose a denunciatory sentence in this case. Justice Jack Watson noted that although deterrence of the defendant is likely not necessary in this case, "failure to impose stern and retributive punishment" in such cases sends the wrong signal about the courts' ability to adequately respond to domestic violence.[140] It also undermines

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[137] For example, in *Ear, supra* note 109, two elders made submissions in support of a conditional sentence for the accused and tried to blame the victim for the assault. The court was not impressed and rejected the bid for a conditional sentence. Similarly, in *Morris, supra* note 130, involving a chief who violently assaulted his common law partner, some elders supported his conditional sentence because of his status in the community. Given the gendered and violent nature of the offence, the conditional sentence was ultimately substituted for a custodial sentence on appeal. *R. v. Morris* (2004), 186 C.C.C. (3d) 549 (B.C.C.A.) [*Morris* CA].

[138] *R. v. S.G.N.* (1999), 133 B.C.A.C. 277 at para. 41 (C.A.). In this case, where the accused had committed numerous sexual assault offences, the court noted that there was no basis for reducing the sentence solely because of his Aboriginal status. See also *Ear, supra* note 109 at para. 35.

[139] *R. v. Chalifoux (D.R.W.)* (2003), 351 A.R. 130 (Q.B.) [*Chalifoux*].

[140] *Chalifoux, supra* note 139 at para. 100. Ultimately, Watson J. felt that ten years' imprisonment was an appropriate sentence in this case. This was reduced by two years for pre-trial custody and one year for the guilty plea. Watson J. noted that it would be

the integrity of the criminal justice system to respond to violent offences in society, especially violence against women.

Some courts appear to have taken a broader view of decolonization that includes addressing violence against Aboriginal women, which has partly resulted from the legacies of colonialism. These courts are careful not to sacrifice the need to protect women in the name of the greater good of Aboriginal communities plagued by violence against women. Hence, they have taken the position that the security interests of women, deterrence, and the denunciation of domestic violence warrant incarceral sentences notwithstanding any appeal for restorative sentences for the benefit of offenders and/or the healing of the alleged community. In *R. v. Ear*, the court emphasized that the protection interests of vulnerable individuals must not be subordinated to seemingly utilitarian goals: "A sentence which does not provide adequate protection of ... victim[s] and members of [their] community is not a restorative sentence. It does not restore the harmony in the community which existed before the commission of the offence."[141]

Similarly, in *R. v. Morris,*[142] the British Columbia Court of Appeal substituted a custodial sentence for the conditional sentence imposed by the trial judge for an Aboriginal man convicted of various offences relating to domestic violence that left his common-law partner seriously injured.[143] While the court did consider *Gladue* and the defendant's Aboriginal background, it was clear that it refused to take a "race-over-gender" approach. The court emphasized that the protection and security interests of women and other vulnerable persons must trump all other considerations. Justice of Appeal Lance Finch stated:

> <Q>The record indicates that there is a "toxic atmosphere" in the community, which relates not only to this particular case but more generally to the epidemic of spousal abuse that exists. There are clearly significant divisions along gender lines, and apparently along "political" lines too, within this community as to how best to deal with this crisis.<Q>

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unethical for a judge to impose a sentence of less than seven years' imprisonment in such a case (at para. 105).

[141] *Ear*, *supra* note 109 at para. 36.

[142] *Morris* CA, *supra* note 137.

[143] For an interesting discussion about applying *Gladue* with gender sensitivity, see *ibid.* at paras. 55–8.

In these circumstances, the conventional Canadian judicial system must respond with a sentence that reflects all of the principles of sentencing as articulated in the *Criminal Code*. All Canadians, Aboriginal or not, are entitled to the protection of the law and are subject to the control of the law. Women and other persons who are vulnerable must be protected and must not be afraid to lay complaints or to pursue charges. And when they do, the law must be seen to respond effectively.[144]

By so holding, these courts have refused to rely on cultural/racial explanations or the need to address the legacies of colonization as a rationalization for violence against Aboriginal women. This is not to suggest that the legacies of colonization and their relationship with offender behaviour should not be acknowledged and/or that Aboriginal justice traditions should not be considered in sentencing Aboriginal offenders. However, contextual and/or culturally appropriate sentencing must be such as to recognize the importance of justice and equality for all women, including Aboriginal women, and to ensure the safety of both victims and their communities. Commenting on the tension between the legacies of colonization and addressing the contemporary issues of violence against Aboriginal women and the need to make the latter trump the former, LaRocque notes that "[n]ative peoples ... are caught within the burdens and contradictions of colonial history, but nonetheless, [they] cannot use colonization or culture to excuse violence."[145]

Women's interests have also been protected within a *Gladue* sentencing regime by emphasizing the seriousness of gendered harms to warrant the non-consideration of systemic and

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[144] *Morris* C.A., *supra* note 137 at paras. 67–8. Similarly, in *R. v. Tony* (2002), 220 Sask. R. 135 (Q.B.), the court allowed the Crown's appeal and doubled the length of a conditional sentence for the accused, who was found guilty of sexual assault, among other things because the original sentence was not sufficiently punitive (at para. 17). See also *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664 (C.A.), where the Alberta Court of Appeal upheld a five-year imprisonment sentence in a case involving domestic violence even after consideration of the principles set out in *Gladue.* The court noted that given the brutal nature of the assault, that it occurred in a domestic relationship, the high likelihood of the defendant to re-offend and his failure to accept responsibility it was appropriate to impose an incarceral sentence. The court further noted that in such cases the goals of separation, denunciation and deterrence must outweigh the objectives of restorative justice that informs section 718.2(e) and the principles set out in *Gladue*.

[145] LaRocque, *supra* note 32 at 92. She notes that the interests of justice and victim protection may sometimes call for a reconsideration of what constitutes Aboriginal "tradition" and that Aboriginal peoples and communities should be open to change if a particular justice tradition is oppressive to victims, especially women.

background factors that may have affected the offender. Alternatively, courts have not been satisfied with evidence of a causal connection between the defendant's disadvantaged background and the domestic violence in question.[146] In such cases, the offenders' Aboriginal status and/or marginalization are rarely considered to be mitigating factors. In this regard, the sensitivity to domestic violence and the need for deterrence and denunciation shown in *R. v. D.B.M.*[147] is commendable. In this case, the defendant, a twenty-seven-year-old Aboriginal man, pleaded guilty to a charge of aggravated assault with a knife that endangered the life of his girlfriend. The defendant was intoxicated at the time of the offence and had severe problems related to alcohol. He was also a survivor of childhood sexual abuse who had experienced emotional difficulties because of his exploitation and the fact that the perpetrator was never charged for his crimes. The court accepted evidence that the offence was out of character for the defendant and that he was remorseful for the incident. He was also keen to obtain professional help for his problems, including alcohol abuse and the childhood sexual abuse. Justice Heino Lilles expressed concern about the potential impact of a lengthy imprisonment far away from the defendant's home community in the context of section 718.2(e). He also noted the support of the defendant's family and community to help him address the issues that he faced to ensure that he did not engage in such conduct again. Notwithstanding these factors, which would have pointed to leniency in this case, Lilles J. emphasized the gravity of the offence and the injuries of the victim, including the breach of trust occasioned by the assault, noting that these factors warranted deterrence and denunciation:

> <Q>I do not minimize the seriousness of the offence, the injuries to the victim and the impact on her family and friends. Denunciation of such a savage, life-threatening and tragic offence committed by a person in a position of trust must also be a sentencing consideration. It is as necessary to deter isolated instances of domestic violence as it is to deter repeated instances.[148]<Q>

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[146] See, for example, *Ear, supra* note 109.

[147] *R. v. D.B.M.*, [2002] Y.J. No. 96 (Terr. Ct.) (QL).

[148] *Ibid.* at para. 24. The court felt a sentence of five years' imprisonment was appropriate in the circumstances. This was reduced by two years for pre-trial custody, leaving the defendant to be sentenced to three years to be served in a federal penitentiary. The five-year sentence is close to what Lilles J. considered to be the high end of the range for aggravated assault involving the use of a weapon and resulting in life-threatening injuries (at para. 19). See also *R. v. Keeash,* [2003] O.J. No. 3413 (Sup. Ct. Jus.) (QL); and *R v. F.L.*, [2002] O.J. No 1989 (Sup. Ct. Jus.) (QL).

While these earlier-noted cases deal with the more difficult situations of violent and serious crimes, many Aboriginal people are incarcerated for non-violent offences,[149] including fine violations.[150] Non-custodial sentences may be more appropriate in cases that do not involve pre-meditated criminal wrongdoing causing death or serious bodily injury. Cases involving violent and serious crimes force courts to balance the sentencing principles of deterrence and denunciation against the remedial and restorative potential of *Gladue,* in order to ensure community safety and female gender equality. In *R. v. Knowlton,* the court justified the imposition of a conditional sentence, among other things, because the offence in question did not involve violence to another human being. While not diminishing the seriousness of the offence in question (break and enter of a private home), the court noted that given the defendant's background and unique circumstances, the focus should be on restorative goals with punishment and denunciation being secondary.[151]

Unfortunately, not all cases involving sexual assault and other crimes of violence against women receive this type of detailed analysis of the effects on the female victim and the need to apply *Gladue* with gender-sensitivity. For example, in *R. v. Schafer,*[152] where the offender sexually assaulted a woman at knifepoint, he was sentenced to two years of imprisonment based on the consideration of background and systemic factors. Despite the defendant's lengthy record of sexual offences, the court focused on the fact that he was extremely intoxicated and that it was a crime "of impulse." These factors justified a period of incarceration that was on the low end of the scale:

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[149] In 2004–5, fewer than one-third (31.9 per cent) of Aboriginal adults involved in correctional services in Nova Scotia, New Brunswick, and Saskatchewan allegedly committed violent crimes. Karen Beattie, *Adult Correctional Services in Canada, 2004/05* (Ottawa: Minister of Industry, 2006) at 32 and 26(5), Juristat, Statistics Canada Catalogue No. 85–002-XIE, <http://www.statcan.ca/english/freepub/85–002-XIE/85–002-XIE2006005.pdf>.

[150] "In 1992–93, admissions for fine default accounted for about one third of all people admitted to Saskatchewan's provincial jails, most of whom were Aboriginal." T. Thompson, Steering Committee Chair, *Justice 2001: Socio-Demographic and Criminal Justice Trends* (Regina: Government of Saskatchewan, 1993), Table A5.25, as cited in Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Saskatchewan Law Review 153 at 176**.** Kwochka argues that it is "an abomination" to imprison people for debts, not to mention that it is incredibly expensive and ineffective as a deterrent (at 176–7).

[151] *Knowlton, supra* note 122 at para. 34.

[152] *R. v. Schafer,* [2000] Y.J. No. 7 (T.C.) (QL).

> <Q>In my opinion, certainty of detection, arrest and public accountability will operate more effectively to deter the public generally than a longer period of incarceration. In any event, the deterrent effect on individuals who are as intoxicated as was Mr. Schafer when he committed this offence would be non-existent. Nor will it deter young men from drinking, as few would be planning to commit a sexual assault when they start drinking. I am satisfied that the reduction of crime in Old Crow will be more effectively achieved through community awareness and healing rather than by imposing sentences of incarceration near the top of the acceptable range.[153]<Q>

Similarly, in *R. v. D.A.H.,*[154] the Aboriginal defendant was convicted of incest of his half sister, with whom he stood in *loco parentis* as a foster parent. The sexual assaults ranged from kissing to oral sex and full intercourse and occurred over a one-year period, during which the defendant abused alcohol. There was evidence that the defendant had a troubled childhood.[155] The victim impact statement was very powerful, detailing the emotional scars left by the abuse and feelings of breach of trust by the accused and a resulting lack of trust for people generally, especially men. Despite the serious nature of the offence, the court imposed a restorative, non-custodial sentence, allegedly in accordance with section 718.2(e). Chief Justice of Ontario Roy McMurtry noted: "I recognize that a conditional sentence in this type of offence is a highly unusual disposition. However, I am of the view that such a disposition is consistent with s. 718.2(e) of the Code and I am satisfied that with appropriate conditions the sentence can meet the important objectives of deterrence and denunciation."[156]

Overall, the case law between 1999 and 2006 shows that the effects of crime on victims, public safety, denunciation, and deterrence are important considerations within the *Gladue* framework. Notwithstanding cases such as *Schafer* and *D.A.H.,* there is cautious optimism that courts are sensitive to the security and protection needs of women victims within a *Gladue* sentencing regime. It appears that many courts are unwilling to impose restorative sentences in cases of personal violence and/or fatal injuries, including violence against women. At best, the

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[153] *Ibid.* at para. 91 (per Lilles, Terr. Ct. J).
[154] *R. v. D.A.H.,* [2003] O.J. No 143 (C.A.) (QL) [*D.A.H.*].
[155] The defendant experienced physical, sexual, and emotional abuse and was often neglected by his mother. He therefore had to fend for himself at a very tender age. He also started abusing alcohol and other substances at a very early age after he had been introduced to these substances by his mother.
[156] *D.A.H., supra* note 154 at para. 43.

terms of incarceration may be reduced in light of systemic and background factors that may have contributed to the commission of the offence in question. Crimes of personal violence are often perceived as violent offences requiring denunciatory sentences to ensure public safety. So far, the imposition of non-incarceral sentences in cases involving bodily injuries and death appears to be the exception. There are often compelling circumstances in cases where courts have found it appropriate to impose restorative sentences. Even then, restorative sentences seem not to be considered appropriate unless they are supported by the offender's community, there is realistic evidence of rehabilitation, and the presence of the defendant in the community would not compromise victim and public safety.

The cautious approach to the consideration of the *Gladue* factors is warranted considering victims' rights and especially since the potential benefits of culturally sensitive sentences are yet to be proven. Yet, it is also important not to have unrealistic expectations that alternative sentences will produce immediate transformative results. The competing interests must be balanced in order to ensure victims' safety, address the causes of Aboriginal criminality, and acknowledge gendered harms in particular. Critics caution that courts should be careful about idealizing the transformative potential of these alternatives to remedy problems of over-incarceration or, more generally, of a breakdown in Aboriginal communities and families, because women and girls could end up paying a high price for this.[157] The seriousness of gendered harms as threatening women's equality is now well known and should not be minimized in the name of cultural sensitivity. The importance of denouncing and deterring gendered crimes sometimes outweighs the need to focus on the particular circumstances of an offender and his or her community. Nevertheless, given the intractable nature of the underlying causes of gendered harms, it might be appropriate to resort to community-based programs that have the potential of addressing the root causes of offenders' behaviour and the victimization of Aboriginal women and children. However, candidates for alternative sentencing must be carefully scrutinized to minimize the possibility of offender manipulation, and there must be adequate resources for training and follow-up in order to avoid the likelihood of compromising victim and public safety. So far, many courts are treading cautiously in dealing with Aboriginal offenders in ways that protect women's interests and public safety, and this approach is to be commended.

[157] For example, see Stubbs, *supra* note 71 at 17–18.

<1>*Conclusion*

Contextual sentencing recognizes the correlation between being marginalized and criminal behaviour. For Aboriginal people, it also entails a recognition of the devastating effects of the legacies of colonization, racism, dispossession, and the denigration of their cultural, spiritual, economic, and political systems. The restorative focus of alternative sentencing grounded in Aboriginal justice traditions destabilizes the hegemony of the Euro-Canadian criminal justice system. Validating Aboriginal conceptions of justice and empowering Aboriginal people through their involvement in the administration of justice is an important step towards their de-colonization.

The complex nature of the problem of Aboriginal criminality and the cycle that perpetuates the problem requires concerted and long-term strategies to break the cycle of crime and violence. Given the correlation between marginality, crime, and victimization, sentencing reform will likely only play a limited role in remedying injustice against Aboriginal people and other marginalized groups in Canada.[158] Even if contextual sentencing reduces recidivism, it might not necessarily result in crime prevention so long as others continue to be marginalized by systemic discrimination. To adequately redress the problem of over-incarceration, we must first remedy the underlying socio-economic imbalance between Aboriginal and many non-Aboriginal Canadians and implement pro-active crime prevention measures. Social transformation will depend on strengthening social citizenship by improving the material conditions of marginalized people and by addressing racism and discrimination as part of crime prevention strategies.

Ultimately, crime prevention requires looking beyond the criminal justice system to destabilize traditional class and racial boundaries and to find "transitional pathways towards a new society, which necessarily involves struggles around the social divisions of the old society."[159] This process would also avoid, or at least minimize, the tension between decolonization and the principles of sentencing identified throughout this article. While the goal

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[158] Limitations of sentencing reform and more generally criminal justice reform to remedy systemic and structural discrimination and inequalities and their effects on criminal wrongdoing have been duly acknowledged. See *Gladue, supra* note 6 at para 65; *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114 at para. 150 (Ont. Sup. Ct. Jus.); *Hamilton, supra* note 13; Borrows et al., *supra* note 58 at 123; and Ruby et al., *supra* note 87 at 1.

[159] White, *supra* note 89 at 392.

of this article has been to examine some of the tensions within sentencing principles and between the goals of gender equality and decolonization, it is clear that there is a still greater tension that must be faced and resolved. The desire for social justice and crime prevention must be reconciled with capitalism, the demands of economic globalization, and the threats to the welfare state that continue to create a new underclass of unemployed and poor people, who could easily become the next generation of criminals and make the law and order agenda seem relevant:

> <Q>In the [neo-liberal] political-economic context, policing and prison become a means of social control. The criminal justice system becomes a means of containing a certain part of the population—people who are feared and condemned not for their criminality but for their low position in the political-economic hierarchy. Prison becomes, at least in part, a means of housing excess people—those extraneous to the needs of capitalism. Globalization has created a new class of people who can be defined as "redundant"—"a new underclass of disposable people."[160]<Q>

Gladue and the case law following it are promising in that the courts seem to be doing a good job balancing substantive equality with individual responsibility and public safety. However, the tension between the protection needs of victims and community/society safety, and the long-term survival of Aboriginal peoples and communities, remains. Although a sentencing regime that is attentive to Aboriginal justice traditions is laudable, it does not address the root causes of the problem. Unless the social and economic inequities that continue to create an underclass of people who are likely to be involved in anti-social behaviour are addressed, sentencing reform will be merely rhetorical and perhaps even neo-colonial. To adequately address Aboriginal over-representation in the criminal justice system, sentencing reform must be pursued in tandem with improving the socio-economic conditions of Aboriginal people and other marginalized people in Canadian society.

[160] Carolyn Brooks, "Globalization and a New Underclass of 'Disposable People,'" in Schissel and Brooks, eds., *supra* note 89, 273 at 274.