



# Gladue Primer



Legal  
Services  
Society

British Columbia  
[www.legalaid.bc.ca](http://www.legalaid.bc.ca)

February 2011



© 2011 Legal Services Society, BC  
ISSN 1925-5799 (print)  
ISSN 1925-6140 (online)

## Acknowledgements

Writer/Editor: Jay Istvanffy  
Designer: Dan Daulby  
Legal reviewer: Pamela Shields

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The *Gladue Primer* is a publication of the Legal Services Society (LSS), a non-government organization that provides legal aid to British Columbians. LSS is funded primarily by the provincial government and also receives grants from the Law Foundation and the Notary Foundation.

This booklet explains the law in general. It isn't intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The *Gladue Primer* is up to date as of **February 2011**.

Special thanks to Jonathan Rudin of Aboriginal Legal Services of Toronto and Linda Rainaldi for their contributions to this booklet. We gratefully acknowledge Community Legal Education Ontario (CLEO) for the use of the information in their booklet *Are you Aboriginal? Do you have a bail hearing? Or are you going to be sentenced for a crime?* (2009).

## How to get the *Gladue Primer*

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# **Section 1 — Gladue primer**

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# Introduction

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This booklet is for Aboriginal **defendants** who want to know more about their Gladue rights and are working with their lawyer on preparing a Gladue report. (A defendant is someone who has been accused of a crime.) This booklet can also be used by Aboriginal advocates, Aboriginal justice workers, Aboriginal community members, the legal community, and anyone else who needs information about Gladue rights.

This booklet contains information about Gladue rights, the history of Gladue, and what Gladue means for you. This booklet also has a workbook that will help you review the information about Gladue (see page 21). The workbook will also walk you and your lawyer (or advocate) through the process of preparing a Gladue report (see page 30). At the end of this booklet, you'll find appendices (see page 39, after the third tab) that can help you learn more about Gladue and preparing Gladue reports.

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**In this booklet, words that you might not know appear bold. These words are defined or explained, usually within the same sentence or paragraph. Sometimes you will be referred to a different page, where the word is explained in detail.**

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## Are you Aboriginal?

If you **self-identify** as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code (section 718.2 (e)) often called **Gladue rights**. Gladue rights refer to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing. When you or your lawyer let the court know that you're Aboriginal and that you have Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is setting your bail or sentencing you, he or she must consider all options other than jail. How Gladue works and how it can help you is explained in the sections that follow.

Gladue rights apply to *all* Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It doesn't matter if you live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community — Gladue still applies to you.



# About Gladue

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## History of Gladue

In 1995, a young Cree woman named Jamie Tanis Gladue was celebrating her 19th birthday with some friends and her fiancé, Reuben Beaver. Jamie and Reuben had one child together and Jamie was pregnant with their second child. They were living together in Nanaimo, BC. Jamie suspected that Reuben was sleeping with her sister. When Reuben left the party with Jamie's sister, Jamie said that "Next time he fools around on me, I'm going to kill him." Jamie confronted Reuben at home, where Reuben insulted her many times. Jamie stabbed Reuben inside their townhouse and when he ran out of the townhouse, she ran after him and stabbed him again. Reuben died from his injuries and Jamie was charged with second degree murder.

Jamie and Reuben had a history of **domestic violence** (abuse) in their relationship — Reuben had assaulted Jamie in the past. When Jamie stabbed Reuben, she was extremely drunk and didn't appear to know what she was doing. Jamie pled guilty to manslaughter and her case didn't go to trial. At the time, she was 20 and didn't have a criminal record. While she was on bail, Jamie attended drug and alcohol counselling and finished Grade 10 and was about to start Grade 11. As well, after the stabbing, she was diagnosed with a medical condition (hyperthyroid) that caused her to overreact to emotional situations.

At the sentencing hearing, Jamie said that she was sorry about what had happened, that she didn't intend to do it, and said that she was sorry to Reuben's family. The judge kept these things in mind when he was sentencing her. The judge also kept in mind that because of the comments that Jamie had made at the party, it was clear that she had intended to hurt Reuben. It was also clear that because Jamie had been the one to attack Reuben, she was not afraid of him. The judge didn't think that Jamie's or Reuben's Aboriginal status was important to the case because they lived in a city off reserve and weren't in an Aboriginal community. He therefore didn't give Jamie any special consideration as an Aboriginal person when he was sentencing her. The judge sentenced Jamie to three years in prison.

Jamie decided to **appeal** her sentence (ask the court to reconsider her sentence), partly because the judge didn't take into account her Aboriginal status. However, the BC Court of Appeal dismissed her appeal. After her appeal was dismissed, Jamie and her lawyer took her case to the Supreme Court of Canada in 1999. The Supreme Court said that the judge who sentenced Jamie might have made a mistake when he said that Jamie's Aboriginal status wasn't important because she didn't live in an Aboriginal community and that he didn't need to give her special consideration under section 718.2 (e) of the Criminal Code. However, the Supreme Court still felt that Jamie's sentence of three years was fair, especially since she'd been granted parole after she'd served six months.

Even though the Supreme Court didn't think it was necessary to change Jamie Gladue's sentence, it did feel that Jamie's case was important. As a result of her case, the court said that there are too many Aboriginal people being sent to jail.



The court also said that Aboriginal people face racism — in Canada and in the justice system. The special rights that Aboriginal people have under section 718.2 (e) of the Criminal Code are a way the justice system can try to make sure that Aboriginal people are treated fairly when their bail is being set or when they're being sentenced.

Now the word **Gladue** refers to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing.

For more information on Jamie Gladue's case in the Supreme Court, see Appendix 2. To see some examples of case law involving the principles of Gladue, you can refer to *Regina v. R.R.B.*, *Regina v. Wesley*, and *Regina v. Sunshine* at [www.canlii.org](http://www.canlii.org).

## Why did the Supreme Court make this decision?

The Supreme Court recognized that the number of Aboriginal people being sent to jail is a problem in Canada. The Supreme Court also recognized that the number of Aboriginal people being sent to jail has been increasing over the last several decades. According to Statistics Canada, between 1965 and 1985, Aboriginal people represented only two percent of the Canadian population, but they formed 10 percent of the federal inmate population for men, and 13 percent of the federal inmate population for women. By 2008, Aboriginal people made up three percent of the Canadian population, but they formed 18 percent of the federal inmate population for men, and 24 percent of the federal inmate population for women<sup>1</sup>. What this means is that the number of Aboriginal people in prison is too high when compared to the number of Aboriginal people in the general population.

The Supreme Court said that this is because Aboriginal people in Canada face racism in their everyday lives, and in the justice system. Gladue rights are a way to address the high numbers of Aboriginal people in jail: now judges will have to look at all options other than jail when they're sentencing an Aboriginal person.

## How can Gladue help you?

When you or your lawyer inform the court of your Gladue rights, the judge must keep in mind that Aboriginal people face unique circumstances, and he or she must give you special consideration when setting your bail or sentencing you. Gladue encourages judges to use **restorative justice** when they're sentencing Aboriginal people. Restorative justice is a form of justice that focuses on repairing the harm done by your crime and giving you and any victims of your crime opportunities to heal. The goal of restorative justice is to give you, the victims of your crime, and your community a chance to move forward, and to help you so that you won't feel the need to turn to crime in the future. This can mean that your sentence will help you to address the issues that got you into trouble with the law in the first place. It may also mean that your sentence is one that's more appropriate and meaningful to your culture.

<sup>1</sup> [www.statcan.gc.ca](http://www.statcan.gc.ca)

The judge also has to consider all options other than jail for your sentence. For example, as mentioned above, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place. This is called a **community sentence**. A community sentence might involve something like participating in drug or alcohol rehabilitation, anger management, or counselling. If you do a community sentence, you may get less or no time in jail.

However, Gladue doesn't automatically mean you won't get jail time. If you committed a serious crime, the judge may have no choice but to send you to jail. If this is the case, the judge must still apply Gladue when he or she decides how long your jail sentence will be.

It's also important to remember that participating in restorative justice or serving a community sentence isn't an easy way out. The main idea behind restorative justice is that the offender has to take responsibility for his or her actions. And, as mentioned above, serving a community sentence often means that you will have to work on addressing the issues that got you into trouble with the law. This can be difficult and a lot of hard work.

For more information on how Gladue can help you, see the fact sheet in Appendix 1.

## How does Gladue work?

### Gladue applies to all Aboriginal people

Gladue rights apply to *all* Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It applies to you if you live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community. Gladue also applies to you even if you were adopted by parents who aren't Aboriginal, or if you were raised in a foster home.

If you don't have a lawyer, you can tell the court that you're Aboriginal and the judge must still apply Gladue.

### Gladue applies to all crimes

Gladue applies to all crimes under the Criminal Code of Canada, even very serious ones. The judge will make his or her decision based on the specific details of your case, and will try to come up with a sentence that's appropriate for you, your community, and the victim. If you committed a serious crime, you may have to go to jail, but the judge will still apply Gladue when he or she is deciding how long your jail sentence should be.

### Exercising your Gladue rights is your choice

It's *your choice* whether you exercise your Gladue rights; once you tell the court that you're Aboriginal, the judge must apply Gladue to your case unless you tell him or her not to.

If you're Aboriginal but don't want to have Gladue applied to your case, you can **waive** your Gladue rights. This means that you can give up your Gladue rights and the judge won't apply Gladue when he or she is setting your bail or sentencing you. However, only you can decide that you don't want Gladue applied to your case — no one else can make that decision for you. In other words, the judge, **Crown counsel** (government lawyer), or your lawyer don't have the right to say that Gladue doesn't apply to you or your case. For example, if your lawyer isn't familiar with Gladue, he or she must still do everything possible to make sure your Gladue rights are respected (to start, he or she can get more information on Gladue from this booklet and the booklet *Are You Aboriginal? Do you have a bail hearing? Or are you being sentenced for a crime?* available at [www.cleonet.ca](http://www.cleonet.ca)). As long as you're Aboriginal, Gladue applies to you and you have the right to have Gladue applied to your case.

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**Before you decide to waive your Gladue rights, it's very important to talk to your lawyer first. It's usually not a good idea to waive your Gladue rights.**

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## When does the judge apply Gladue?

The judge applies Gladue when he or she is setting your bail or sentencing you. Your bail hearing will happen before your trial. Your sentencing hearing happens after you plead guilty (in which case your case won't go to trial), or if the judge finds you guilty at your trial. Gladue doesn't apply to the trial itself. If you're sent to jail, Gladue applies if you have a parole hearing in jail.

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**In BC, if you self-identify as Aboriginal, you can apply to have your bail and sentencing hearings in First Nations Court. See page 17 for more information.**

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For more information on bail, see page 9. For more information on sentencing and the types of sentences a judge might give you, see page 12.

## What does the judge need in order to apply Gladue?

In order to apply Gladue, the judge needs to know that you self-identify as Aboriginal and to understand your circumstances. At your bail hearing, the judge also needs to know what options there are for you instead of jail while you wait for your next court date. This is called a **bail plan** (see page 11). At your sentencing hearing, the judge also needs to know what kinds of community sentences are available.

To help the judge, your lawyer needs to give the court a **Gladue report**. A Gladue report gives the judge, Crown counsel, and your lawyer as much information as possible about you and your background so that they can understand why you committed the crime that you did, what kinds of community sentences are available, and how those community sentences might help you to address the issues that got you into trouble with the law in the first place. If the judge has all the information he or she needs to apply Gladue, he or she will be able to make the best decision possible for you and your community.



## Gladue reports

### What kind of information is included in a Gladue report?

A Gladue report gives the judge the information he or she needs to make the best decision possible when setting your bail or sentencing you. The judge needs to be able to answer two important questions:

- Why is this particular Aboriginal person before the court? (In other words, how or why did you end up getting into trouble with the law?)
- What sentencing options other than jail are available that might help to address the reasons why this Aboriginal person is before the court? (In other words, what kinds of community sentences are available and how will they help you to address the issues that got you into trouble with the law?)

To answer these questions, the judge will need to know more about you, and he or she will need as much information as possible about you and your background in order to get a full picture of your life. The judge will also need to know some information about your family and your community. A few examples of the types of information the judge will need to know about you include:

- Where are you from? Do you live in the city or in a **rural** area (the country)? Do you live on reserve? Did you grow up on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with **substance abuse** (drug or alcohol abuse)? Have you been affected by someone else's substance abuse? For example, did you grow up in a home where there was substance abuse or addictions?
- Did you grow up in a home where there was domestic violence or abuse?
- Is there a program in your community that would help you to address the issues that got you into trouble with the law? For example, is there a counselling program or alcohol or drug rehabilitation program that you feel would be helpful to you?
- Have you participated in community activities such as family gatherings, fishing, longhouse ceremonies, or sweat lodge ceremonies?

The more the information in your Gladue report can be supported by other people or documentation, the better it will be for your case. However, even if you can't support the information in some way or if there's no one who can back up the information (this can often be the case for information about abuse), you should still include it. The judge still needs as much information about you as possible.

Some of the information in your Gladue report may be private or sensitive for you, and you may not like to talk about it. If you don't want this information discussed out loud in court, you can ask your lawyer to give this information in writing to the judge and Crown counsel.

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The judge doesn't need the same amount of personal information to apply Gladue at your bail hearing as at your sentencing hearing. See page 11 for more information on Gladue considerations at bail.

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The workbook in Section 2 on page 30 will walk you and your lawyer (or advocate) through preparing a Gladue report. Appendix 3 includes a checklist of all the information you should include in your report, blank templates of a Gladue report (one is a sample with instructions, and one is blank that you can photocopy and fill in), and a Gladue report writer's style guide. For information on who can help you prepare a Gladue report, see below.

## Are Gladue reports different from pre-sentencing reports?

Yes. Gladue reports and pre-sentencing reports are addressed in different sections of the Criminal Code. Gladue reports are addressed in section 718.2 (e) and pre-sentencing reports are addressed in section 721.

Ideally, Gladue reports are prepared with the help of someone who has a connection to and understands the Aboriginal community. The purpose of a Gladue report is to give the court a complete picture of you and your life, including information about your background, your Aboriginal community, and the specific circumstances that brought you before the court. A Gladue report will put your particular situation into an Aboriginal context so that the judge can come up with a sentence that's unique to you and your culture, and has an emphasis on **rehabilitation** (healing). A Gladue report is usually 12 – 18 pages long.

Pre-sentencing reports are prepared by a probation officer. The purpose of a pre-sentencing report is to give the court a picture of you as an offender and is based on your criminal record. A pre-sentencing report focuses on your criminal behaviour and on **risk analysis** (how likely you are to re-offend).

Aboriginal community advocates who understand your culture are in the best position to help you prepare your Gladue report or provide information that can be used in your Gladue report. See page 8 for more information on who can help you prepare your Gladue report.

## Who can help me with my Gladue report?

You and your lawyer (or advocate) can use the workbook on page 30 and the resources in Appendix 3 to prepare your Gladue report.

If you don't have a lawyer or your lawyer isn't familiar with Gladue, a **Native courtworker** may be able to help you. Native courtworkers give information and guidance to Aboriginal people who are before the courts, and make sure they have access to the help they need to deal with the legal system. Native courtworkers can also connect you to Aboriginal community groups that can help you with other issues, such as substance abuse or family problems. The Native Courtworker and Counselling Association of British Columbia's website at [www.nccabc.ca](http://www.nccabc.ca) has more information about who they are and the services they provide. You can call the Native Courtworker and Counselling Association of British Columbia at **604-985-5355** (in Greater Vancouver) or **1-877-811-1190** (elsewhere in BC, call no charge).

The expanded duty counsel at First Nations Court in New Westminster can answer some questions as you prepare your Gladue report. (See page 17 for more information about First Nations Court.) The expanded duty counsel can give you legal advice on or *before* the day of court. For more information, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).



# Bail and sentencing

## Bail

Bail is an assurance or guarantee to the court that you will appear in court when you're required to do so, and that you will obey any conditions the court sets. Bail is sometimes called **judicial interim release** or **show cause**. In Canada, anyone who is charged with a crime has the right to be considered for bail. In other words, no one is automatically held **in custody** (jail) until their trial. Whether you're held in custody until your trial will depend on the type of crime you've been charged with and other factors such as whether you have a criminal record.

After you've been arrested, depending on the crime you've been charged with and the circumstances of your arrest, the police will either release you without a bail hearing, or they will keep you in custody until you can attend a bail hearing.

## Release without a bail hearing

A bail hearing isn't always necessary. If the crime you've been charged with isn't a serious one and the police are confident you will go to court on the specified date, they will release you. You may have to sign a document agreeing to follow certain conditions until your court date, and promising to appear in court on the specified date. If you live more than 200 kilometres from the court, you may have to pay a cash deposit. If you're released without a bail hearing, it won't be necessary to apply Gladue to your case at this time. If you plead guilty to the charges or are found guilty at your trial, you or your lawyer can submit a Gladue report at your sentencing hearing and ask the judge to apply Gladue then.

## Bail hearings

The purpose of a bail hearing is to determine whether you should be released or held in custody until your trial. A bail hearing must be held within 24 hours of your arrest, except in special circumstances. You don't have to plead guilty or not guilty at the bail hearing; you will do this when your case goes to trial. A judge or a justice of the peace will set your bail based on the offence you've been charged with, and other factors such as your criminal record (if you have one) and your previous history for appearing in court.

In certain serious circumstances, *you* may be responsible for proving that you're eligible for release. This is called **reverse onus**.

It's a good idea to get a lawyer to represent you at your bail hearing, especially if you've been charged with a serious offence. Contact legal aid immediately to find out if you qualify for a free lawyer. If you don't qualify for a free lawyer, most courts in BC have duty counsel. Duty counsel are lawyers who can give you free legal advice on or before the day of court. Legal aid can give you more information on when and where you can meet with a duty counsel in your area.

Legal aid:

604-408-2172 (Greater Vancouver)

1-866-577-2525 (elsewhere in BC, call no charge)

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## Bail options — If you're released

The court may release you on an **undertaking**. An undertaking is a written promise that you will show up at court at the specified times. The undertaking may have conditions that you need to follow, such as:

- reporting to a bail supervisor at specified times,
- remaining within the court's **territorial jurisdiction** (area of authority),
- reporting to the court any change of address or employment,
- not communicating with witnesses or victims,
- staying away from certain areas,
- **abstaining from** (not using) alcohol or drugs,
- depositing your passport, and
- not possessing any **firearms** (guns) or weapons.

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If you're afraid you might not be able to abstain from alcohol, you can ask for a clause that allows you to drink alcohol inside your home only.

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If the Crown counsel can give the court reasons why you shouldn't be released on an undertaking with conditions, the court may still release you on a **recognizance**. A recognizance is a written promise that you will show up at court at the specified times, in addition to a fine you may have to pay if you fail to attend court, or an amount you and/or your **surety** (see below) may have to pay. If you live more than 200 kilometres from the court, you or your surety may have to pay a cash deposit. A recognizance may also have conditions that you have to follow.

A surety is a person who agrees in writing to be responsible for you until your case is concluded. The judge or justice of the peace will interview your surety to make sure he or she is reliable and to find out what kinds of assets he or she has available. For example, the judge or justice of the peace will want to know what type of job your surety has, how long he or she has lived in the province, and whether he or she has bank accounts, property, and/or stocks and bonds.

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Your Aboriginal community can act as a surety for you.

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For more information on bail and bail options, see the Ministry of Attorney General website at [www.ag.gov.bc.ca](http://www.ag.gov.bc.ca). On the left-hand navigation bar, click Courts — Court Services Branch — Criminal Court — Bail in B.C.

## If you're not released

If the judge or justice of the peace isn't confident that you will show up in court at the specified times or is concerned that you might commit further crimes if you're released, he or she may decide that you should stay in custody until your trial. In general, you have a much better chance of being released on bail if you don't have a criminal record, you're gainfully employed or going to school, or you have another program or plan in place (a **bail plan**). It can take a long time for the courts to schedule a criminal trial. If you're not released on bail, you may be in custody for months.

## What is a bail plan?

A bail plan is a comprehensive plan for being in the community while the charges against you are pending. Your bail plan may include conditions similar to an undertaking or recognizance and should include a Gladue report (see below). Working with your lawyer to come up with a comprehensive bail plan that has several conditions, including a surety, is your best option for release.

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**Working with your lawyer to fully prepare for your bail hearing and to develop a bail plan is important because you could be in custody for a long time before your trial if you're not released.**

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Taking the time for you and your lawyer to develop a bail plan and Gladue report might delay your bail hearing for a few weeks, which means you would have to remain in custody for those weeks. However, this approach is often much better than rushing into a bail hearing without a bail plan, as you're more likely to be released and won't have to remain in custody for the months leading up to your trial.

## Gladue considerations for bail

Your Gladue report doesn't have to be as detailed or contain as much personal information for your bail hearing as it does for the sentencing hearing. The judge or justice of the peace will need to know that you're Aboriginal and the details of your life that would be relevant to bail — employment, education, whether you have a surety, etc. For example:

- Where are you from? Do you live on reserve or off reserve?
- Are you employed? What level of education do you have?
- Do you have a hard time finding work because you lack education or because there are limited opportunities in your community?
- Do you struggle with any addictions?
- Have you been affected by racism?



- Has your life been impacted by colonization in any other significant ways? For example, did you attend an Indian residential school?
- Is there someone who can act as a surety for you? (Remember that your Aboriginal community can act as a surety.)
- Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, longhouse ceremonies, or sweat lodge ceremonies?

If you haven't had time to prepare a Gladue report, you or your lawyer can tell the judge or justice of the peace these things out loud.

You can also include positive aspects of your Aboriginal culture in your bail plan. For example, your bail plan could include a commitment to attend sweat lodge ceremonies once per week; do volunteer work for an Aboriginal elder, your Aboriginal community, or friendship centre; or to participate in the potlatch or any other activities that keep you connected to your Aboriginal culture (big house ceremonies, longhouse ceremonies, winter dance, sundance, berry picking, fishing, hunting, beading, drumming, etc.).

## Sentencing

If you plead guilty to the charges against you or are found guilty at your trial, the judge will **sentence** you. A sentence is the punishment that the judge feels is appropriate for you given your circumstances and the crime you committed. There are three types of punishments (sentencing options): a fine, probation, or **imprisonment** (jail). A sentence may be served in jail or in the community (for more information, see the table on page 13).

## Sentencing hearings

Sentencing takes place in a hearing after you plead guilty to the charges against you, or after your trial if you're found guilty. If you plead guilty to the charges against you, your case won't go to trial and will go straight to sentencing. At the sentencing hearing, the Crown counsel will have a chance to speak and let the judge know what he or she thinks the judge should keep in mind when sentencing you. After the Crown counsel has spoken, your lawyer will have a chance to speak on your behalf and let the court know what he or she thinks the judge should keep in mind when sentencing you (sometimes called a **sentencing plan**; see Appendix 3B for more information). If you want Gladue applied to your case, this will include your Gladue report. Once the judge has heard from both lawyers, he or she will make a decision. The judge will let you and your lawyer know his or her reasons for the decision.

## Types of sentences

The type of sentence the judge gives you will depend on the seriousness of your crime and your circumstances. Sentences range from an absolute discharge (which means you will have no conditions, no jail, and no criminal record) to federal imprisonment. The table below lists the different types of sentences from least restrictive to most restrictive; the more restrictive your sentence is, the less freedom you will have.

Types of sentences — Least restrictive to most restrictive	
<b>Community sentences</b> — A community sentence is any sentence that allows you to remain in the community without going to jail.	
Orders	An order is a document that records the judge's decision and is entered at the court registry.
Diversion or alternative measures	Diversion is an out-of-court solution. Typically you must plead guilty for the offence that you've been charged with. The judge will give you a sentence that has conditions. For example, you might be required to perform a certain number of hours of community service, or to abstain from alcohol. If you meet all of the conditions, you won't have a criminal record and your guilty plea won't be entered in court. If you don't meet all of the conditions, your case will go back before the court.
Peace bond	A peace bond is a court order not to harass or bother another person. You may not be allowed to communicate with the person and you may have to stay away from their home or work. A peace bond can last up to a year.
Absolute discharge	An absolute discharge means that even though the judge finds you guilty, he or she doesn't convict you. An absolute discharge has no conditions, probation, fines, or <b>restitution</b> (see page 14). After one year, you'll have no criminal record. An absolute discharge is usually only available for minor offences and if you have no previous history of similar offences.
Conditional discharge	A conditional discharge is similar to an absolute discharge, except the judge will place you on probation for a set period of time. Your probation will have conditions that you have to follow. If you follow the conditions, your discharge will become absolute once it expires. After three years, you'll have no criminal record.

Types of sentences — Least restrictive to most restrictive	
Fines	If you committed a <b>summary offence</b> (minor offence), the maximum fine is \$2000. If you committed an <b>indictable offence</b> (serious offence), there is no maximum fine. The court must consider your ability to pay the fine, and may set up a program that allows you to pay the fine in set amounts over a specified period of time. A <b>Victims Fine Surcharge</b> applies to all offences. This is a fund that helps victims of crime. If you're unable to pay this, let the judge know and he or she may waive it.
Restitution	Restitution is a way of making amends with the victim of your crime. Restitution usually involves a payment to help cover the costs of the physical or emotional harm that you caused, or to help pay for damaged or lost property.
Probation	Probation is a court order that allows you to remain in the community while following certain conditions, such as undergoing counselling, participating in addictions treatment, and performing community service. Probation may last up to three years. You may also have to pay a fine or go to jail for a certain amount of time.
Suspended sentence	A suspended sentence usually means that the judge will sentence you to prison, but will delay your prison sentence and release you on probation instead. If you follow the conditions of your probation, you won't have to go to jail. If you don't follow the conditions of your probation, you will spend the remainder of your sentence in jail.



Types of sentences — Least restrictive to most restrictive	
<b>Imprisonment within the community</b> — Certain prison sentences can be served within the community, as long as you follow conditions set by the court.	
Conditional sentence order	A conditional sentence order is a prison sentence that's served in the community. This is also known as <b>house arrest</b> . A conditional sentence has conditions that restrict your freedom. For example, you may have to stay in your home except to go to work or medical appointments. You may also have to follow conditions set out in a probation order. If you don't follow the conditions, you will have to spend the remainder of your sentence in jail.
Intermittent sentence	If the judge sentences you to less than 90 days in jail, you may be able to serve the sentence on weekends only. This will allow you to continue working. You will also have to follow the conditions of a probation order.
<b>Imprisonment</b>	
Provincial jail	If the judge sentences you to prison for two years less a day or less, you'll be sent to a provincial jail.
Federal jail	If the judge sentences you to prison for two years or more, you'll be sent to a federal jail.

## Gladue considerations for sentencing

You and your lawyer (or advocate) should prepare a detailed Gladue report to submit at your sentencing hearing. See page 6 for more information on Gladue reports, and see the workbook on page 30 and the resources in Appendix 3 for help with preparing your Gladue report.

If you haven't had a chance to prepare a Gladue report, you or your lawyer can tell the judge that you're Aboriginal, and tell him or her about the details of your life that he or she will need to know in order to give you an appropriate sentence. However, taking the time to prepare a Gladue report is a better approach and should be done whenever possible, as you will have a chance to think about what information might be important for the judge to know, and it will help you to keep sensitive details about your life private.

You or your lawyer can also ask witnesses such as an Aboriginal elder, band chief, hereditary chief, or other representatives from your Aboriginal community to speak on your behalf at the sentencing hearing. You can also give the judge any letters of support, certificates (such as a certificate that shows you participated in drug or alcohol counselling), and a letter of apology to the victim(s) of your crime.

You or your lawyer can ask the judge to consider sentencing options that are appropriate to your culture. For example, you can ask to participate in an Aboriginal restorative justice program; attend Aboriginal treatment or counselling programs; perform volunteer work for elders, your Aboriginal community, or friendship centre; fish or hunt for your Aboriginal community; or take part in any other relevant Aboriginal traditions, such as holding a shame feast, or participating in the winter dance or longhouse ceremony.

A list of Aboriginal restorative justice programs in BC is available on the Department of Justice website at [www.justice.gc.ca/eng](http://www.justice.gc.ca/eng). You can navigate to the page as follows:

1. On the left-hand navigation bar, click Programs and Initiatives. The Programs and Initiatives page appears.
2. Scroll down and, under Aboriginal Justice, click Aboriginal Justice Strategy. The Aboriginal Justice Strategy page appears.
3. On the left-hand navigation bar, click Programs. The Community-Based Justice Programs page appears.
4. Click British Columbia. The Community-Based Justice Programs page for British Columbia appears.

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**If the judge has all of the information he or she needs to apply Gladue but doesn't follow Gladue when sentencing you, the judge may have made a mistake and you may be able to appeal your sentence. Talk to your lawyer about your options.**

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# First Nations Court

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## What is First Nations Court?

If you live in BC and you self-identify as Aboriginal, you may be able to have your bail or sentencing hearing at First Nations Court in New Westminster. First Nations Court takes a holistic, restorative, and healing approach to sentencing, with a focus on rehabilitation whenever possible. The First Nations Court sits once a month and hears criminal and related child protection matters. You must apply to have your matter heard in First Nations Court.

First Nations Court is different from other provincial courts. First Nations Court focuses on community and makes sure everyone involved in the case has a chance to be heard. During sentencing, the judge, Crown counsel, Aboriginal community members, the victim and the victim's family, you and your family, as well as probation officers, social workers, and drug and alcohol counsellors are invited to sit around a table where everyone gets a chance to speak. After each person has spoken, the judge will work with everyone at the table to come up with a healing plan. The healing plan might involve referrals to counsellors; programs that are appropriate to your culture, job training, and education; and programs offered by Health Canada. You're expected to stick to your healing plan and you must go to future court dates to report on your progress.

## How do I apply to have my matter heard in First Nations Court?

The First Nations Court expanded duty counsel can help you apply for First Nations Court, give you free legal advice on or *before* the day of court, and help you prepare a Gladue report. If you're interested in applying to have your bail or sentencing hearing in First Nations Court, you or your lawyer can contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC) for more information.

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**It's your choice whether you apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, contact the First Nations Court expanded duty counsel.**

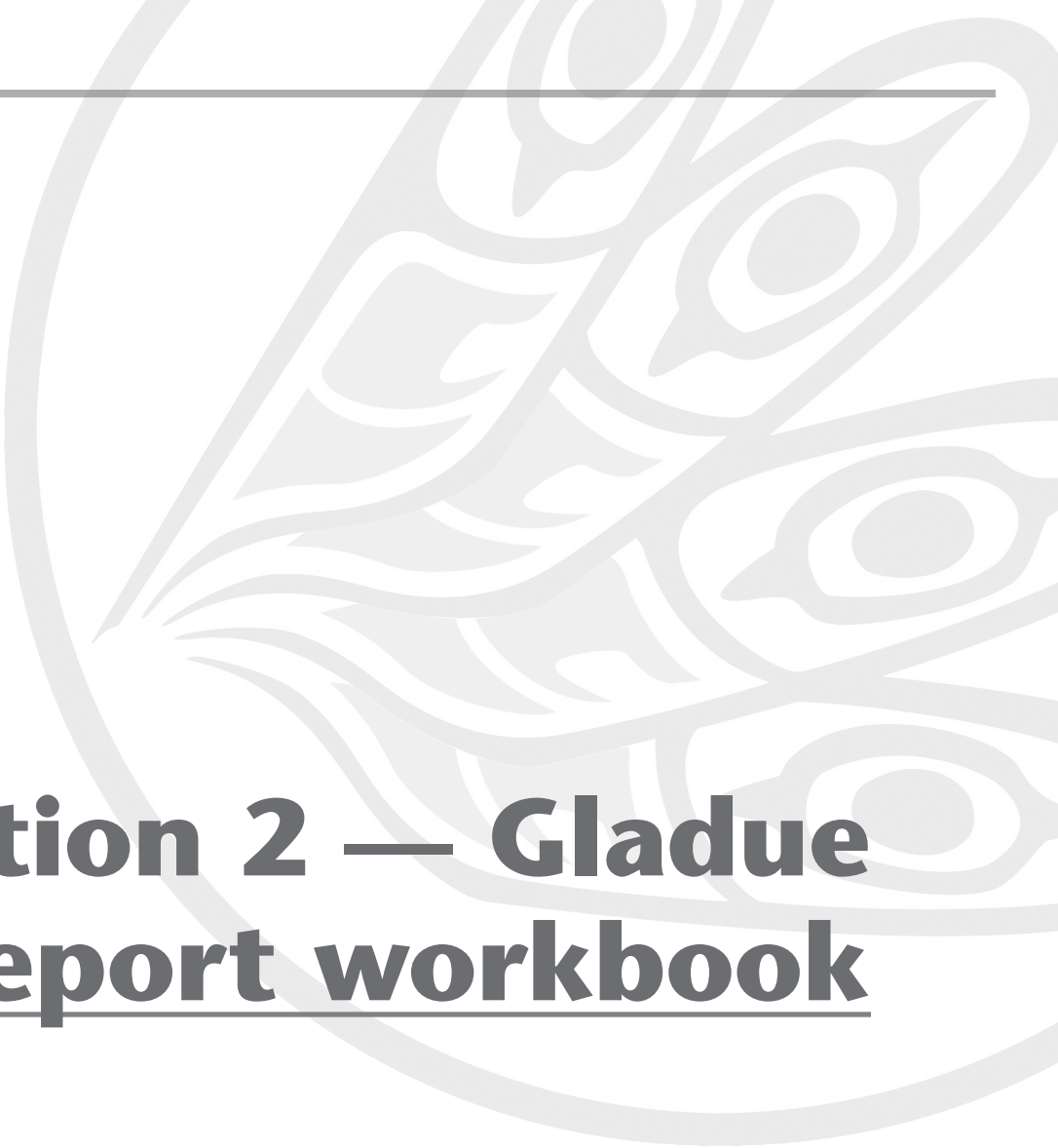
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If your matter is heard in First Nations Court, you will have to appear in person. This means you will have to be able to travel to New Westminster. If you can't travel to New Westminster, you may be able to get special permission to participate in your hearings by telephone or videoconference.





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# **Section 2 — Gladue report workbook**

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# Review of Gladue materials

This section of the workbook briefly reviews the information on Gladue. You can enter any notes or questions you want to bring up with your lawyer or Native courtworker in the space provided.

## Are you Aboriginal?

If you self-identify as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code often called Gladue rights.

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Gladue rights apply to *all* Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It doesn't matter if you live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community — Gladue still applies to you.

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## About Gladue

Gladue rights refer to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing.

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When you or your lawyer let the court know that you're Aboriginal and that you have Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is setting your bail or sentencing you, he or she must consider all options other than jail.

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## History of Gladue

In 1995, a young Cree woman named Jamie Tanis Gladue was celebrating her 19th birthday with some friends and her fiancé, Reuben Beaver. Jamie and Reuben were living together in Nanaimo, BC. Jamie suspected that Reuben was sleeping with her sister.

**Do you see similarities in your circumstances?**

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When Reuben left the party with Jamie's sister, Jamie confronted Reuben at home. Jamie stabbed Reuben inside their townhouse and again outside of their townhouse.

**Do you see similarities in your circumstances?**

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Reuben died from his injuries. Jamie was charged with second degree murder.

**Do you see similarities in your circumstances?**

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Jamie pleaded guilty to manslaughter and her case didn't go to trial.  
**Do you see similarities in your circumstances?**

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At the sentencing hearing, the judge said that he didn't think Jamie's or Reuben's Aboriginal status was important to the case because they lived in a city off reserve, and weren't in an Aboriginal community. The judge didn't give any special consideration to Jamie as an Aboriginal person when he was sentencing her. The judge sentenced Jamie to three years in prison.

**Do you see similarities in your circumstances?**

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Jamie decided to appeal her case. It went to the Supreme Court in 1999. Even though the Supreme Court didn't think it was necessary to change Jamie's sentence, it did feel that Jamie's case was important.

**Do you see similarities in your circumstances?**

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As a result of Jamie's case, the Supreme Court said that too many Aboriginal people are being sent to jail. The Supreme Court also said that Aboriginal people face racism — in Canada and in the justice system.

**Do you see similarities in your circumstances?**

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The special rights that Aboriginal people have under section 718.2 (e) of the Criminal Code are a way the justice system can try to make sure that Aboriginal people are treated fairly when their bail is being set, or when they're being sentenced.

**Do you see similarities in your circumstances?**

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## How can Gladue help you?

When you or your lawyer inform the court of your Gladue rights, the judge must keep in mind that Aboriginal people face unique circumstances, and he or she must give you special consideration when setting your bail or sentencing you.

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Gladue encourages judges to use restorative justice when they're sentencing Aboriginal people.

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The judge also has to consider all options other than jail for your sentence. For example, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place (a community sentence).

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## How does Gladue work?

Gladue rights apply to all Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It applies to you if live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community.

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Gladue also applies to you even if you were adopted by parents who aren't Aboriginal, or if you were raised in a foster home.

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If you don't have a lawyer, you can tell the court that you're Aboriginal and the judge must still apply Gladue.

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Gladue applies to all crimes, even very serious ones.

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Exercising your Gladue rights is your choice. Only you can choose to waive (give up) your Gladue rights.

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The judge applies Gladue when he or she is setting your bail or sentencing you. Gladue doesn't apply to the trial process. Gladue also applies if you have a parole hearing in jail.

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In order to apply Gladue, the judge needs to understand your circumstances and to know what kinds of community sentences are available.

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To help the judge, your lawyer needs to give the court a Gladue report.

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## Gladue reports

A Gladue report gives the judge the information he or she needs to make the best decision possible when setting your bail or sentencing you.

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A Gladue report gives the judge as much information as possible about you, your background, your family, and your community.

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A Gladue report also gives the judge information on the types of community sentences available and how they will help you.

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Gladue reports are different from pre-sentencing reports. A Gladue report gives the judge a more complete picture of you and your life, while a pre-sentencing report focuses on your criminal behaviour.

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Ideally, a Gladue report should be prepared by someone who has ties to the Aboriginal community.

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## Who can help me with my Gladue report?

A Native courtworker may be able to help you. Native courtworkers give information and guidance to Aboriginal people who are before the courts, and make sure they have access to the help they need to deal with the legal system.

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The expanded duty counsel at First Nations Court in New Westminster may also be able to answer some questions as you prepare your Gladue report.

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## What is First Nations Court?

If you live in BC and you self-identify as Aboriginal, you may be able to have your bail or sentencing hearing at First Nations Court in New Westminster.

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First Nations Court takes a holistic and restorative approach to sentencing. First Nations court focuses on rehabilitation whenever possible.

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The judge at First Nations Court works with everyone involved with the case, including Crown counsel, probations staff, and cultural resources such as friendship centres and Native courtworkers, to come up with a healing plan.

You're expected to stick to your healing plan and to show up at future court dates to report on your progress.

It's your choice whether you apply to have your matter heard in First Nations Court.

If your matter is heard in First Nations Court, you will have to appear in person. This means you will have to be able to travel to New Westminster. If you can't travel to New Westminster, you may be able to get special permission to participate in your hearings by telephone or videoconference.

# Preparing a Gladue report

## What does the judge need to know?

Use this section of the workbook to begin preparing your Gladue report. The judge needs to know about you, your life, and your background — who you are and how you got here. Try to give the judge as complete a picture as possible. The judge also needs to know what kinds of community sentences are available, which ones you're interested in, how they will help you and why. Appendix 3 has a Gladue report writer's checklist, templates you or your Gladue report writer can use (a sample that includes instructions and a blank template that you can fill in), and a Gladue report writer's style guide you can refer to.

Remember to support your information with other documentation or people who can back up your story whenever possible. The more you can support your information, the better it will be for your case. However, don't worry if you can't back something up in this way — what's more important is to give the judge as much information about yourself as you can.

Once you've collected all the information you need, your lawyer (or advocate) should use it to write up a report. Your lawyer should then give the report to the judge. If you don't have a lawyer or your lawyer can't write up a report for you for any reason (for example, if there isn't enough time), it's still important to give this information to the judge in whatever way you can so that the judge can apply Gladue.

Remember that this information doesn't have to be discussed out loud in court. You can ask your lawyer to give this information in writing to the judge or Crown counsel.

## What is your background?

Do you self-identify as Aboriginal? Aboriginal can be status or non-status Indian, First Nations, Métis, or Inuit.

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Where are you from? What community or band are you from? Do you live in the city or in a rural area (the country)?

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What kind of living arrangements do you have right now? For example, how many people live in your house? Are these people your brothers and sisters or other relatives?

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What is your home community like? Are there any issues with **substandard** (second rate) housing, lack of clean water, chronic unemployment, or seasonal employment? Is your community “dry”? Are there any issues with substance abuse?

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What kind of living arrangements did you have when you were growing up?

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Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?

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Do you feel **dislocated** from your community? (Have you been taken away from your community in some way?) Has your community been **fragmented** (broken apart)? Do you feel isolated or lonely because of this?

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Did you or a family member go to an Indian residential school?

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Have you made an application to the *Indian Residential School Settlement*? If so, has this process been painful for you or caused other problems? If you received a settlement payment, has this caused problems for you or your family?

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Have you spoken with an Indian residential school counsellor or therapist?

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Have you ever struggled with substance abuse (drug or alcohol abuse)? Have you ever struggled with addictions to drugs or alcohol?

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Did you grow up in a home where there were issues with substance abuse or addictions?

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Did you grow up in a home where there was abuse?

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Do you have any mental health issues?

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What level of education do you have? For example, did you finish high school? If not, what's the last grade you finished?

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Did you or a family member have any issues that may have affected your opportunities to learn? For example, do you have any issues with trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?

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Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, berry picking, longhouse or sweat lodge ceremonies, Hobiye, sundances or winter dances, Métis dancing, potlatches, shame feasts, friendship centre events, or volunteering for elders or other community members?

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Have you ever been affected by racism? Please describe what happened and how this affected you.

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Have you ever been affected by poverty? For example, did you or your family struggle to pay bills or rent, buy food, or pay for healthcare?

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What are your interests and goals? For example, is there any education or training you'd like to complete? Is there a job or volunteer opportunity that you're interested in? Do you have goals for your family or community?

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Have you ever been involved with any Aboriginal restorative justice programs, or with community elders or teachings? If so, give examples.

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Is there someone in your community whom you or your lawyer, Native courtworker, or other advocate can contact if you need help? For example, is there a family member, elder, social worker, chief, or band councillor who can help you?

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### **What types of community sentences are available?**

You and your lawyer (or advocate) can also ask a Native courtworker to help find you community sentences that will work for you. The judge should still consider a community sentence for you even if it isn't an Aboriginal program.

Is there a program in your community that you think can help you address the issues that got you into trouble with the law in the first place? For example, is there a drug or alcohol rehabilitation program that you think might be helpful to you? What about personal counselling or anger management counselling?

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If you've identified a program, explain why you think this program will be helpful to you. For example, have you had experiences or participated in programs that have been helpful to you in the past? Think about what does and doesn't work for you.

Are there sentencing options in your community that are appropriate to your culture? For example, is there an Aboriginal restorative justice program you could participate in? Could you perform volunteer work for elders, your Aboriginal community, or friendship centre? Could you take part in any other relevant Aboriginal traditions, such as holding a shame feast, or participating in the winter dance or longhouse ceremony?

Is there someone in your community who can provide you with a letter of support? For example, can you get a letter of support from an elder, hereditary chief, elected chief, support worker, or your employer, friends, family, or members of your church? You can attach letters of support to your Gladue report.

If you've attended courses to upgrade your skills or schooling, are you able to get a certificate of completion? Can you get proof of attendance for counselling or addictions meetings? You can attach these certificates to your Gladue report.



Notes

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# **Appendices**

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# Appendix 1:

*Are you Aboriginal? fact sheet*

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# Are you Aboriginal?

Do you have a bail hearing?

Are you being sentenced for a crime?

Do you know about First Nations Court?



Legal  
Services  
Society

British Columbia  
www.legalaid.bc.ca

If you self-identify as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code, often called Gladue rights. These rights apply to all Aboriginal people, whether you're status or non-status Indian, First Nations, Métis, or Inuit, and whether you live on or off reserve. In addition to your Gladue rights, you may be able to have your bail or sentencing hearing in the First Nations Court of BC in New Westminster.

## What is Gladue?

In 1999, an Aboriginal woman named Jamie Gladue had her case heard by the Supreme Court of Canada. As a result of this case, the court said that there are too many Aboriginal people being sent to jail. The court also said that Aboriginal people face racism in Canada and in the justice system.

Now the word Gladue refers to the special consideration that judges must give an Aboriginal person when sentencing or setting bail. When your lawyer informs the court of your Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is sentencing you, he or she must consider *all options other than jail*.

**Note:** It's *your right* to have Gladue applied to your case. Your lawyer should do everything possible to make sure your Gladue rights are respected. More information on Gladue is available in the *Gladue Primer*

(see [www.legalaid.bc.ca/publications](http://www.legalaid.bc.ca/publications)), or from the booklet *Are You Aboriginal?*

(see [www.cleonet.ca](http://www.cleonet.ca)). If you don't have a lawyer, the judge must still apply Gladue.

## Will Gladue keep me out of jail?

Gladue does not automatically mean you won't get jail time. However, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place. This is called a **community sentence**. A community sentence might involve participating in drug rehabilitation or counselling. If you do a community sentence, you may get less or no time in jail.

However, the judge may have no choice but to send you to jail. If this is the case, the judge must still apply Gladue when deciding how long your jail sentence will be.

## What is a Gladue report?

In order to apply Gladue, the judge needs to understand your circumstances and to know what kinds of community sentences are available. To help the judge, your lawyer needs to provide the court with a **Gladue report**. A Gladue report gives the judge, the **Crown counsel** (the government lawyer), and your lawyer as much information as possible about you. The other side of this fact sheet has some questions that can help you and your lawyer get started on preparing your Gladue report.

### NOTE

Contact legal aid immediately to find out if you qualify for a free lawyer.

### Legal aid:

604-408-2172 (Greater Vancouver)

1-866-577-2525 (call no charge, elsewhere in BC)

*Continued over*

## Do you know about First Nations Court?

You may be able to have your bail or sentencing hearing at First Nations Court. First Nations Court takes a **restorative** approach to sentencing. This means that the judge, Crown counsel, Aboriginal community members, and your family will work with you and your lawyer to come up with a healing plan. First Nations Court sits once a month and hears criminal and related child protection matters. For more information, contact the First Nations Court expanded **duty counsel** at **1-877-601-6066** (call no charge from anywhere in BC).

Duty counsel are lawyers who give free legal advice. If you don't have a lawyer, the expanded duty counsel can give you legal advice on or *before* the day of court. He or she can also help you prepare your Gladue report.

**Note:** It's *your choice* whether you exercise your Gladue rights or apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).

## Some questions for preparing your Gladue report

**Note:** Some of this information may be private or sensitive for you and you may not like to talk about it. If you don't want this information discussed out loud in court, you can ask your lawyer to give this information in writing to the judge and the government lawyer.

- Where are you from? Do you live in a city or in a rural area? Do you live on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with **substance abuse** (drug or alcohol abuse)? Have you been affected by someone else's substance abuse?
- What level of education do you have? What is your reading level?
- Did you or a family member have any issues that may have affected your opportunities to learn, such as trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?

## Your important details

Name of lawyer: \_\_\_\_\_

Bail hearing: \_\_\_\_\_

Trial hearing: \_\_\_\_\_

Sentencing hearing: \_\_\_\_\_

Special thanks to Community Legal Education Ontario for use of the information in their booklet *Are you Aboriginal?* (2009).



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## Appendix 2:

Case law: *Regina v. Gladue*

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

**Jamie Tanis Gladue**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**The Attorney General of Canada, the Attorney  
General for Alberta and Aboriginal Legal  
Services of Toronto Inc.**

*Interveners*

**Indexed as: R. v. Gladue**

File No.: 26300.

1998: December 10; 1999: April 23.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

*Criminal law -- Sentencing -- Aboriginal offenders -- Accused sentenced to three years' imprisonment after pleading guilty to manslaughter -- No special consideration given by sentencing judge to accused's aboriginal background -- Principles governing application of s. 718.2(e) of Criminal Code -- Class of aboriginal*



*people coming within scope of provision -- Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e).*

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their townhouse, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a large knife and stabbed him in the chest. When returning to her home, she was heard saying "I got you, you fucking bastard". There was also evidence indicating that she had stabbed the victim on the arm before he left the townhouse. At the time of the stabbing, the accused had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

At the sentencing hearing, the judge took into account several mitigating factors. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. Her family was supportive and, while on bail, she had attended alcohol abuse counselling and upgraded her education. The accused was provoked by the victim's insulting behaviour and remarks. At the time of the offence, the accused had a hyperthyroid condition which caused her to overreact to emotional situations. She showed some signs of remorse and entered a plea of guilty.

The sentencing judge also identified several aggravating circumstances. The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape. From the remarks she made before and after the stabbing it was clear that the accused intended to harm the victim. Further, she was not afraid of the victim; she was the aggressor. The judge considered that the principles of denunciation and general deterrence must play a role in the present circumstances even though specific deterrence was not required. He also indicated that the sentence should take into account the need to rehabilitate the accused. The judge decided that a suspended sentence or a conditional sentence of imprisonment was not appropriate in this case. He noted that there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration. Both were living in an urban area off-reserve and not “within the aboriginal community as such”. The sentencing judge concluded that the offence was a very serious one, for which the appropriate sentence was three years’ imprisonment. The majority of the Court of Appeal dismissed the accused’s appeal of her sentence.

*Held:* The appeal should be dismissed.

The considerations which should be taken into account by a judge sentencing an aboriginal offender have been summarized at para. 93 of the reasons for judgment. The following is a reflection of that summary.

Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence. In that Part, s. 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of

aboriginal offenders. The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force. Section 718.2(e) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration.

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(e), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in

turn may come from representations of the relevant aboriginal community. The offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including one in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

In this case, the sentencing judge may have erred in limiting the application of s. 718.2(e) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly distinct conception of sentencing held by the accused, by the victim's family, and by their community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society.

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**Referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. McDonald* (1997), 113 C.C.C. (3d) 418; *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444; *R. v. Wells* (1998), 125 C.C.C. (3d) 129; *R. v. Hunter* (1998), 125 C.C.C. (3d) 121; *R. v. Young* (1998), 131 Man. R. (2d) 61; *R. v. Fireman* (1971), 4 C.C.C. (2d) 82; *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.



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*Criminal Code*, R.S.C., 1985, c. C-46, Part XXIII [repl. 1995, c. 22, s. 6], ss. 718, 718.1, 718.2 [am. 1997, c. 23, s. 17], 742.1 [am. 1997, c. 18, s. 107].

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B.C.J. No. 2333 (QL), affirming a judgment of Hutchinson J. sentencing the accused to three years' imprisonment. Appeal dismissed.

*Gil D. McKinnon, Q.C.*, and *Michael D. Smith*, for the appellant.

*Wendy L. Rubin*, for the respondent.

*Kimberly Prost* and *Nancy L. Irving*, for the intervener the Attorney General of Canada.

*Goran Tomljanovic*, for the intervener the Attorney General for Alberta.

*Kent Roach* and *Kimberly R. Murray*, for the intervener Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

*//Cory and Iacobucci JJ.//*

1 CORY AND IACOBUCCI JJ.-- On September 3, 1996, the new Part XXIII of the *Criminal Code*, R.S.C., 1985, c. C-46, pertaining to sentencing came into force. These provisions codify for the first time the fundamental purpose and principles of sentencing. This appeal is particularly concerned with the new s. 718.2(e). It provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. This appeal must consider how this provision should be interpreted and applied.

I. Factual Background

2           The appellant, one of nine children, was born in McLennan, Alberta in 1976. Her mother, Marie Gladue, who was a Cree, left the family home in 1987 and died in a car accident in 1990. After 1987, the appellant and her siblings were raised by their father, Lloyd Chalifoux, a Metis. The appellant and the victim Reuben Beaver started to live together in 1993, when the appellant was 17 years old. Thereafter they had a daughter, Tanita. In August 1995, they moved to Nanaimo. Together with the appellant's father and two of her siblings, Tara and Bianca Chalifoux, they lived in a townhouse complex. By September 1995, the appellant and Beaver were engaged to be married, and the appellant was five months pregnant with their second child, a boy, whom the appellant subsequently named Reuben Ambrose Beaver in honour of his father.

3           In the early evening of September 16, 1995, the appellant was celebrating her 19th birthday. She and Reuben Beaver, who was then 20, were drinking beer with some friends and family members in the townhouse complex. The appellant suspected that Beaver was having an affair with her older sister, Tara. During the course of the evening she voiced those suspicions to her friends. The appellant was obviously angry with Beaver. She said, "the next time he fools around on me, I'll kill him". The appellant told one of her friends that she wanted to test Beaver, and asked her friend to "hit on Reuben to see if he would go with her", but the friend refused.

4           The appellant's sister Tara left the party, followed by Beaver. After he had left, the appellant told her friend, "He's going to get it. He's really going to get it this time." The appellant, on several occasions, tried to find Beaver and her sister. She

eventually located them coming down the stairs together in her sister's suite. The appellant suspected that they had been engaged in sexual activity and confronted her sister, saying, "You're going to get it. How could you do this to me?"

5           The appellant and Beaver returned separately to their townhouse and they started to quarrel. During the argument, the appellant confronted him with his infidelity and he told her that she was fat and ugly and not as good as the others. A neighbour, Mr. Gretchin, who lived next door was awakened by some banging and shouting and a female voice saying "I'm sick and tired of you fooling around with other women." The disturbance was becoming very loud and he decided to ask his neighbours to calm down. He heard the front door of the appellant's residence slam. As he opened his own front door, he saw the appellant come running out of her suite. He also saw Reuben Beaver banging with both hands at Tara Chalifoux's door down the hall saying, "Let me in. Let me in."

6           Mr. Gretchin saw the appellant run toward Beaver with a large knife in her hand and, as she approached him, she told him that he had better run. Mr. Gretchin heard Beaver shriek in pain and saw him collapse in a pool of blood. The appellant had stabbed Beaver once in the left chest, and the knife had penetrated his heart. As the appellant went by on her return to her apartment, Mr. Gretchin heard her say, "I got you, you fucking bastard." The appellant was described as jumping up and down as if she had tagged someone. Mr. Gretchin said she did not appear to realize what she had done. At the time of the stabbing, the appellant had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.



7                On June 3, 1996, the appellant was charged with second degree murder. On February 11, 1997, following a preliminary hearing and after a jury had been selected, the appellant entered a plea of guilty to manslaughter.

8                There was evidence which indicated that the appellant had stabbed Beaver before he fled from the apartment. A paring knife found on the living room floor of their apartment had a small amount of Beaver's blood on it, and a small stab wound was located on Beaver's right upper arm.

9                There was also evidence that Beaver had subjected the appellant to some physical abuse in June 1994, while the appellant was pregnant with their daughter Tanita. Beaver was convicted of assault, and was given a 15-day intermittent sentence with one year's probation. The neighbour, Mr. Gretchin, told police that the noises emanating from the appellant's and Beaver's apartment suggested a fight, stating: "It sounded like someone got hit and furniture was sliding, like someone pushed around" and "The fight lasted five to ten minutes, it was like a wrestling match." Bruises later observed on the appellant's arm and in the collarbone area were consistent with her having been in a physical altercation on the night of the stabbing. However, the trial judge found that the facts as presented before him did not warrant a finding that the appellant was a "battered or fearful wife".

10              The appellant's sentencing took place 17 months after the stabbing. Pending her trial, she was released on bail and lived with her father. She took counselling for alcohol and drug abuse at Tillicum Haus Native Friendship Centre in Nanaimo, and completed Grade 10 and was about to start Grade 11. After the stabbing, the appellant was diagnosed as suffering from a hyperthyroid condition, which was said to produce an exaggerated reaction to any emotional situation. The appellant underwent radiation

therapy to destroy some of her thyroid glands, and at the time of sentencing she was taking thyroid supplements which regulated her condition. During the time she was on bail, the appellant pled guilty to having breached her bail on one occasion by consuming alcohol.

11               At the sentencing hearing, when asked if she had anything to say, the appellant stated that she was sorry about what happened, that she did not intend to do it, and that she was sorry to Beaver's family.

12               In his submissions on sentence at trial, the appellant's counsel did not raise the fact that the appellant was an aboriginal offender but, when asked by the trial judge whether in fact the appellant was an aboriginal person, replied that she was Cree. When asked by the trial judge whether the town of McLennan, Alberta, where the appellant grew up, was an aboriginal community, defence counsel responded: "it's just a regular community". No other submissions were made at the sentencing hearing on the issue of the appellant's aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment. Crown counsel argued in favour of a sentence of between three and five years' imprisonment.

13               The appellant was sentenced to three years' imprisonment and to a ten-year weapons prohibition. Her appeal of the sentence to the British Columbia Court of Appeal was dismissed.

## II. Relevant Statutory Provisions

14 It may be helpful at this stage to set out ss. 718, 718.1 and 718.2 of the *Criminal Code* as well as s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

### *Criminal Code*

#### *Purpose and Principles of Sentencing*

**718.** [Purpose] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

**718.1** [Fundamental principle] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

**718.2** [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
  - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
  - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

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

### *Interpretation Act*

**12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

### III. Judicial History

#### A. *Supreme Court of British Columbia*

15            In his reasons, the trial judge took into account several mitigating factors. The appellant was only 20 years old at the time of sentence, and apart from an impaired driving conviction, she had no criminal record. She had two children and was expecting a third although he considered her pregnancy a neutral factor. Her family was supportive and she was attending alcohol abuse counselling and upgrading her education. The appellant was provoked by the deceased's insulting behaviour and remarks. At the time of the offence, the appellant had a hyperthyroid condition which caused her to overreact

to emotional situations. The appellant showed some signs of remorse and entered a plea of guilty.

16           On the other hand, the trial judge identified several aggravating circumstances. The appellant stabbed the deceased twice, the second time after he had fled in an attempt to escape. Also, the offence was of particular gravity. From the remarks she made before and after the stabbing it was very clear that the appellant intended to harm the deceased. Further, the appellant was not afraid of the deceased; indeed, she was the aggressor.

17           The trial judge considered that specific deterrence was not required in the circumstances of this case. However, in his opinion the principles of denunciation and general deterrence must play a role. He was of the view that the sentence should also take into account the need to rehabilitate the appellant and give her some insight both into her conduct and the effect of her propensity to drink. The trial judge decided that in this case it was not appropriate to suspend the passing of sentence or to impose a conditional sentence.

18           The trial judge noted that both the appellant and the deceased were aboriginal, but stated that they were living in an urban area off-reserve and not “within the aboriginal community as such”. He found that there were not any special circumstances arising from their aboriginal status that he should take into consideration. He stated that the offence was a very serious one, for which the appropriate sentence was three years’ imprisonment with a ten-year weapons prohibition.



B. *Court of Appeal for British Columbia* (1997), 98 B.C.A.C. 120

19           The appellant appealed her sentence of three years' imprisonment, but not the ten-year weapons prohibition. She appealed on four grounds, only one of which is directly relevant, namely whether the trial judge failed to give appropriate consideration to the appellant's circumstances as an aboriginal offender. The appellant also sought to adduce fresh evidence at her appeal regarding her efforts since the killing to maintain links with her aboriginal heritage. The fresh evidence showed that the appellant had applied to become a full status Cree, and that she had obtained that status for her daughter Tanita. She had also maintained contact with Beaver's mother, who is a status Cree, and who was in turn assisting the appellant with the status applications.

20           The Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(e) did not apply because the appellant was not living on a reserve. However, Esson J.A. (Prowse J.A. concurring) found no error in the trial judge's conclusion that, in this case, there was no basis for giving special consideration to the appellant's aboriginal background. Esson J.A. noted that the appellant's actions involved deliberation, motivation, and "an element of viciousness and persistence in the attack", and that the killing constituted a "near murder" (p. 138). He found that, on the facts presented in this case, it could not be said that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person. Esson J.A. concluded therefore that the trial judge did not err in not giving effect to the principle set out in s. 718.2(e) of the *Criminal Code* and dismissed the appeal. Although it is not entirely clear from the reasons of Esson J.A., he appears also to have dismissed the appellant's application to adduce fresh evidence regarding her efforts to maintain links with her aboriginal heritage.

21           Rowles J.A. (dissenting) reviewed many reports and parliamentary debates and determined that the mischief that s. 718.2(e) was designed to remedy was the excessive use of incarceration generally, and the disproportionately high number of aboriginal people who are imprisoned, in particular. She stated that s. 718.2(e) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.

22           In this case, Rowles J.A. agreed that the crime committed by the appellant was serious. The circumstances surrounding the offence were tragic for everyone, including the appellant's children. Yet, the circumstances of the offence included provocation, superimposed on an undiagnosed medical problem affecting the appellant's emotional stability. The offender was young and emotionally immature. She had an alcohol problem but no history of other criminal conduct or acts of violence. The success the appellant enjoyed while on bail awaiting trial showed that she was likely to be a good candidate for further rehabilitation. Rowles J.A. also referred favourably to the fresh evidence which showed that the appellant was taking steps to maintain links with her aboriginal heritage.

23           Rowles J.A. concluded that a sentence of three years' imprisonment was excessive. The principles of general deterrence and denunciation had to be reflected in the sentence, but the sentence could have been designed to advance the appellant's rehabilitation through a period of supervised probation. Rowles J.A. would have allowed the appeal and reduced the sentence to two years less a day to be followed by a three-year period of probation.

#### IV. Issue

24                   The issue in this appeal is the proper interpretation and application to be given to s. 718.2(e) of the *Criminal Code*. The provision reads as follows:

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

...

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

The question to be resolved is whether the majority of the British Columbia Court of Appeal erred in finding that, in the circumstances of this case, the trial judge correctly applied s. 718.2(e) in imposing a sentence of three years' imprisonment. To answer this question, it will be necessary to determine the legislative purpose of s. 718.2(e), and, in particular, the words "with particular attention to the circumstances of aboriginal offenders". The appeal requires this Court to begin the process of articulating the rules and principles that should govern the practical application of s. 718.2(e) of the *Criminal Code* by a trial judge.

#### V. Analysis

##### A. *Introduction*

25                   As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and

ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 875; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131.

26                   Also of importance in interpreting federal legislation is s. 12 of the federal *Interpretation Act*, which provides:

**12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

27                   Section 718.2(e) has already received judicial consideration in several provincial appellate court decisions: see, e.g., *R. v. McDonald* (1997), 113 C.C.C. (3d) 418 (Sask. C.A.); *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444 (Nfld. C.A.); *R. v. Wells* (1998), 125 C.C.C. (3d) 129 (Alta. C.A.); *R. v. Hunter* (1998), 125 C.C.C. (3d) 121 (Alta. C.A.); *R. v. Young* (1998), 131 Man. R. (2d) 61 (C.A.). This is the first occasion on which this Court has had the opportunity to construe and apply the provision.

28                   With this introduction, we now wish to discuss the wording of s. 718.2(e) and the scheme of Part XXIII of the *Criminal Code*, as well as the legislative history and the context behind s. 718.2(e), with the aim of determining and describing the circumstances of aboriginal offenders. This discussion is followed by a framework for

the sentencing judge to use in sentencing an aboriginal offender. The reasons then deal with the specific facts and sentence in this case.

*B. The Wording of Section 718.2(e) and the Scheme of Part XXIII*

29           The interpretation of s. 718.2(e) must begin by considering its words in context. Although this appeal is ultimately concerned only with the meaning of the phrase “with particular attention to the circumstances of aboriginal offenders”, that phrase takes on meaning from the other words of s. 718.2(e), from the purpose and principles of sentencing set out in ss. 718-718.2, and from the overall scheme of Part XXIII.

30           The respondent observed that some caution is in order in construing s. 718.2(e), insofar as it would be inappropriate to prejudge the many other important issues which may be raised by the reforms but which are not specifically at issue here. However, it would be equally inappropriate to construe s. 718.2(e) in a vacuum, without considering the surrounding text which gives the provision its depth of meaning. To the extent that the broader scheme of Part XXIII informs the proper construction to be given to s. 718.2(e), it will be necessary to draw at least some general conclusions about the new sentencing regime.

31           A core issue in this appeal is whether s. 718.2(e) should be understood as being remedial in nature, or whether s. 718.2(e), along with the other provisions of ss. 718 through 718.2, are simply a codification of existing sentencing principles. The respondent, although acknowledging that s. 718.2(e) was likely designed to encourage sentencing judges to experiment to some degree with alternatives to incarceration and to be sensitive to principles of restorative justice, at the same time favours the view that

ss. 718-718.2 are largely a restatement of existing law. Alternatively, the appellant argues strongly that s. 718.2(e)'s specific reference to aboriginal offenders can have no purpose unless it effects a change in the law. The appellant advances the view that s. 718.2(e) is in fact an "affirmative action" provision justified under s. 15(2) of the *Canadian Charter of Rights and Freedoms*.

32               Section 12 of the *Interpretation Act* deems the purpose of the enactment of the new Part XXIII of the *Criminal Code* to be remedial in nature, and requires that all of the provisions of Part XXIII, including s. 718.2(e), be given a fair, large and liberal construction and interpretation in order to attain that remedial objective. However, the existence of s. 12 does not answer the essential question of what the remedial purpose of s. 718.2(e) is. One view is that the remedial purpose of ss. 718, 718.1 and 718.2 taken together was precisely to codify the purpose and existing principles of sentencing to provide more systematic guidance to sentencing judges in individual cases. Codification, under this view, is remedial in and of itself because it simplifies and adds structure to trial level sentencing decisions: see, e.g., *McDonald, supra*, at pp. 460-64, *per* Sherstobitoff J.A.

33               In our view, s. 718.2(e) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(e) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in



imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(e) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(e), and the legislative history of the provision all support an interpretation of s. 718.2(e) as having this important remedial purpose.

34                In his submissions before this Court, counsel for the appellant expressed the fear that s. 718.2(e) might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(e) creates a judicial duty to give its remedial purpose real force.

35                Let us consider now the wording of s. 718.2(e) and its place within the overall scheme of Part XXIII of the *Criminal Code*.

36                Section 718.2(e) directs a court, in imposing a sentence, to 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”. The broad role of the provision is clear. As a general principle, s. 718.2(e) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

37                The next question is the meaning to be attributed to the words “with particular attention to the circumstances of aboriginal offenders”. The phrase cannot be

an instruction for judges to pay “more” attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider “the circumstances” for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

38           The wording of s. 718.2(e) on its face, then, requires both consideration of alternatives to the use of imprisonment as a penal sanction generally, which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders. The respondent argued before this Court that this statutory wording does not truly effect a change in the law, as some courts have in the past taken the unique circumstances of an aboriginal offender into account in determining sentence. The respondent cited some of the recent jurisprudence dealing with sentencing circles, as well as the decision of the Court of Appeal for Ontario in *R. v. Fireman* (1971), 4 C.C.C. (2d) 82, in support of the view that s. 718.2(e) should be seen simply as a codification of the state of the case law regarding the sentencing of aboriginal offenders before Part XXIII came into force in 1996. In a

similar vein, it was observed by Sherstobitoff J.A. in *McDonald, supra*, at pp. 463-64, that it has always been a principle of sentencing that courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances. Thus the general principle of restraint expressed in s. 718.2(e) with respect to all offenders might equally be seen as a codification of existing law.

39               With respect for the contrary view, we do not interpret s. 718.2(e) as expressing only a restatement of existing law, either with respect to the general principle of restraint in the use of prison or with respect to the specific direction regarding aboriginal offenders. One cannot interpret the words of s. 718.2(e) simply by looking to past cases to see if they contain similar statements of principle. The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(e), must be interpreted in its total context, taking into account its surrounding provisions.

40               It is true that there is ample jurisprudence supporting the principle that prison should be used as a sanction of last resort. It is equally true, though, that the sentencing amendments which came into force in 1996 as the new Part XXIII have changed the range of available penal sanctions in a significant way. The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in s. 718.2(e) must be construed and applied in this light.

41 Further support for the view that s. 718.2(e)'s expression of the principle of restraint in sentencing is remedial, rather than simply a codification, is provided by the articulation of the purpose of sentencing in s. 718.

42 Traditionally, Canadian sentencing jurisprudence has focussed primarily upon achieving the aims of separation, specific and general deterrence, denunciation, and rehabilitation. Sentencing, like the criminal trial process itself, has often been understood as a conflict between the interests of the state (as expressed through the aims of separation, deterrence, and denunciation) and the interests of the individual offender (as expressed through the aim of rehabilitation). Indeed, rehabilitation itself is a relative late-comer to the sentencing analysis, which formerly favoured the interests of the state almost entirely.

43 Section 718 now sets out the purpose of sentencing in the following terms:

**718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (d), (e), and (f) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: D. Kwochka, “Aboriginal Injustice: Making Room for a Restorative Paradigm” (1996), 60 *Sask. L. Rev.* 153, at p. 165. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament’s choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(e) will necessarily be informed by this re-orientation.

44 Just as the context of Part XXIII supports the view that s. 718.2(e) has a remedial purpose for all offenders, the scheme of Part XXIII also supports the view that s. 718.2(e) has a particular remedial role for aboriginal peoples. The respondent is correct to point out that there is jurisprudence which pre-dates the enactment of s. 718.2(e) in which aboriginal offenders have been sentenced differently in light of their unique circumstances. However, the existence of such jurisprudence is not, on its own, especially probative of the issue of whether s. 718.2(e) has a remedial role. There is also sentencing jurisprudence which holds, for example, that a court must consider the unique circumstances of offenders who are battered spouses, or who are mentally disabled. Although the validity of the principles expressed in this latter jurisprudence is

unchallenged by the 1996 sentencing reforms, one does not find reference to these principles in Part XXIII. If Part XXIII were indeed a codification of principles regarding the appropriate method of sentencing different categories of offenders, one would expect to find such references. The wording of s. 718.2(e), viewed in light of the absence of similar stipulations in the remainder of Part XXIII, reveals that Parliament has chosen to single out aboriginal offenders for particular attention.

### *C. Legislative History*

45                Support for the foregoing understanding of s. 718.2(e) as having the remedial purpose of restricting the use of prison for all offenders, and as having a particular remedial role with respect to aboriginal peoples, is provided by statements made by the Minister of Justice and others at the time that what was then Bill C-41 was before Parliament. Although these statements are clearly not decisive as to the meaning and purpose of s. 718.2(e), they are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of Part XXIII as a whole: *Rizzo & Rizzo Shoes, supra*, at paras. 31 and 35.

46                For instance, in introducing second reading of Bill C-41 on September 20, 1994 (*House of Commons Debates*, vol. IV, 1st Sess., 35th Parl., at pp. 5871 and 5873), Minister of Justice Allan Rock made the following statements regarding the remedial purpose of the bill:

Through this bill, Parliament provides the courts with clear guidelines  
....

...



The bill also defines various sentencing principles, for instance that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. When appropriate, alternatives must be contemplated, especially in the case of Native offenders.

...

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

...

Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. . . . [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.

It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely. [Emphasis added.]

The Minister's statements were echoed by other Members of Parliament and by Senators during the debate over the bill: see, e.g., *House of Commons Debates*, vol. V, 1st Sess., 35th Parl., September 22, 1994, at p. 6028 (Mr. Morris Bodnar); *Debates of the Senate*, vol. 135, No. 99, 1st Sess., 35th Parl., June 21, 1995, at p. 1871 (Hon. Duncan J. Jessiman).

47

In his subsequent testimony before the House of Commons Standing Committee on Justice and Legal Affairs (*Minutes of Proceedings and Evidence*, Issue No. 62, November 17, 1994, at p. 62:15), the Minister of Justice addressed the specific role the government hoped would be played by s. 718.2(e):

[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of

Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.

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

48           It can be seen, therefore, that the government position when Bill C-41 was under consideration was that the new Part XXIII was to be remedial in nature. The proposed enactment was directed, in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.

*D. The Context of the Enactment of Section 718.2(e)*

49           Further guidance as to the scope and content of Parliament's remedial purpose in enacting s. 718.2(e) may be derived from the social context surrounding the enactment of the provision. On this point, it is worth noting that, although there is quite a wide divergence between the positions of the appellant and the respondent as to how s. 718.2(e) should be applied in practice, there is general agreement between them, and indeed between the parties and all interveners, regarding the mischief in response to which s. 718.2(e) was enacted.

50           The parties and interveners agree that the purpose of s. 718.2(e) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of s. 718.2(e), and of various other provisions in Part XXIII,

is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations. As the respondent states in its factum before this Court, s. 718.2(e) “provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing”.

51           The fact that the parties and interveners are in general agreement among themselves regarding the purpose of s. 718.2(e) is not determinative of the issue as a matter of statutory construction. However, as we have suggested, on the above points of agreement the parties and interveners are correct. A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada’s aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.

(1) The Problem of Overincarceration in Canada

52           Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada’s rate of approximately 130 inmates per 100,000 population places it second or third highest: see Federal/Provincial/Territorial Ministers Responsible for Justice, *Corrections Population Growth: First Report on Progress* (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1998* (March 1999); The

Sentencing Project, *Americans Behind Bars: U.S. and International Use of Incarceration, 1995* (June 1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, "Prison population and costs" in *Infomat: A Weekly Review* (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instil a sense of pride.

53           The systematic use of the sanction of imprisonment in Canada may be dated to the building of the Kingston Penitentiary in 1835. The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail. Sentencing reformers advocated the use of penitentiary imprisonment as having effects which were not only deterrent, denunciatory, and preventive, but also rehabilitative, with long hours spent in contemplation and hard work contributing to the betterment of the offender: see Law Reform Commission of Canada, Working Paper 11, *Imprisonment and Release* (1975), at p. 5.

54           Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in *McDonald, supra*, at pp. 429-30:

A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . . .

. . . An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be

reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation. Imprisonment has failed to satisfy a basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled: "Toward Unity: Criminal Justice and Corrections" (1969) as "to protect society from crime in a manner commanding public support while avoiding needless injury to the offender". [Emphasis added; footnote omitted.]

55 In a similar vein, in 1987, the Canadian Sentencing Commission wrote in its report entitled *Sentencing Reform: A Canadian Approach*, at pp. xxiii-xxiv:

Canada does not imprison as high a portion of its population as does the United States. However, we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction. [Emphasis added.]

56 With equal force, in *Taking Responsibility* (1988), at p. 75, the Standing Committee on Justice and Solicitor General stated:

It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.

Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.

The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments. [Emphasis added; footnotes omitted.]

The Committee proposed that alternative forms of sentencing should be considered for those offenders who did not endanger the safety of others. It was put in this way, at pp. 50 and 54:

[O]ne of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.

...

[E]xcept where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint.

57           Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.



(2) The Overrepresentation of Aboriginal Canadians in Penal Institutions

58

If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent: see M. Jackson, "Locking Up Natives in Canada" (1988-89), 23 *U.B.C. L. Rev.* 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates: Solicitor General of Canada, Consolidated Report, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later* (1998), at pp. 142-55. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia: Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 1995-96* (1997), at p. 30.

59

This serious problem of aboriginal overrepresentation in Canadian prisons is well documented. Like the general problem of overincarceration itself, the excessive incarceration of aboriginal peoples has received the attention of a large number of commissions and inquiries: see, by way of example only, Canadian Corrections

Association, *Indians and the Law* (1967); Law Reform Commission of Canada, *The Native Offender and the Law* (1974), prepared by D. A. Schmeiser; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996).

60                    In “Locking Up Natives in Canada”, *supra*, at pp. 215-16, Jackson provided a disturbing account of the enormity of the disproportion:

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada’s correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system’s heaviest sanctions. Government figures -- which reflect different definitions of “native” and which probably underestimate the number of prisoners who consider themselves native -- show that almost 10% of the federal penitentiary population is native (including 13% of the federal women’s prisoner population) compared to about 2% of the population nationally. . . . Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities.

Bad as this situation is within the federal system, it is even worse in a number of the western provincial correctional systems. . . . A study reviewing admissions to Saskatchewan’s correctional system in 1976-77 appropriately titled “Locking Up Indians in Saskatchewan”, contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Métis were 8 times more likely to be admitted. If only the population over fifteen years of age is considered (the population eligible to be admitted to provincial correctional centres in Saskatchewan), then male treaty Indians were 37 times more likely to be admitted, while male non-status Indians were 12 times more likely to be admitted. For women the figures are even more extreme: a treaty Indian woman was 131 times more likely to be admitted and a non-status or Métis woman 28 times more likely than a non-native.

The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the highest risk of imprisonment). The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents. [Emphasis added; footnotes omitted.]

61 Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system”.

62 Statements regarding the extent and severity of this problem are disturbingly common. In *Bridging the Cultural Divide*, *supra*, at p. 309, the Royal Commission on Aboriginal Peoples listed as its first “Major Findings and Conclusions” the following striking yet representative statement:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada -- First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural -- in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

63 To the same effect, the Aboriginal Justice Inquiry of Manitoba described the justice system in Manitoba as having failed aboriginal people on a “massive scale”,

referring particularly to the substantially different cultural values and experiences of aboriginal people: *The Justice System and Aboriginal People*, *supra*, at pp. 1 and 86.

64                These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

65                It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed

which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

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

(1) What Are the “Circumstances of Aboriginal Offenders”?

66           How are sentencing judges to play their remedial role? The words of s. 718.2(e) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

(a) *Systemic and Background Factors*

67           The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education,

substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, “Some Issues in Sentencing of Aboriginal Offenders”, in *Continuing Poundmaker and Riel’s Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that “[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail.”

68               It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

69               In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique



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

(b) *Appropriate Sentencing Procedures and Sanctions*

70               Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in paras. (d), (e), and (f) of s. 718 of the *Criminal Code* apply to all offenders, and not only aboriginal offenders. However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e).

71               The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is

understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. See generally, e.g., *Bridging the Cultural Divide*, *supra*, at pp. 12-25; *The Justice System and Aboriginal People*, *supra*, at pp. 17-46; Kwochka, *supra*; M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", [1992] *U.B.C. L. Rev. (Special Edition)* 147.

72           The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence. See Kwochka, *supra*, who writes at p. 165:

At this point there is some divergence among proponents of restorative justice. Some seek to abandon the punishment paradigm by focusing on the differing goals of a restorative system. Others, while cognizant of the differing goals, argue for a restorative system in terms of a punishment model. They argue that non-custodial sentences can have an equivalent punishment value when produced and administered by a restorative system and that the healing process can be more intense than incarceration. Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.

73           In describing in general terms some of the basic tenets of traditional aboriginal sentencing approaches, we do not wish to imply that all aboriginal offenders, victims, and communities share an identical understanding of appropriate sentences for particular offences and offenders. Aboriginal communities stretch from coast to coast and from the border with the United States to the far north. Their customs and traditions and their concept of sentencing vary widely. What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.

74           It is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects, which are available especially to aboriginal offenders. What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

(2) The Search for a Fit Sentence

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

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

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

77           The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender’s community will frequently

understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.

78                In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

79                Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

80                As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this

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

81           The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and

purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

(3) The Duty of the Sentencing Judge

82           The foregoing discussion of guidelines for the sentencing judge has spoken of that which a judge must do when sentencing an aboriginal offender. This element of duty is a critical component of s. 718.2(e). The provision expressly provides that a court that imposes a sentence should consider all available sanctions other than imprisonment that are reasonable in the circumstances, and should pay particular attention to the circumstances of aboriginal offenders. There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.

83           How then is the consideration of s. 718.2(e) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.



84                However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

85                Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.

(4) The Issue of “Reverse Discrimination”

86                Something must also be said as to the manner in which s. 718.2(e) should not be interpreted. The appellant and the respondent diverged significantly in their interpretation of the appropriate role to be played by s. 718.2(e). While the respondent saw the provision largely as a restatement of existing sentencing principles, the appellant

advanced the position that s. 718.2(e) functions as an affirmative action provision justified under s. 15(2) of the *Charter*. The respondent cautioned that, in his view, the appellant's understanding of the provision would result in "reverse discrimination" so as to favour aboriginal offenders over other offenders.

87               There is no constitutional challenge to s. 718.2(e) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the *Charter*. We would note, though, that the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.

88               But s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(e) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. It cannot be forgotten that s. 718.2(e) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be

given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

(5) Who Comes Within the Purview of Section 718.2(e)?

89           The question of whether s. 718.2(e) applies to all aboriginal persons, or only to certain classes thereof, is raised by this appeal. The following passage of the reasons of the judge at trial appears to reflect some ambiguity as to the applicability of the provision to aboriginal people who do not live in rural areas or on a reserve:

The factor that is mentioned in the *Criminal Code* is that particular attention to the circumstances of aboriginal offenders should be considered. In this case both the deceased and the accused were aboriginals, but they are not living within the aboriginal community as such. They are living off a reserve and the offence occurred in an urban setting. They [*sic*] do not appear to have been any special circumstances because of their aboriginal status and so I am not giving any special consideration to their background in passing this sentence.

It could be understood from that passage that, in this case, there were no special circumstances to warrant the application of s. 718.2(e), and the fact that the context of the offence was not in a rural setting or on a reserve was only one of those missing circumstances. However, this passage was interpreted by the majority of the Court of Appeal as implying that, “as a matter of principle, s. 718.2(e) can have no application to aboriginals ‘not living within the aboriginal community’” (p. 137). This understanding of the provision was unanimously rejected by the members of the Court

of Appeal. With respect to the trial judge, who was given little assistance from counsel on this issue, we agree with the Court of Appeal that such a restrictive interpretation of the provision would be inappropriate.

90           The class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(e) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. The numbers involved are significant. National census figures from 1996 show that an estimated 799,010 people were identified as aboriginal in 1996. Of this number, 529,040 were Indians (registered or non-registered), 204,115 Metis and 40,220 Inuit.

91           Section 718.2(e) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture. See the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (1996), at p. 521:

Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

92           Section 718.2(e) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term “community” must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

## VI. Summary

93           Let us see if a general summary can be made of what has been discussed in these reasons.

1. Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.
2. Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

3. Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.
4. Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.
5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.
6. Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

- (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
  - (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.
7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.
8. If there is no alternative to incarceration the length of the term must be carefully considered.
9. Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.



10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.
11. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.
12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.
13. It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

VII. Was There an Error Made in This Case?

94           From the foregoing analysis it can be seen that the sentencing judge, who did not have the benefit of these reasons, fell into error. He may have erred in limiting the application of s. 718.2(e) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, and perhaps as a consequence of the first error, he does not appear to have considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct, or the possibly distinct conception of sentencing held by the appellant, by the victim Beaver's family, and by their community. However, it should be emphasized that the sentencing judge did take active steps to obtain at least some information regarding the appellant's aboriginal heritage. In this regard he received little if any assistance from counsel on this issue although they too were acting without the benefit of these reasons.

95           The majority of the Court of Appeal, in dismissing the appellant's appeal, also does not appear to have considered many of the factors referred to above. However, the dissenting reasons of Rowles J.A. discuss the relevant factors in some detail. The majority also appears to have dismissed the appellant's application to adduce fresh evidence. The majority of the Court of Appeal may or may not have erred in ultimately deciding to dismiss the fresh evidence application. The correctness of its ultimate decision depends largely upon the admissibility of the fresh evidence and its relevance to the weighing of the various sentencing goals. However, assuming admissibility and relevance, it was certainly incumbent upon the majority to consider the evidence, and especially so given the failure of the trial judge to do so. Moreover, if the fresh evidence before the Court of Appeal was itself insufficient to inform the court adequately regarding the circumstances of the appellant as an aboriginal offender, the proper remedy

would have been to remit the matter to the trial judge with instructions to make all the reasonable inquiries necessary for the sentencing of this aboriginal offender.

96           In most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing. It is difficult for this Court to determine a fit sentence for the appellant according to the suggested guidelines set out herein on the basis of the very limited evidence before us regarding the appellant's aboriginal background. However, as both the trial judge and all members of the Court of Appeal acknowledged, the offence in question is a most serious one, properly described by Esson J.A. as a "near murder". Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account in the sentencing of the aboriginal appellant as it would be for any offender. For that offence by this offender a sentence of three years' imprisonment was not unreasonable.

97           More importantly, the appellant was granted day parole on August 13, 1997, after she had served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the appellant was granted full parole with the same conditions as the ones applicable to her original release on day parole.

98           In this case, the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society. In these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant's circumstances as an aboriginal offender.

99 In the result, the appeal is dismissed.

*Appeal dismissed.*

*Solicitor for the appellant: Gil D. McKinnon, Vancouver.*

*Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.*

*Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.*

*Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Calgary.*

*Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Kent Roach and Kimberly R. Murray, Toronto.*

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# Appendix 3 —

Resources for preparing Gladue reports

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# Appendix 3A:

Gladue report writer's style guide

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# Gladue report writer's style guide

As you're preparing your client's Gladue report, keep in mind the following style tips. This will help to ensure the Gladue report is clearly written and easy to read. If you have grammar questions that aren't addressed below, you may find Capital Community College Foundation's online Guide to Grammar and Writing helpful: [grammar.ccc.commnet.edu/grammar](http://grammar.ccc.commnet.edu/grammar).

## Using the active voice

When you use the active voice in a sentence, the subject performs the action (verb). When you use the passive voice, the subject receives the action of the verb. Use the active voice — it's more direct, concise, and meaningful.

**Passive voice:** The sound of the schoolyard swing will always be remembered by him.

**Active voice:** He will always remember the sound of the schoolyard swing.

**Passive voice:** The younger siblings were watched over by older siblings when the adults were working.

**Active voice:** When the adults were working, the older siblings watched over the younger siblings.

## Using apostrophes

Use an apostrophe for contractions, which eliminate a letter or letters from a word. Apostrophes are also used to show possession, when an "s" is added to a noun.

**Contractions:** do not — don't; will not — won't; cannot — can't

**Possessive:** George's car; a day's work; the boat's schedule

"Its" and "it's" are often confused. "It's" is a contraction for "it is." "Its" is the possessive for "it."

**Example:** It's hot outside.

**Example:** The book is missing its cover.

## Using hyphens in numbers

Use a hyphen in a number when the number is used as an adjective (modifies a noun) that appears *before* the noun in the sentence.

**Before the noun:** The twenty-year-old car sped through the intersection.  
(Or, The 20-year-old car sped through the intersection.)

**After the noun:** Mary was twenty years old when she moved to Vancouver.

## Capitalization

Capitalize proper nouns (names of people or places); always capitalize "Aboriginal." Titles (job titles or positions) don't need to be capitalized.

**Proper nouns:** The client, Jane Doe, self-identifies as Aboriginal.  
Jane Doe lives in Vancouver, British Columbia.

**Titles:** The client's probation officer provided a pre-sentencing report.  
The client's band leader provided a letter of reference.

## Using quotation marks

Use quotation marks when you're providing a direct quote of something someone has said. Use a comma before the opening quotation mark. Use a period before the closing quotation mark.

**Example:** Jane Doe said, "I didn't see a car in the driveway."

## Formality

Use a more formal style when writing a Gladue report. Refer to yourself as "the writer," instead of "I." Avoid informal terms such as "mom" or "dad"; instead use "mother" or "father."

**Example:** The writer interviewed Jane Doe's mother, Karen.

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# Appendix 3B:

Gladue report writer's checklist

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# Gladue report writer's checklist

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This checklist is for advocates (or lawyers) who are helping their Aboriginal client prepare a Gladue report. In addition to the information described in the workbook on page 30, the following checklist provides a comprehensive outline of all the information necessary for a Gladue report. As you're writing the Gladue report, you may find it helpful to refer to the Gladue report writer's style guide in Appendix 3A, the sample in Appendix 3C, and the blank template in Appendix 3D.

## Preparing a Gladue report

Preparing a Gladue report can be a significant time investment, and may take anywhere from eight to 20 hours. You will need to sit down with your client for several interviews to get all the information necessary for a Gladue report.

You will need to set up an initial interview with your client to go through the information necessary for a Gladue report. The initial interview can take up to three hours, and you may need to set up a second interview to complete the process. Once the initial interview is completed, you will need to get in touch with the community contacts your client provides. This can also take a significant amount of time. After talking with these contacts and compiling any letters of support and certificates, set up a final interview with your client to review the information.

You should have your client's Gladue report finalized one week before the court date. This means you should start preparing your client's Gladue report at least four weeks before the court hearing. Once the report is ready, give it to your client's lawyer.

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**Your client may become upset or traumatized by the information that comes up in the course of preparing a Gladue report. If your client becomes distressed, please stop the interview immediately. It's a good idea to have the contact information for a counsellor available to pass on to your client.**

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# Checklist

## Before you begin

- Does your client self-identify as Aboriginal? Aboriginal includes status or non-status Indians, First Nations, Métis, and Inuit.
- Is your client interested in having his or her bail or sentencing hearings in the First Nations Court in New Westminster? First Nations Court sits once a month and hears criminal and related child protection matters. Your client will need to apply to have his or her matter heard in First Nations Court, and will need to travel to New Westminster or get special permission to participate via telephone or videoconferencing.  
For more information, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).
- Does your client agree to have his or her Gladue report used in court? A Gladue report will include detailed information about your client's history and family life, and preparing a Gladue report can bring up painful and traumatic information. Discuss with your client whether he or she is ready to talk about his or her background. If your client is willing to go through the process of preparing a Gladue report, it's a good idea to make sure your client has support available and people he or she can talk to after your interview (family, friends, and counsellors).

## Court and case information

- Where is the court located?
- Who is the presiding judge or justice? (The term judge is used for a Provincial Court case and the term justice is used in a Supreme Court case.)
- Who is the Crown counsel?
- Who is the defence counsel (your client's lawyer)?

## Contact information

- What is your client's full name? Does he or she have any aliases (nicknames)?
- Does your client have an Aboriginal name?
- What is your client's date of birth? Where was your client born ("place of birth")?
- What is your client's home address? Does he or she have a mailing address?
- What is/are your client's phone number(s)?

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**It's a good idea to make sure you have more than one phone number for your client. In addition to his or her home phone, be sure to get any cell phone, work phone, school phone, and emergency (message) numbers where he or she can be reached if you can't reach him or her at the primary phone number.**

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## Offence information

- What files are currently before the court? List the file numbers and the information in the charge.
- What was your client's date of arrest? When is the hearing for the Gladue report (i.e., when is the bail or sentencing hearing)?
- Who are your client's contact people? These might be friends, relatives, support workers, or hereditary or band chiefs. Be sure to get as many contacts as possible from your client, along with their phone numbers and cell phone numbers. If these people provide you with reference letters in support of your client, you can attach them to the Gladue report.

## Documents for review

- Does your client have the particulars (disclosure) from the Crown? If not, you will need to contact your client's lawyer.
- If you're preparing a Gladue report for a sentencing hearing, ask your client if he or she has the pre-sentencing report from the probation officer.
- Does your client have any letters of support or certificates? For example, if his or her community members have written reference letters, or if he or she has a certificate of completion from a course, counselling program, or addictions treatment program, you can attach them to the Gladue report.

## Your client's circumstances

- What kind of relationship does your client have with his or her family? Consider describing your client's family relationships in a separate paragraph (or more) for each significant family member.
- Is there a history of child protection issues in your client's family? For example, has your client ever been in foster care? Have members of his or her family been in foster care (his or her siblings or children)?
- Was your client raised by a single parent? Is he or she a single parent?
- What is your client's marital status? What was/is the length of your client's marriage or relationship?
- Does your client have any children? How old are they? Do the children live with your client? Have the children ever lived with your client? If not, why not?
- Who are your client's **associates** (friends)?
- What are your client's past and present living arrangements? For example, how many siblings and relatives lived in the same house while he or she was growing up? How many siblings and relatives does he or she share a home with now?

- What is your client's education? What is your client's reading ability? Does your client face any challenges that would prevent him or her from learning, such as trauma, learning disabilities, or Fetal Alcohol Spectrum Disorder (FASD)?
- What is your client's past and present employment record?
- Does your client have any special training, skills, or talent?
- Is your client a member of any clubs — social, professional, or religious?
- What are your client's interests, goals, and aspirations — educational, professional, or otherwise?
- What is your client's financial situation? Has your client been impacted by poverty? Does he or she have a history with social assistance, employment insurance, food banks, or shelters?
- Does your client have any mental health issues? What is his or her mental, emotional, and behavioural status?
- Is your client in good health? Does he or she have any health or physical problems?
- Has your client ever struggled with addictions or substance abuse (now or in the past)? Did your client grow up in a home where there was a history of addictions or substance abuse?
- Did your client grow up in a home where there was domestic violence or abuse?
- What is the Court History Assessment for your client? (The Court History Assessment is a listing of your client's past criminal record, which is included in the disclosure package from the Crown counsel.) You should review all of the offences listed with your client. Take note of any patterns. For example, you may notice that every December your client is in trouble. This could reflect a trauma, such as the death of a parent. It's also good to note any long periods of time during which your client wasn't charged with any offences. Discuss with your client the positive things that were happening in his or her life at that time.
- What is your client's attitude with regard to the offence?
- If you're preparing a Gladue report for a sentencing hearing, is your client receptive to any proposed conditions, such as a curfew or working with an elder?



## Gladue considerations

- What is your client's Aboriginal affiliation? Is he or she a status or non-status Indian, First Nations, Métis, or Inuit? Does he or she have a band affiliation?
- Where is your client from? Which community or band is he or she from? Does he or she live in an urban or rural area? Does he or she live on reserve or off reserve?
- List the ways in which your client has been negatively impacted by colonization. For example, has your client been affected by racism? Did he or she attend an Indian residential school? This list should be detailed, personal, and specific to your client.
- Has your client been affected by suicides or other deaths of his or her family or friends?
- Does your client have any suicidal tendencies?

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**If your client has suicidal tendencies, please stop the interview and refer your client to a trained professional immediately.**

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- Do you notice a pattern in your client's life that is connected to the anniversary of the death of a loved one (or another trauma)?
- If applicable, note how your client compares to Jamie Gladue (see page 2 for more information).

## Your client's Aboriginal community

For this section, you will need to interview your client, your client's relatives, and a representative from your client's Aboriginal community (such as a band social worker or hereditary chief). These interviews will allow you to confirm the facts of your client's situation.

- What is the general history and overview of your client's Aboriginal community?
- Was there an Indian residential school in or nearby the community?
- Ask your client to describe his or her community. Are there issues of substandard housing, lack of clean water, chronic unemployment, or seasonal employment? Is the community "dry," or are there issues of substance abuse within the community? What is the availability of treatment or rehabilitative services for substance abuse?
- How has colonization impacted the community as a whole? For example, are there issues with community health, unemployment, poor economic conditions, addictions, child welfare, etc.?
- How many people in the community speak the Aboriginal language?

- What are the positive, healing aspects of the community? What resources are available within the community that could help your client? What are the community's strengths? List any community programs, initiatives, successes, and role models.
- Is there anything your client can do to help his or her community? Are there volunteer opportunities?
- Who are the community elders?
- Are there community activities or cultural traditions that your client can participate in or volunteer for? Examples include potlatches, sweat lodges, winter dances, sundances, feasts, berry picking, gathering firewood, hunting, fishing, big house ceremonies, longhouse ceremonies, etc.

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**It's also a good idea to ask the community representative about cultural traditions your client can take part in. These activities are important to the recommendations you and your client's lawyer can make regarding your client's release or community sentencing.**

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- Is there someone in your client's community whom you can contact if your client needs assistance? (For example, the chief and council, elders, family members, friends, etc.)
- Has your client ever been involved with an Aboriginal restorative justice program, or with community elders or teachings? If so, give examples.

## **Your client's connection to his or her Aboriginal community**

- Was your client raised in or does he or she have an awareness of his or her Aboriginal culture/community?
- Is your client connected to his or her Aboriginal community?
  - If yes, please explain.
  - If no, please explain why not. For example, was your client part of a "scoop" or otherwise placed in foster care? Does he or she have problems with his or her family or community?
  - If your client lives in an urban area, has he or she made connections in the city with other Aboriginal people?
  - If your client has an Aboriginal spouse or partner, has your client connected with his or her spouse's or partner's Aboriginal community?
- Does your client speak his or her Aboriginal language? If not, why not?
- Has your client been affected by dislocation from his or her community, community fragmentation, or loneliness?
- Did your client attend an Indian residential school? Did any of your client's family members attend an Indian residential school?
- Has your client spoken with an Indian residential school counsellor or therapist?

- Has your client filed a claim with the *Indian Residential School Settlement*?
- Has the Indian residential school system — including settlement payments — impacted your client's family or community?
- Has your client participated in Aboriginal community traditions, celebrations, or gatherings as a child or as an adult? Examples include sweat lodges, sundances, winter dances, potlatches, funeral feasts, berry picking, gathering firewood, fishing, hunting, long house ceremonies, family gatherings, etc.

## Summary and proposed recommendations

Once you've spoken with your client and his or her family, friends, support workers, and Aboriginal community, you should have a clear idea of what's realistic and appropriate for your client for his or her bail or sentencing plan. Keep in mind that your bail or sentencing plan will need to address your client's specific situation and should not put at risk any vulnerable members of his or her community, including elders. For example, if your client is charged with assault, his or her sentencing plan should include a condition not to contact the victim. If your client is charged with theft, his or her sentencing plan should include staying away from the business or area where the theft took place.

The more detailed the bail or sentencing plan is, the better chance your client will have of staying in the community. Be as specific as you can. If you're making recommendations for bail, your plan should ensure that your client attends his or her court dates, that he or she is safe to be in the community, and should prevent your client from re-offending if he or she is released from jail. Standard sentencing recommendations include: keeping the peace, being of good behaviour, reporting regularly to a probation officer, attending personal counselling, attending alcohol or drug counselling, or attending anger management counselling. If appropriate, additional recommendations might include: not possessing firearms or weapons, obeying a curfew (as long as it doesn't interfere with employment), volunteering, and abstaining from drugs and alcohol.

As this is a Gladue report, it's important to emphasize culturally appropriate interventions, such as Aboriginal residential treatment facilities; Aboriginal restorative justice programs; or volunteering for elders, chief and council, other community members, or a friendship centre. Cultural recommendations (such as attending a sweat lodge once a week, or helping to prepare for a feast) should be specific to your client's Aboriginal community and traditions. Discuss with your client his or her availability to take part in the suggested conditions.

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**If your client lives in an urban area that's far from his or her Aboriginal community, look into local Aboriginal resources that might be helpful and meaningful to your client.**

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Once you've made your recommendations, review them with your client to ensure he or she agrees with everything that you've proposed, and that the plan is achievable and realistic. Discuss with your client any potential barriers to following the plan. Once you've written the Gladue report, review the report with your client to make sure it's accurate, and to make sure that your client understands that everything in the report will be shared with the court and that it may be read aloud in court. After reviewing the report with your client, review the report with your client's lawyer.

If your client is willing to share his or her Gladue report with the Legal Services Society for educational or training purposes, have him or her sign the Authorization for Release of Gladue Report Information in Appendix 3E.

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**The release of this information is optional. All of your client's and your client's contacts' identifying information will be removed and kept strictly confidential.**

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## Appendix 3C:

Gladue report for bail or sentencing  
hearing (sample)

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## Gladue report for [bail] [sentencing] hearing

The information contained in this Gladue report is privileged and confidential, and is intended for the use of the individual(s) named below and for the court hearing. Copying, distributing, or disseminating this report to third parties is prohibited.

### Court and case information

Court: \_\_\_\_\_

Court file number: \_\_\_\_\_

Judge/Justice: \_\_\_\_\_

Presiding justice: \_\_\_\_\_

Crown counsel: \_\_\_\_\_

Phone: \_\_\_\_\_

Defence counsel: \_\_\_\_\_

Phone: \_\_\_\_\_

### Contact information

Name: \_\_\_\_\_

Date of birth: [day/month/year] \_\_\_\_\_

Place of birth: \_\_\_\_\_

Current address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone 1: \_\_\_\_\_

Phone 2: \_\_\_\_\_

### Offence data

[This information will be in the particulars for the offender. Crown counsel will provide the particulars or disclosure to defence counsel, including the Information, Initial Sentencing Position, and Report to Crown Counsel. If you have any questions, speak to the defence counsel about them.]

File number: \_\_\_\_\_

Count: \_\_\_\_\_

File number: \_\_\_\_\_

Count: \_\_\_\_\_

File number: \_\_\_\_\_

Count: \_\_\_\_\_

Name: \_\_\_\_\_

Report writer: \_\_\_\_\_

## Information sources

[Try to contact a minimum of six people and/or organizations]

### People contacted for the preparation of this report

1. \_\_\_\_\_ (Offender, in person)
2. \_\_\_\_\_ (in person, or by telephone)
3. \_\_\_\_\_ (in person, or by telephone)
4. \_\_\_\_\_ (in person, or by telephone)
5. \_\_\_\_\_ (in person, or by telephone)
6. \_\_\_\_\_ (in person, or by telephone)

### Documents reviewed for the preparation of this report

1. Particulars from Crown on files
2. Pre-sentence report from probation office
3. Technical suitability report from probation office
4. Relevant case law [e.g., *R. v. Silversmith* for a bail hearing, *R. v. Kakekagamick* for a sentencing hearing.]
5. Other (any print or online materials regarding: client's First Nation, healing programs, Aboriginal restorative justice programs, medical reports or letters, psychiatric reports, etc.)

## Current circumstances

### Family relationships

[Include as many family members as possible — parents, grandparents, siblings, etc. Include anyone who has a significant relationship with your client, even if they aren't a member of his or her immediate family. For example, you can include an aunt who adopted him or her, or an uncle or cousin who provides guidance. Use a sub-heading for each person (e.g., "John Doe's mother, Ms. Rebecca Doe"). Under each heading, provide a description of that person's circumstances and his or her connection to your client.]



**Current circumstances (continued)**

**Living arrangements**

**Associates**

**Education**

**Employment**

**Career goals**

**Finances**

Name: \_\_\_\_\_

Report writer: \_\_\_\_\_

## Current circumstances (continued)

**Mental health, physical health, behavioural and emotional status**

**Addictions, substance abuse**

**Court history assessment**

[Take note of how your client responded to any past sentences. Review your client's criminal history with him or her.]

**Attitude towards previous and proposed interventions**

[**Note:** This only applies to a Gladue report for sentencing. If you're preparing a Gladue report for a bail hearing, don't make any admissions of guilt or any statements regarding the offence on behalf of your client.]

**Attitude towards and understanding of offence**

## Gladue considerations

[In the two sections that follow, state your client's Aboriginal affiliation — status or non-status Indian, Métis, or Inuit; include his or her band affiliation if applicable. Also list the ways in which your client has been negatively impacted by colonization. Some of these facts may have already been addressed above, but they can be restated here (e.g., "As indicated earlier, John Doe was raised in foster care").]

### Client's Aboriginal community

[Provide a general history and overview of your client's Aboriginal community (e.g., reserve population, was there an Indian residential school in the community, etc.). Include ways in which the community has been impacted by colonization. You can also include any positive community programs and initiatives.]

Keep in mind that you're providing this information to a judge or justice who may not be familiar with the Aboriginal community — give as complete a picture as possible.]

### Client's connection to his or her Aboriginal community

[Include any cultural ties that your client has. For example, does your client participate in community or traditional activities or ceremonies? These can include hunting, fishing, berry picking, gathering firewood, family gatherings, or ceremonies such as a longhouse ceremony.]

If your client is disconnected from his or her Aboriginal community, describe the cause of the disconnect (e.g., being placed in foster care, attending an Indian residential school, or experiencing the inter-generational impacts that resulted from a family member attending an Indian residential school, etc.)]

## Summary and proposed recommendations

[Some things to keep in mind when making your recommendations:

- Be as specific as possible regarding a plan for your client to be in the community.
- Common recommendations include keeping the peace, being of good behaviour, curfews, etc.
- Emphasize any culturally appropriate interventions, such as Aboriginal residential treatment facilities or Aboriginal restorative justice programs. Include whether there's a waiting list for the programs you describe. You can also include volunteer work for the chief and council, friendship centre, band social workers, etc. For example, your client can volunteer to provide fish or game for an elder or a single mother in the community.
- Also include any non-Aboriginal programs, such as counselling or addictions treatment, that might be helpful to your client.
- Describe any barriers that your client might encounter in following the plan, and outline how those barriers have been addressed.
- List anyone who can act as a surety — this can be your client's Aboriginal community — or otherwise be responsible for your client's compliance with the plan.

You need to assure the court that your client will comply with the conditions set out in the plan.]

Respectfully submitted,

---

Gladue report writer

cc:

Defence counsel

Crown counsel

**[Your name] — Gladue report writer**

Contact information: [Address, telephone, email]

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Consent to release information  
AUTHORIZATION FOR RELEASE OF RECORDS  
Pursuant to section 33(b) of the  
Freedom of Information and Protection of Privacy Act  
RSBC, C. 165

[Once you have completed your report, have your client sign the following to authorize the release of his/her records to the court.]

Date: \_\_\_\_\_

I hereby consent to the release of any assessment, clinical information, medical, psychiatric, psychological, legal, educational, social, and family information to **[your name]**, Certified Gladue Report Writer.

I understand this information may be used by **[your name]** for compiling report(s) for the court in British Columbia and may be taken into account in making court decisions.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Address

\_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness [must be present when the  
client signs the form]

Name: \_\_\_\_\_

Report writer: \_\_\_\_\_



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## Appendix 3D:

Gladue report for bail or sentencing  
hearing (template)

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## Gladue report for \_\_\_\_\_ hearing

The information contained in this Gladue report is privileged and confidential, and is intended for the use of the individual(s) named below and for the court hearing. Copying, distributing, or disseminating this report to third parties is prohibited.

### Court and case information

Court: \_\_\_\_\_

Court file number: \_\_\_\_\_

Judge/Justice: \_\_\_\_\_

Presiding justice: \_\_\_\_\_

Crown counsel: \_\_\_\_\_

Phone: \_\_\_\_\_

Defence counsel: \_\_\_\_\_

Phone: \_\_\_\_\_

### Contact information

Name: \_\_\_\_\_

Date of birth: \_\_\_\_\_

Place of birth: \_\_\_\_\_

Current address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone 1: \_\_\_\_\_

Phone 2: \_\_\_\_\_

### Offence data

File number: \_\_\_\_\_

Count: \_\_\_\_\_

File number: \_\_\_\_\_

Count: \_\_\_\_\_

File number: \_\_\_\_\_

Count: \_\_\_\_\_

Name: \_\_\_\_\_

Report writer: \_\_\_\_\_

## Information sources

### People contacted for the preparation of this report

1. \_\_\_\_\_ (Offender, in person)
2. \_\_\_\_\_ (in person, or by telephone)
3. \_\_\_\_\_ (in person, or by telephone)
4. \_\_\_\_\_ (in person, or by telephone)
5. \_\_\_\_\_ (in person, or by telephone)
6. \_\_\_\_\_ (in person, or by telephone)

### Documents reviewed for the preparation of this report

1. Particulars from Crown on files
2. Pre-sentence report from probation office
3. Technical suitability report from probation office
4. Relevant case law
5. Other (any print or online materials regarding: client's First Nation, healing programs, restorative justice programs, medical reports or letters, psychiatric reports, etc.)

## Current circumstances

### Family relationships

**Current circumstances (continued)**

**Living arrangements**

**Associates**

**Education**

**Employment**

**Career goals**

**Finances**

Name: \_\_\_\_\_

Report writer: \_\_\_\_\_

**Current circumstances (continued)**

**Mental health, physical health, behavioural and emotional status**

**Addictions, substance abuse**

**Court history assessment**

**Attitude towards previous and proposed interventions**

**Attitude towards and understanding of offence**

**Gladue considerations**

**Client's Aboriginal community**

**Client's connection to his or her Aboriginal community**

Confidential

## Summary and proposed recommendations

Respectfully submitted,

---

Gladue report writer

cc:  
Defence counsel  
Crown counsel

\_\_\_\_\_ — Gladue report writer

Contact information:

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Consent to release information  
AUTHORIZATION FOR RELEASE OF RECORDS  
Pursuant to section 33(b) of the  
Freedom of Information and Protection of Privacy Act  
RSBC, C. 165

Date: \_\_\_\_\_

I hereby consent to the release of any assessment, clinical information, medical, psychiatric, psychological, legal, educational, social, and family information to \_\_\_\_\_, Certified Gladue Report Writer.

I understand this information may be used by \_\_\_\_\_ for compiling report(s) for the court in British Columbia and may be taken into account in making court decisions.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Address

\_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

Name: \_\_\_\_\_

Report writer: \_\_\_\_\_





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# Appendix 3E:

Authorization for release of Gladue  
report information (template)

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## Authorization for release of Gladue report information

I, \_\_\_\_\_

HEREBY AUTHORIZE my Gladue report writer, \_\_\_\_\_ to release copies of my Gladue report to the Legal Services Society.

I consent to the use of this information by the Legal Services Society for educational or training purposes only.

I hereby release my Gladue report writer from any and all claims whatsoever that may arise as a result of the release of the above information.

This release of information is optional. All client information will be redacted (blacked out), so that the Gladue report, and the people contacted to prepare it, are anonymous.

I am 19 years of age or older.

SIGNATURE \_\_\_\_\_

DATED \_\_\_\_\_

WITNESS:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
Signature





