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Plenary: Restorative Justice – Aboriginal Offenders

Bridging The Cultural Divide: The Challenge to Justice Unanswered

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Introduction

As a law professor I have written a great dealt about the issues of Aboriginal peoples in the Canadian justice system, about Aboriginal justice systems and as counsel I have participated in the continuing struggle of Aboriginal peoples for justice before the courts of this country.

For this plenary I thought might it be helpful after 40 years of writing about these issues is to reflect on what, after a succession of reports, royal commissions, Criminal Code amendments and Supreme Court of Canada decisions and academic reviews, we have learned about the nature and root causes of the injustice to Aboriginal peoples, particularly in the criminal justice system, review some of the major initiatives that have been undertaken in the legislative and judicial spheres, and consider whether we are moving forward to ensure that the arc of history bends towards justice.

Aboriginal overrepresentation in prison

It is helpful to start with some inescapable facts and some inconvenient truths about which there is no dispute. These are the figures on Aboriginal overrepresentation in the Canadian justice system, an overrepresentation which is not unique to Canada and is replicated in New Zealand and Australia. I first wrote about this 26 years ago in a report for the Canadian Bar Association that was presented at its national meeting in Montréal in 1988. Pointedly it is entitled “Locking up Natives in Canada”. I wrote:

> *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%.*
>
> *Bad as this situation is within the federal system, in a number of the Western provincial correctional systems, it is even worse in Manitoba and Saskatchewan, native people, representing 6% – 7% of the population constitute 46% and 60% of prison admissions, A 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… 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 represents for the rest of us. Placing this in a historical context, the prison has become for many young Native people the contemporary equivalent of what the Indian residential school represented for their parents.*
>
> *It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities*[1]

We sometimes make predictions about which we would be happy to be wrong.This was one I had hoped that with the benefit of greater public and legal understanding of the causes of the problems, the introduction of political and judicial remedial tools to address those causes, I would have happily had been proved wrong as I speak today.

10 years after the publication of the CBA report, In 1999 the Supreme Court of Canada cited this passage in the *Gladue* case as a "disturbing account of the enormity of the disproportion." The Court issued this call to action: **"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"**. [2] In the decade between "Locking up Natives" and the *Gladue* case the overrepresentation had deepened. By 1997 "Aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates"[3]. Later in its judgment the Court referred to the "**staggering injustice"** these figures represented. In the 15 years since *Gladue* the figures have got worse and so it's not surprising that when the Supreme Court of Canada revisited Gladue in its 2012 decision in *Ipellee* it did not try to find conjure up the next gradation in the scale of injustice.

By 2004, the 1997 12% of Aboriginal federal prisoners had arisen to 18.5% with no correlative rise in the non-prison Aboriginal population. In October 2006 the Correctional Investigator, Howard Sapers, Canada's federal ombudsman, has highlighted the

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1 Canadian Bar Association Committee on Imprisonment and Release, *Locking up Natives in Canada* by Michael Jackson [Ottawa: Canadian Bar Association, 1988]. Reprinted in [1989] 23 *U.B.C. Law Review* 215. See also 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: A Report on Aboriginal People and Criminal Justice in Canada* [Ottawa: Canada Communications Group, 1996].)

2 *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64

3 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 cited in *Gladue* at para 58

continuing and accelerating overrepresentation of Aboriginal persons in Canada's federal institutions and the current dimensions of the problem facing federal corrections:

> *The overrepresentation of natives in Canada's prisons and penitentiaries is well-known: nationally, Aboriginal people are less than 2.7% of the Canadian population but comprise almost 18.5 % of the total federal prison population. For women, this overrepresentation is even more acute - they represent 32 % of women in federal penitentiaries. Alarmingly, this huge overrepresentation has grown in recent years. While the federal inmate population in in Canada actually went down 12.5% between 1996 and 2004, the number of First Nations people in federal institutions increased by 21.7%. This is a 34% difference between Aboriginal and non Aboriginal inmates. Moreover, the number of federally incarcerated First Nations women increased a staggering 74.2% over this period.*[4]

More recent figures only darken the mirror of justice:

> *While Indigenous people represented approximately 3 per cent of the total Canadian adult population according to the 2006 Census, in 2008/2009 they constituted 27 per cent of those admitted into provincial and territorial prisons, 18 per cent of those admitted into federal prisons, 21 per cent of those on remand, and 20 per cent of those on conditional sentences. Between 1998/1999 and 2007/2008, there was a decrease in the total number of people admitted into provincial and territorial custody. Within that total, however, the proportion of Indigenous people sentenced to custody actually increased from 13 per cent to 18 per cent.*
>
> *Incarceration rates for Indigenous women and youth are even further skewed. Among all women sentenced to provincial and territorial custody between 1998/1999 and 2007/2008, the proportion of Indigenous women increased from 17 per cent to 24 per cent. In 2008/2009, Indigenous women represented 37 per cent of all women admitted into custody. In the same period, Indigenous youth represented 36 per cent of youth admitted into custody. The proportion of Indigenous youth sentenced to custody is 5.5 times greater than their proportion of the total youth population.*
>
> *The disproportionate rate of Indigenous incarceration is more severe in some provinces than in others. For example, in Saskatchewan, Indigenous people constituted 11 per cent of the total adult population in 2006 but made up 80 per cent of those sentenced to custody in 2008/2009. In Manitoba, Indigenous people represented 12 per cent of the total adult population but represented 71 per cent of those sentenced to prison over the same period.*[5]

The 2012-013 Annual Report of the Correctional Investigator provides the latest figures of the federal prison population:

> *The Aboriginal incarceration rate is already estimated to be 10 times higher than the national average.*[32] *Today, 22% of the total federal inmate population claims Aboriginal ancestry. Aboriginal women represent 33.6% of all federally sentenced women in Canada. Current sentencing trends combined with a growing and youthful demographic*

4 Annual Report of the Correctional Investigator, 2005-65

5 Newell, Ryan. "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration." Osgoode Hall Law Journal 51.1 (2013) : 199-249, 202-3

> *indicate that the over-representation of Aboriginal people in Canada's correctional system is likely to grow.*[6]

It is also an inescapable fact that prison overrepresentation is part of a larger pattern. As the Supreme Court observed in *Gladue*:

> *[T]he 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] 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".*
>
> *Statements regarding the extent and severity of this problem are disturbingly common. In Bridging the Cultural Divide, at p. 309, the Royal Commission on Aboriginal Peoples ("RCAP") 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.*[7]

A further inescapable fact and an inconvenient truth that that has been exposed by the Correctional Investigator is that systemic discrimination does not stop at the prison door. This is how Howard Sapers described the situation inside the walls in addressing parliamentarians in 2006 in the tabling of his Annual Report:

> *While the Correctional Service is not responsible for the social conditions and policy decisions which help shape its offender population, it is responsible for operating in compliance with the law and ensuring all offenders are treated fairly. It is therefore with grave concern I am underscoring today that the Correctional Service of Canada falls short of this standard by allowing for systemic discrimination against Aboriginal inmates. For example:*
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> - *Inmates of First Nations, Métis and Inuit heritage face routine over-classification resulting in their placement in minimum security institutions at only half the rate of non-Aboriginal offenders.*
> - *The over-classification for Aboriginal women is even worse. For example, at the end of September, native women made up 45 percent of maximum security federally sentenced women, 44 percent of the medium security population and only 18 percent of minimum security women.*
> - *This over-classification is a problem because it means inmates often serve their sentences far away from their family and the valuable support of other community members, friends and supports such as Elders.*

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6 Annual Report of the Offce of the Correctional Investigator 2012-13
http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx#sIV

7 *Gladue* , paras 61-2

- *Aboriginal offenders are placed in segregation more often than non-Aboriginal offenders.*
- *Placement in a maximum security institution and segregation limits access to rehabilitative programming and services intended to prepare inmates for release and successful reintegration into society.*
- *Aboriginal inmates are released later in their sentences than other inmates.*
- *The proportion of Full Parole applications resulting in reviews by National Parole Board is lower for Aboriginal offenders.*

In short, as stated by the Canadian Human Rights Commission, the general picture is one of institutionalized discrimination. That is, Aboriginal people are routinely disadvantaged once they are placed into the custody of the Correctional Service.[8]

As a consequence, longer periods of incarceration and more statutory releases, as opposed to parole, for Aboriginal offenders contribute to less time in the community for programming and supportive intervention than for non-Aboriginal offenders; the proportion of Aboriginal offenders under community supervision is significantly smaller than the proportion of non-Aboriginal offenders serving their sentences on conditional release in the community; Aboriginal offenders continue to be over-represented as a proportion of offenders referred for detention and ultimately detained compared to the other offender groups; parole is more likely to be revoked for Aboriginal offenders than non-Aboriginal offenders. The rate of revocations for breach of parole conditions (i.e., no new criminal offence) is higher for Aboriginal offenders; Aboriginal offenders are re-admitted to federal custody more frequently than non-Aboriginal offenders, and too often this cycle of inequitable treatment begins again. To break this cycle, the Correctional Service must do a better job at preparing Aboriginal offenders while in custody, and provide better support while in the community; the outcome gaps are even more pronounced when looking at the situation of Aboriginal woman offenders.

The Correctional Service's own statistics regarding correctional outcomes for offenders confirm that, despite years of task force reports, internal reviews, national strategies, partnership agreements and action plans, there has been no measurable improvement in the overall situation of Aboriginal offenders during the last 20 years. To the contrary, the gap in outcomes between Aboriginal and other offenders The causes of overrepresentation the causes of overrepresentation

8 In his 2007-8 Annual Report the Correctional Investigator summarises the cumulative effect of systemic barriers to reintegration: "The combination of over-classification and lack of Aboriginal programming best illustrates how systemic barriers can hinder offender reintegration. Aboriginal offenders are over-classified because of a poorly conceived actuarial scale. As a result, Aboriginal offenders are disproportionately and inappropriately placed in higher security institutions, which have limited or no access to core programs designed to meet their unique needs. This scenario, for the most part, explains why the reintegration of Aboriginal offenders is lagging so significantly behind the reintegration of other offenders. Clearly, correctional outcomes cannot be explained by individual differences alone". Annual Report of the Correctional Investigator, 2007-8, online at
http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20072008-eng.aspx

The causes of overrepresentation

The staggering overrepresentation of Aboriginal offenders receiving prison sentences suggests either that Aboriginal peoples are committing disproportionately more crimes or that they are the victims of systemic discrimination. Studies and Commission reports confirm that both phenomena operate in combination.[9]

Although over-policing and other forms of systemic discrimination undoubtedly play their part in higher crime rates, the available evidence shows higher Aboriginal crime rates in many reserve communities and among urban Aboriginal populations: particularly disturbing are the rates of interpersonal violence in some reserve communities where women are the primary victims. A June 2006 report of the Canadian Centre for Justice Statistics that presented the grim picture of the realities for Aboriginal people and their communities. Specifically, young people aged 15 to 34 experience violent victimization 2½ times more frequently than those aged 35 or older; on-reserve crime rates were about three times higher than crime rates elsewhere in Canada, and violent crime rates were significantly higher; rates of spousal violence were 3½ times higher than for non-Aboriginals.

Like the figures on overrepresentation, the statistics on higher crime rates have demanded uneasy answers to hard questions directed to the root causes. Why does crime and social disorder play more havoc in personal and community well-being than they do in the lives of non-Aboriginal people and communities? This is a critical question because "misunderstanding the roots of the problem can lead only to solutions that provide, at best, temporary alleviation and, at worst, aggravation of the pain reflected in the faces of Aboriginal victims of crimes — in many cases women and children — and in the faces of the Aboriginal men and women who receive their `just' deserts in the form of a prison sentence".[10]

Over the 25 years since the release of Locking up Natives in Canada that has emerged a consensus of the interrelated explanatory theses for this "crisis in the Canadian criminal justice system." The Supreme Court in *Gladue* referred to the socio-economic causes of overrepresentation:

> *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.[11] 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). Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting that "[t]he unemployed,*

9 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 33 (hereafter "Bridging the Cultural Divide") at

10 *Bridging the Cultural Divide*, p.39

11 *Gladue*, para. 67

> *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."*[12]

There is a further explanatory pathway in which overrepresentation is linked to the particular and distinctive historical and political processes that have made Aboriginal people poor beyond poverty. As described by RCAP in its report *Bridging the Cultural Divide*

> *The relationship of colonialism provides an overarching conceptual and historical link in understanding much of what has happened to Aboriginal peoples. Its relationship to issues of criminal justice was identified clearly by the Canadian Bar Association in its 1988 report, Locking Up Natives in Canada.*
>
> > *What links these views of native criminality as caused by poverty or alcohol is the historical process which Native people have experienced in Canada, along with indigenous people in other parts of the world, the process of colonization. In the Canadian context that process, with the advance first of the agricultural and then the industrial frontier, has left Native people in most parts of the country dispossessed of all but the remnants of what was once their homelands; that process, superintended by missionaries and Indian agents armed with the power of the law, took such extreme forms as criminalizing central Indian institutions such as the Potlatch and Sundance, and systematically undermined the foundations of many Native communities. The Native people of Canada have, over the course of the last two centuries, been moved to the margins of their own territories and of our `just' society.*[13]

The Supreme Court in 2012 in *Ipeelee* unequivocally acknowledged the importance of judicial understanding of the significance of the legacies of colonialism:

> *"To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."* [14] *(R. v. Ipeelee, SCC 13 2012)*

Bridging the Cultural Divide: Restorative Justice and The Framework for Reform

In the Royal Commission on Aboriginal People report *Bridging the Cultural Divide*, the report which I was privileged to help draft, the Commission recognized that the recognition of Aboriginal peoples rights to establish their own justice system as part of the inherent right to self-government under section 35 of the *Constitution Act 1982* was an integral part of throwing off the mantle of colonialism and reestablishing the legitimacy of law within a legally pluralistic Canada. The following passage explains the case for Aboriginal control of justice:

> *It has been through the law and the administration of justice that aboriginal people*

12 *Gladue*, para. 65

13 *Bridging the Cultural Divide*, p. 47

14 *R. v. Ipeelee*, SCC 13 2012

have experienced the most repressive aspects of colonialism. Ovide Mercredi, National Chief of the Assembly of First Nations, made this point in a presentation to the Aboriginal Justice Inquiry of Manitoba

> *In Law, with law and through law, Canada has imposed a colonial system of government and justice upon our people without due regard to out treaty and aboriginal rights.*

It is in Aboriginal law, with Aboriginal law and through Aboriginal law that Aboriginal people aspire to regain control over their lives and communities. The establishment of systems of Aboriginal justice is a necessary part of throwing off the suffocating mantle of a legal system imposed through colonialism. It is difficult and disturbing to realize that aboriginal people see the non-Aboriginal justice system is alien and repressive, but the evidence permits no other conclusion.

Aboriginal peoples' alienation from the justice system is partly a result of the fact that justice – far from bringing the blind, impartial arbiter - has been the handmaiden to their oppression. But equally important, this alienation is a product of the fundamental differences Aboriginal people bring to the concept and process of justice. Recognition of the rights of aboriginal peoples to establish and control their own justice systems is an essential an integral part of recognizing and respecting cultural difference.

Aboriginal control over the substance and process of justice, flowing from the Aboriginal right of self-government, and the right to have a justice system that respects the cultural distinctiveness of Aboriginal peoples are not only issues of principle. Based on the evidence we have considered, it is our view that the contemporary expression of Aboriginal concepts and processes of justice are likely to be more effective than the existing non-Aboriginal justice system, both in responding to the wounds that colonialism has inflicted, which are evident in a cycle of disruptive and destructive behavior, and in order for meeting the challenges of maintaining peace and security in a changing world.[15]

The Commission reviewed examples of different Aboriginal nations' concepts of justice linked to distinctive worldviews and philosophies relating to the holistic relationship of individuals, communities and the natural order that characterize many indigenous peoples. It is these principles and processes of justice that have broadly referred to as restorative justice. Although indigenous conceptions of justice are not singular and take many different forms they are broadly characterized by a focus on individual and community healing and restoration of order rather than the punitive focus that has been the dominant characteristic of non-Aboriginal systems.[16]

Bridging the Cultural Divide recognized that the reconstituting Aboriginal systems of justice as part of a recognition of Aboriginal self-governance was a long-term goal, and represented an enormous challenge for Aboriginal peoples involving as it did addressing the destructive and dislocating legacies of the laws and policies of the past.

15 *Bridging the Cultural Divide* at 58 and 66

16 see Michael Jackson, In Search of the Parthways to Justice: Alternative Dispute Resolution in Aboriginal Communities UBC Law Review 1997 special edition; Bridging the Cultural Divide Ch.1

As the Commission observed "the problems that bring Aboriginal people into the courts and prisons of this country do not lend themselves to easy solutions. As we have been told over and over again, there is a great need for healing, which can be provided only by aboriginal people themselves to replace 'the great Canadian lockup.'"[17]

Recognizing that the reestablishment of Aboriginal systems of justice was a long-term goal *Bridging the Cultural Divide* proposed two distinctive yet interrelated reform agendas. The report provided a framework that offered both conceptual and constitutional space for the development of Aboriginal justice systems as well as grappling with the challenging issues raised by the inclusion of Aboriginal justice systems within Canadian federalism. But it also made recommendations for the reform of the existing criminal justice system to make it more respectful of and responsive to the experience of Aboriginal people. There are several reasons for this dual approach. For Aboriginal nations that chose to reestablish the justice systems they would be a transition period before they assume the full scope of their jurisdiction, Also some nations may decide that certain cases are beyond their collective ability to resolve and may wish those cases to be referred to the non-Aboriginal system, A third reason related to the challenges of establishing Aboriginal justice systems in urban areas. As the Report stated "the connection between the establishment of Aboriginal justice systems and necessary changes to the non-Aboriginal system should be seen in the holistic framework of reform. In the area of justice – perhaps more than any other, because of the impact on the lives of aboriginal people – constructive partnership and dialogue are critical."[18]

In proposing a reform agenda to existing criminal justice system *Bridging the Cultural Divide* reviewed many of the initiatives that are already been undertaken in Canada including the development in some jurisdictions of sentencing circles that included the participation of elders and members of the Aboriginal community within a restorative justice framework.

The 1996 Criminal Code Amendments and Gladue

As *Bridging the Cultural Divide* was being written the Canadian Parliament was enacting the most comprehensive reforms to sentencing law since the Criminal Code's introduction in 1892. The amendments represented a codification of existing common-law sentencing principles but also included what could be loosely referred to as restorative principles of providing reparations for and promoting acknowledgment of harm done to the victims or to the community and promoting acknowledgment of the harm done. The very last clause of the sentencing principles and the one which was to become the focus of the Supreme Court of Canada decision in *Gladue* provided:

> *s. 718.2: A court that imposes a sentence shall also take into consideration the following principles … (e) all available sanctions other than*

17 *Bridging the Cultural Divide* at 76-7
18 *Bridging the Cultural Divide* at 78

> *imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.*[19]

This amendment was seen by some as being a minimalist step in acknowledging the overrepresentation of Aboriginal people and in light of its ambiguity did not bring about any immediate changes in sentencing practices.[20] It was to be left to the Supreme Court of Canada in *Gladue* to pour substantive content into the section and invigorate its meaning. As I have described *Gladue* set out the inescapable facts relating to overrepresentation and its causes justifying the characterization of "a crisis in the criminal justice system" and "a staggering injustice." The Supreme Court, in acknowledging the colonial legacy was aware of the limited but nevertheless a vital role that judges can play in redressing this in the sentencing process:

> *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. 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.*[21]

The Supreme Court went on to provide a framework of analysis for the sentencing judge dealing with an aboriginal offender:

> *How are sentencing judges to play their remedial role? The words of s. 718.2(e) [Criminal Code] 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:*
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> *(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and*
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> *(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.*[22]

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19 *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22. .

20 "This statement of purposes and principles certainly does not preclude imposing a sentence that emphasizes restorative and healing goals, but these are not given priority nor are they seen as anchoring the sentencing process.

An Aboriginal statement of purposes and principles would likely read quite differently, privacy would likely be given to restoring harmony and peaceful relationships through the healing of both offenders and victims and the provisions of restitution and compensation bombs done. In other words, healing and restitution would be at the center rather than on the margins of the process" *Bridging the Cultural Divide* at 240-1

21 *Gladue*, para. 65

22 *Gladue*, para. 66

As those unique systemic or background factors the court stated:

> *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.*[23]

Regarding the types of sentencing procedures and sanctions the Supreme Court placed particular emphasis on restorative justice which were now recognized as part of the purposes of sentencing in the *Criminal Code*, because "most traditional Aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice"[24]. The Court contrasted the principles the traditionally guide sentencing, deterrence, separation and denunciation with those that guide the community-based sanctions used in many Aboriginal communities. While the court acknowledged that "Aboriginal communities stretch from coast to coast and from the border with the United States to the far north and 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". [25]

While endorsing the concepts of restorative justice and their particular relevance to Aboriginal peoples, the Supreme Court issued a cautionary note that in historical retrospect was to become a source of interpretive controversy.

> *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.*
>
> *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.*[26]

23 *Gladue*, para. 68
24 *Gladue,* para. 70
25 *Gladue*, para. 73
26 *Gladue*, paras 78-9

Gladue because of its indictment of the criminal justice system and its application to aboriginal peoples not only made national headlines but was seen by many of us as a harbinger of hope for real change. Mary Ellen Turpel – Lafond, who prior to her appointment as a Saskatchewan provincial court judge had written extensively on aboriginal justice issues, saw the judgment "as an important watershed in Canadian criminal law." She suggested that "as a barometer of Canadian law the Gladue decision certainly registers as a vital departure point… Perhaps this is more this is no more than the history of the common law with its dialectic of stability and change, but I suspect something more profound is at work."[27]

As part of the 1995 Criminal Code amendments the conditional sentence, an intermediate sanction between prison and probation was introduced as a sentencing alternatives. It allowed a sentence of imprisonment of less than 2 years to be served in the community, subject to conditions that were both more onerous and enforceable than probationary conditions. The conditional sentence seemed particularly well suited to be one which, in conjunction with the *Gladue* decision, would enable judges to play their role in reducing the high rates of Aboriginal imprisonment. Indeed the Court in *Gladue* describes the advent of conditional sentences as "alter[ing] the sentencing landscape" for its ability to give real meaning ss. 718.2) (e).[28]

Changing the Landscape after Gladue: The promise of justice

In the context of a seminal Report of the Royal Commission, the Criminal Code amendments and a landmark decision of the Supreme Court and recognizing the deep structural roots of the problems that lead to overcarceration, it would have been unrealistic to expect dramatic drops in those rates overnight. But it was not unrealistic to see significant change on the immediate horizen

But this has not happened. As I have previously described, not only did the rates of overrepresentation not decline in the years after *Gladue,* but they continued to rise without abatement. Scholars who looked to rates of imprisonment expressed some mystification about this. Julian Roberts and Ronald Melchers reviewed admissions to provincial correctional facilities from 1978 to 2001 and found that for the post Bill C-41 period , including several years after *Gladue*, the decision did not have any impact on Aboriginal incarceration rates.

> *What is mystifying is why the number of aboriginal admissions to custody did not decline at an accelerated rate (compared to non-aboriginal offenders) from 1996 onwards, as a result of the sentencing reforms introduced that year and the subsequent judgments from the Supreme Court within the next few years. In fact, although it encompasses only a few years (1997-1998 to 2000-2001), the post C-41 period reveals an increase in the volume of aboriginal admissions to custody of 3%, while non-aboriginal admissions declined by fully 27%. This is quite the reverse of what would be expected*

27 "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (1999) 43:1 Crim LQ 34 at 35.
28 at para. 40.

> *in light of sentencing reforms specifically addressing the plight of aboriginal offenders. After all, both statutory reforms and appellate jurisprudence during this period encouraged judges to consider the use of alternatives to incarceration for all offenders but to pay particular attention to consider the use of alternatives to incarceration for all offenders but to pay particular attention to the circumstances of aboriginal offenders.*
>
> *This suggests that these developments, including a proliferation of publications highlighting the issue, codification of a special direction to judges (and its subsequent endorsement by the Supreme Court), and the creation of a new alternative to imprisonment (the conditional sentence of imprisonment) have all failed to benefit aboriginal offenders to quite the same extent as non-aboriginal offenders.*[29]

We now have the benefit of a number of scholarly analyses explaining why *Gladue* thus far has failed to achieve its purpose. Jonathan Rudin, a co-writer of *Bridging the Cultural Divide* and program director of Aboriginal Legal Society of Toronto (an intervener in *Gladue*) has identified as one of the key reasons in the lack of the necessary informational resources to implement the decision. As he explains the Supreme Court implementation of *Gladue* is contingent upon judges being provided with information that goes beyond the material typically provided by defense counsel:

> *The key reason that rates of Aboriginal over-representation have not decreased is that the process by which judges are to get information about Aboriginal offenders proposed in R. v. Gladue does not work in practice. As courts have repeatedly stated, Gladue is in no way a "get out jail free card" for Aboriginal offenders. Aboriginal offenders do not receive a discount in their sentence by virtue solely of being Aboriginal. Gladue emphasizes that in order to craft a different sentence for an Aboriginal offender, judges need information, both about the offender and about the systemic factors that have played a role in the life of the offender.*
>
> *It is not surprising that judges are not getting this information. Defence counsel do not have any particular knowledge or expertise on the systemic factors that have led to Aboriginal over-representation. Nor do defence counsel necessarily have the skills to gather information on the life history of their client. Law schools still spend very little time teaching about sentencing and sentencing submissions. While a vital part of the work of defence counsel, sentencing is rarely the subject of continuing legal education sessions. Even if counsel do possess the skills necessary to gather the requisite information for a substantive sentencing submission, they do not necessarily get remunerated for this work. In many legal aid plans a guilty plea is a guilty plea — regardless of the work that is put into the plea. While it would be nice to think that money should not be a factor in this area, that view would reveal a striking degree of naivety.*
>
> *Theoretically, issues of the kind raised in R. v. Gladue could be the subject of pre-sentence reports ("p.s.r.s"). Although some provinces indicate that they include Gladue considerations in their p.s.r.s, the reality is that this is a very hit and miss process. In some provinces the amount of time a probation officer can spend on a p.s.r. is prescribed and might preclude taking the time necessary to acquire the requisite information. As well, the scope of many p.s.r.s, particularly for adult*

29 J. Roberts & R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45 Can. J. Crim. & Crim. Just., at 211.

> *offenders, is simply to determine whether the offender is suitable for a community disposition, not what that disposition might be. For the most part, the reality is that the sentencing of Aboriginal offenders in the post-Gladue world proceeds very much like it did pre-Gladue. When the prevailing ethos is "business as usual" then there is no reason to expect that sentencing practices will change. If sentencing practices do not change, then rates of Aboriginal over-representation will not change either; indeed, they may worsen.*[30]

A second explanation is directly related to the ambiguity I previously referenced in *Gladue* itself in the court's statement that "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." Although in its decision in *Wells*[31] a year after Gladue the Supreme Court stated that "The generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application," *Wells* created its own layer of ambiguity with a further statement that while section 718.2(e) requires sentencing judges to adopt a different methodology for sentencing aboriginal offenders, but one that does not necessarily mandate a different result. The Gladue statement that the more violent and serious the offense the more likely that a term of imprisonment would be appropriate for Aboriginal offenders was picked up, particularly by Crowns and became the subject of competing lines of decisions in appellate courts of appeal. As described by Ryan Newell

> *Courts have subsequently struggled to determine the place of the Gladue analysis in the context of serious and violent offences. Many decisions of provincial appellate courts have focussed more on resolving this ambiguity than on implementing the thrust of the Gladue analysis—that is, remedying the over-incarceration of Indigenous people.*[32]*The way that provincial appellate courts have resolved this ambiguity has diverged widely. For instance, Roach's analysis of appellate court decisions in the decade following Gladue, from 1999 to 2009, suggests that the Courts of Appeal of British Columbia and Saskatchewan "have operated on the assumption that Gladue does not really apply in cases that are particularly serious." That the Saskatchewan Court of Appeal has narrowed the scope of Gladue in this manner is especially troublesome given that the over- incarceration of Indigenous people is the highest in that province.*[33]

30 Jonathan Rudin, Aboriginal Over-representation and R v. Gladue: Where We Were, Where We Are and Where We Might Be Going (2008) 40 Supreme Court Law Review (2d) 677 at 703-4

31 2000 SCC 10, [2000] 1 SCR 207

32 Kent Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal" (2009) 54:4 Crim LQ 470 at 478.

33 in 2006 Indigenous people made up 11 per cent of the total adult population of Saskatchewan but represented 80 per cent of those sentenced to custody in 2008/2009. Ryan Newell "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration." Osgoode Hall Law Journal 51.199 at 213 (2013)

In 2012 in its decision In *Ipeelee*,[34] the Supreme Court revisited *Gladue* for the first time in over a decade and took the opportunity both to reaffirm *Gladue* but also to address "the irregular and uncertain application of the *Gladue* principles." The Court heard appeals concerning the sentencing of two offenders with long criminal records, who had been declared long-term offenders, and as a result were the subject of long-term supervision orders (LTSO). The issue before the Court was the manner in which to determine a proper sentence for Indigenous offenders who have breached an LTSO. The Supreme Court recognized both that "the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened"[35] since the 1996 amendments, and that "[c]ourts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society."[36] in a passage I previously sent out Justice LeBel reiterates *Gladue*'s directive to judges, underscoring that to provide the necessary context to sentence"

> *courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.*[37]

Judicial notice of the legacies of colonialism was directed to one of the two problems *Ipeelee* identifies with the jurisprudence post-*Gladue* that have "thwart[ed] what was originally envisioned by *Gladue*"[38] This was that "some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge."[39] This incorrect interpretation of *Gladue* functions as an "evidentiary burden,"[40] which goes much farther than the *Gladue* directive to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts."[41] This practice is inappropriate because a causal link will be prohibitively difficult for Aboriginal offenders to disentangle and establish given the complexities and interrelationships within the continuing effects of colonization.[42]

The second problem *Ipeelee* identifies in the post-*Gladue* jurisprudence is the "irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences."[43] Justice LeBel explains *Gladue*'s reference that sentences will be more similar for Aboriginal and non-Aboriginal offenders the more serious or violent the offence has led to "unwarranted emphasis" on this proposition, prompting "[n]umerous courts" to "erroneously [interpret] this generalization as an indication that the *Gladue*

34 *R v. Ipeelee* 2012 SCC 13, [2012] 1 SCR 433
35 at para. 62.
36 Ibid.
37 at para. 60.
38 at para. 80.
39 at para. 81.
40 at para. 82.
41 *Gladue*, at para. 69.
42 *Ipeelee*, at para. 83.
43 *Ipeelee*, at para. 84.

principles do not apply to serious offences"[44] Justice LeBel held that the *Gladue* analysis is equally applicable to serious and violent offences, and exempting them would essentially "deprive s. 718.2(e) of much of its remedial power."[45] Judges have a *duty* to apply s. 718.2(e),[46] and to fail to apply *Gladue* when sentencing an Aboriginal offender "runs afoul of this statutory obligation," producing "a sentence that was not fit and was not consistent with the fundamental principle of proportionality."[47] Therefore, it is not sufficient for sentencing judges to detail the personal history of an Aboriginal offender but to then fail "to consider whether and how that history ought to impact on her sentencing decision. To end the ambiguity that have bedeviled provincial courts of appeal the Supreme Court declared that the "application of the *Gladue* principles is required in every case involving an Aboriginal offender … and a failure to do so constitutes an error justifying appellate intervention."[48]

In addition to the explanations of inadequate information resources and the uncertainty surrounding the application of the Gladue principles in relation to more serious and violent crimes, feminist scholars have seen less obvious but no less serious obstacles to implementation. Toni Williams in her analysis of 18 judgments sentencing Aboriginal women from 2005 - 2006 set out to understand how Aboriginal women continue to be over incarcerated despite the avowed goals of section 718.2(e) and the conditional sentencing regime to reduce reliance on imprisonment. Elspeth Kaiser-Derrick undertook a larger study involving 91 cases in her LL.M thesis. The problem involves the different ways in which *Gladue* factors can be seen as both militating against imprisonment but also as risk factors which justify it.

> *Williams argues that because s. 718.2(e) effectively requires judges to identify and weigh such factors as "emotional trauma, familial failings and community dysfunction" through application of the Gladue test, this provision operates to import a contextualized, intersectional analysis into the sentencing process.* [49]
>
> *Williams suggests that because primary factors evaluated within institutional decision-making are alternately Gladue factors in the sentencing process and risk factors in prison machinery, there is dissonance producing a conflict between the goal of Gladue factors to reduce overincarceration and that of penal risk factors to inform the necessary*
>
> *level of punitiveness. Moreover, this conflict becomes effectively internalized within sentencing discourses. Judges must navigate between the level of risk and personal*

44 *Ipeelee*, at para 84
45 *Ipeelee*, at para 86.
46 Ibid.
47 *Ipeelee*, at para. 87.
48 Ibid. In her LLM thesis which analyzes a database of post-*Gladue* sentencing cases involving Aboriginal women Elspeth Kaiser-Derek found both of the errors *Ipeelee* identified featured in the cases in her research. "Listening to What the Criminal Justice System Hears and the Stories It Tells: Judicial Sentencing Discourses about the Victimization and Criminalization of Aboriginal Women". LLM thesis UBC December 2012
49 Toni Williams, "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?" in Emily Grabham et al, eds., Intersectionality and Beyond: Law, Power and the Politics of Location (New York: Routledge-Cavendish, 2009) 79.

> *needs assessed for the offender (as determined primarily based on the PSR and the judge's own evaluation) against the Gladue directive to look to alternatives for imprisonment for Aboriginal offenders. For example, an offender may be assessed to present a high risk because of her criminal history and substance abuse, which may militate toward a punitive sanction designed to separate the offender from society – whereas this may be in tension with Gladue factors that would formulate these (otherwise "risky") factors in the context of colonization and might point to the inappropriateness of a prison sanction. Williams asserts that s. 718.2(e) functions as a conduit for intersectional concerns to become retranslated as risk factors, which in turn undercut the ability of s. 718.2(e) to ameliorate the overrepresentation of Aboriginal offenders in prison because elevated risk projections suggest harsher sanctions.*
>
> *In her study, Williams finds that judges making community orders (largely conditional sentence orders) resolve the tension by either formulating sentences that are guided by rehabilitation and reintegration (healing-oriented, including imposing minimal confinement and discretionary conditions) or by focusing on the risk assessed for the offender and amplifying the punitive features of the conditional sentence (such as ordering lengthier sentences with more restrictive terms). For some cases in her study in which judges order incarceration, Williams finds that judges paradoxically cast their decisions in a restorative light, focusing on rehabilitation, but then deliver a punitive sanction, while "construct[ing] the prison at least to some extent as a therapeutic environment, a place of safety, healing and growth for a defendant whose life in the community marks her as both victimizer and victimized* .[50]

it should not be thought that has been some sort of organized resistance against the implementation of *Gladue* by the judiciary. In the history of efforts to redress the systemic injustice of overrepresentation, there is a consistent theme of trial judges trying to make a difference. Circle sentencing was pioneered by judges in Canada's North who saw first hand how the criminal justice system was failing Aboriginal communities.[51] Since *Gladue* an important counterpoint to the stories of lack of implementation is a competing narrative where judges, defense and crown counsel and Aboriginal organizations have applied *Gladue* in the spirit in which it was clearly intended. In different parts of the country we have seen provincial courts being reshaped in what are now referred to as *Gladue* and First Nation courts. There are more to this reshaping than simply a different name. A major component for their successful operation is providing the informational and human resources to enable the sentencing process to create alternatives to imprisonment. The first *Gladue* court was established in Toronto and Jonathan Rudin has described its operation as of 2008 and the evaluations of its success:

> *In October 2001, the Gladue (Aboriginal Persons) Court began hearing cases at Old City Hall. The court now sits two days a week. Two other Gladue Courts have been established in Toronto. All Gladue Courts deal with bail hearings and sentencing Aboriginal offenders. The courts do not do trials.*

50 Judicial Sentencing Discourses about the Victimization and Criminalization of Aboriginal Women" at 91-92. Chapter 3 of Kaiser-Derrick's 2012 thesis contains the most detailed empirical analysis to date of how judges have addressed the *Gladue* factors in the sentencing of Aboriginal women.
51 See *Bridging the Cultural Divide* at 109-110

> *In order to support the Gladue Court, Aboriginal Legal Services of Toronto ("ALST") created the position of the Gladue Caseworker. It is the role of the Gladue Caseworker to prepare written reports on Aboriginal offenders at the request of the judge, defence or Crown. The reports, known as Gladue Reports, are generally prepared only where there is a strong likelihood that an offender will receive a period of incarceration as part of his or her sentence.*
> *Gladue Reports go into great detail concerning the life circumstances of the offender. All efforts are made to speak with friends, family members and anyone who can shed light on the life of the person. The reports also place the individual's life circumstances in the context of the systemic factors that have affected Aboriginal people. The reports also contain concrete plans as to alternatives to incarceration. For example, if the report suggests that the offender take a program for substance abuse, an application to a program will often have been completed and an acceptance date received prior to the report being filed. ALST will, if necessary, provide the funds to allow the offender to attend the treatment centre if it is out of town.*
>
> *What this means in practice is that a judge who is in receipt of a Gladue Report will have a greater understanding of the life of the offender before him or her and of how systemic issues have impacted that life, and there will also be a very detailed plan presented that will attempt to address the factors that have led the offender into the criminal justice system.*
>
> *Evaluations of the program have shown that Gladue Reports have an impact on the sentences that are handed down to Aboriginal offenders. Campbell Research Associates found that judges, Crown counsel and defence counsel all agreed that Gladue Reports enable the courts to better meet the requirements of the Criminal Code and the Youth Criminal Justice Act regarding the sentencing of Aboriginal offenders. Crown attorneys often changed their position on sentence after receiving a Gladue Report. All the judges interviewed in the evaluation agreed that the reports formed a sound basis for a sentence.*
> *The experience of the Gladue Courts and Gladue Reports shows that jail need not be the default option when sentencing Aboriginal offenders. It also shows that there is a need to consciously address how to do things differently if change is going to occur.*[52]

In British Columbia a number of First Nation Courts are now operating and those involved in their operation have reported experiences the parallel those that Jonathan Rudin describes.

With the development of these new courts and in light of the Supreme Court's endorsement and reinvigoration of *Gladue* in *Ipeelee* in 2012 I would like to believe that the Supreme Court's reaffirmation of its commitment and its direction to trial and appellate courts to take seriously Aboriginal overrepresentation and use the tools available to them through the sentencing function would bring about significant change on the landscape of

52 Jonathan Rudin, Aboriginal Over-representation and R v. Gladue, at 705-6

imprisonment. While it is too early to look at this through a statistical analysis, as I will soon describe, recent legislative changes have changed that landscape in ways that will likely undermine the best intentions of the Supreme Court.

The Promise of Justice Denied

There has indeed been a change in the landscape of criminal justice in Canada in a reversal of 30 years of Canadian criminal justice policies, and indeed policies informed by the reports and commissions of inquiry which are the theme of this conference and which has been seen by many other countries as emblematic of a just and compassionate society. What we have seen is a virtual avalanche of legislative amendments aimed at toughening and deepening the criminal justice system and giving greater priority to victims of crime. None of these amendments are directed to addressing and redressing the crisis in the criminal justice system articulated in *Gladue* but cumulatively they are likely to have impacts on Aboriginal peoples which will undermine of the promise of *Bridging the Cultural Divide* and *Gladue* and intensify and deepen the crisis. This changing landscape, particularly debates around the 2011 *Safe Streets and Communities Act*[53] and its impacts on over-repesentation has been well described in a recent article by Ryan Newell in the Osgoode Hall Law Journal:

> *Bill C-10, the Safe Streets and Communities Act, is a large omnibus law made up of several smaller bills, most of which were initially introduced by the Conservative Party while they were a minority government. In 2011, the Conservatives campaigned on a platform promising significant reforms to the Canadian criminal justice system within the first one hundred sitting days in Parliament. Upon receiving a majority of the House of Commons in May 2011, the Conservatives made the enactment of the SSCA a priority. In their first speech from the Throne, the Conservatives committed to "move quickly to reintroduce comprehensive law-and-order legislation to combat crime and terrorism." On 12 March 2012, the Conservatives made good on their campaign promise when the bill was passed by the House of Commons. Bill C-10 received Royal Assent on 13 March 2012..*
>
> *The parliamentary debates and the submissions of some witnesses before the Senate Committee on Legal and Constitutional Affairs explored the ways that the SSCA was expected to contribute to the crisis of Indigenous over-incarceration.*
>
> *Throughout the parliamentary debates on the SSCA, the Conservatives continually relied upon empty tough-on-crime rhetoric when responding to critics. Attorney General Rob Nicholson introduced the SSCA during its second reading as a reflection of "the strong mandate that Canadians have given us to protect society and to hold criminals accountable." Suggestions by Opposition members that the SSCA would contribute to Indigenous over-representation in the Canadian criminal justice system triggered vacuous retorts. There was a repeated refusal on the part of* the Conservatives to actually engage *with the substance of the criticisms. When asked by New Democratic Party of Canada (NDP) MP Carol Hughes whether "we should be stocking our prisons with aboriginals … as opposed to providing rehabilitative and proper services for them," Conservative MP Kevin Sorenson replied:*

53 SC 2012, c 1.

> *Madam Speaker, I think our prisons should be full of those who have committed crimes against our society and who have been found guilty in a court of law. I think our prisons should be a place where we can try to rehabilitate people, but we should hold them, incarcerate them and tell them that the penalty for crime is prison in some cases. … We realize that there is a high percentage of aboriginals in our penitentiaries, and, yes, that must be addressed as well, but in many cases there are many aboriginal victims who are standing right there while the offender is the [sic] locked in prison.*[115]

MP Sorenson is correct that many of the victims of crime perpetrated by Indigenous people are themselves Indigenous. In fact, many Indigenous people who are charged with criminal offences have on other occasions been the victims of crime. It also should not be ignored that Indigenous people implicated in the criminal justice system are also survivors of the genocidal policies of the Canadian state. However, the question that Sorenson and other Conservative MPs consistently evaded throughout the parliamentary debates was whether an increased reliance on imprisonment would actually address the underlying causes of crime and help to prevent future victimization.

The SSCA was referred to the Standing Senate Committee on Legal and Constitutional Affairs after passing third reading by the House on 5 December 2011 and after receiving two readings in the Red Chamber. Several witnesses before the Senate Committee emphasized the impact that the SSCA was likely to have on the crisis of Indigenous over-incarceration and urged the Senate to make amendments before returning it to the House. Roger Jones, Senior Strategist at the Assembly of First Nations (AFN), stated unequivocally that the SSCA would compound "the already unacceptable overrepresentation of our people in the criminal justice system." Christa Big Canoe of Aboriginal Legal Services of Toronto emphasized that the SSCA would chip away at the gains made by the Bill C-41 reforms and their interpretation in Gladue:

> *Our largest concern with the passing of the act is that there will be an undermining of the principles of sentencing as set out in section 718.2 of the Criminal Code of Canada. When I say that, I mean the entire section, not just (e). … We believe that the Safe Streets and Communities Act will make the problem of Aboriginal over-representation in prison even worse, while at the same time not actually addressing the legitimate safety concerns of Aboriginal and non-Aboriginal people in this country.*

Despite urging by Indigenous advocates and their allies that the SSCA would fail to meet its stated objectives while also exacerbating the crisis of Indigenous over-incarceration, the Conservative-dominated Senate refused to amend the SSCA to make room for the application of the Gladue principles.[125] *Conservative Senator Daniel Lang responded to Liberal Party of Canada (Liberal) Senator Joan Fraser's suggestion that attention to the specific circumstances of Indigenous people should be considered at the sentencing stage as follows*:

> *I do have a concern for the Aboriginal community—I think we all do—in respect of the number of individuals who have had to go into the court system, in many cases, not because of their fault but because of the situation they grew up in, the family*

> *situations that they have had to endure in some cases, and the residential school situation we have all talked about. … I think I can speak for rural Canada…*
>
> *For the life of me, to say that "Because you are Aboriginal, it is okay; we will give you a lighter sentence, although you have been dealing in some very serious drug offences," I just cannot buy it. It just defies common sense.*
>
> *Senator Lang's remarks indicate the ideological inflexibility of the Conservatives' tough-on-crime agenda. While Conservative parliamentarians were willing to concede some of the social and historical context that gives rise to Indigenous over-incarceration—for example, the legacy of residential schools—in the Conservatives' ideological paradigm, the applicability of contextualized sentencing ends precisely where the "common sense" of retributive justice begins.*[54]

The two features of the *Safe Streets and Communities Act* that critics have identified as likely to aggravate Aboriginal overrepresentation are the provisions dealing with additional and increased mandatory minimum sentences and further restrictions to the availability of conditional sentences. Already previous legislation introduced by the Conservative government had added to the repertory of mandatory minimums and limited the court's discretion to impose conditional sentences but the *Safe Streets and Communities Act* both expanded mandatory minimums and further reduced judicial discretion for conditional sentences.[55] The most significant change in the 2012 amendments is the greatly expanded list of offences for which conditional sentences will no longer be available if prosecuted by way of indictment. Conditional sentences are no longer available for offences such as criminal harassment, motor vehicle theft, theft over five-thousand dollars, and being unlawfully in a dwelling-house. Because conditional sentences are not available where there is a mandatory minimum the expansion of new mandatory minimums further contracts the availability of conditional sentences.[56]
In its submission to the House of Commons and Senate committees on the legislation the

54 Newell, Making Matters Worse, at 217-22

55 Amendments in 2007 had already rendered conditional sentences unavailable for "serious personal injury offences" defined as an indictable offence (excluding treason and first and second-degree murder) "for which the offender may be sentenced to imprisonment for ten years or more," and involving "the use or attempted use of violence;" conduct likely to or endangering another person's life/safety; or that likely to or inflicting "severe psychological damage" on another. In commenting on this change Kaiser-Derrick notes:"This aspect of the amendments is of particular relevance to Aboriginal women because as noted by Justice Arbour in her 1996 report for the Commission of Inquiry into Certain Events at the Prison for Women, Aboriginal women are often imprisoned for more violent offences and experience more periods of incarceration". Kaiser-Derrick, at 43

56 One aspect of the SSCA that will mitigate the harshness of the imposition of mandatory minimums in select circumstances is the addition of a provision that allows courts to delay sentencing in order to allow an offender to participate in a drug treatment court program approved by the Ministry of the Attorney General or to attend a treatment program as defined in section 720(2) of the Code. Perhaps even more significant is the amendment to section 10(5) of the CDSA: "If the offender successfully completes a program under subsection (4), the court is not required to impose the minimum punishment for the offence for which the person was convicted."

The Canadian Bar Association was one of many to argue against the further restriction of conditional sentences and its likely negative impact on increasing imprisonment for Aboriginal peoples.[57]

I started this paper with an analysis of the statistics of overrepresentation. To understand just how severe an impact the restrictions on conditional sentences are likely to have in bending the arc of justice it is instructive, albeit distressing, to reflect on the findings of Elspeth Kaiser-Derrick who, as I previously referenced, in her LLM thesis analyzed 91 cases involving the sentencing of Aboriginal women between 1999 and 2011 to consider how the courts applied the *Gladue* principles. Thirty one of the cases resulted in conditional sentences. After receiving a draft of the thesis I asked her to go back over the cases to assess whether this outcome would now be legally possible in light of the 2012 amendments. This is her conclusion

> *Following the 2012 s. 742.1 amendments, 29 of those 31 conditional sentence orders would no longer be possible. That bears repeating: either immediately on the law, or because on the facts the Crown proceeded by indictment for a hybrid offence now excluded by s. 742.1, 29 of the 31 Aboriginal women that received conditional sentence orders in my research would no longer be eligible for conditional sentences for the same offences/facts today. For one further case, I was unable to determine whether that offender would remain eligible for a conditional sentence, because the answer hinged on whether the Crown proceeded by indictment or summarily, which is unclear in the judgment. I only found one decision of the 31 that actually resulted in a conditional sentence order that would continue to be eligible for a conditional sentence order after the 2012 amendments. To be clear, that means that those 29 (possibly 30, depending on the answer for the judgment I could not conclusively settle) criminalized Aboriginal women would likely have been sent to prison instead under the current 2012 law (although perhaps in limited a strict probationary term may have been ordered). This regressive turn in sentencing law is deeply troubling, and threatens to further exacerbate the ongoing problem of overrepresentation.*[58]

In his 2008 article in the Supreme Court Law Review, reflecting on the first decade of implementation of *Gladue* and particularly the difficulties associated with a lack of informational resources, Jonathan Rudin asked an interesting question:

> *One might wonder why the direction from the Supreme Court of Canada to change the way Aboriginal offenders are sentenced has not met with the same response as other decisions of the Court. For example, when the Court stated that delays in getting matters to trial meant that charges would be thrown out of court, governments responded by building more courthouses and appointing more judges. When the Court mandated more expansive disclosure rules, disclosure practices changed quickly. Recently, the Court required a change to the laws regarding those held on security*

57 Submission on Bill C-10 Safe Streets and Communities Act (Ottawa: CBA, October 2011) at 14, online: <http://www.cba.org/cba/submissions/PDF/11-45-eng.pdf>.

58 Listening to What the Criminal Justice System Hears and the Stories It Tells: Judicial Sentencing Discourses about the Victimization and Criminalization of Aboriginal Women (LL.M. Thesis, University of British Columbia, 2012)

> *certificates and an amended law was passed by Parliament within months. Should not all directions from the Court be addressed promptly?*
>
> *The key difference between R. v. Gladue and the other examples cited above is that in the latter cases, failure by the government to act would mean that potentially guilty people might go free or be released from custody. Inaction on these issues would lead to serious questions from the opposition, editorials in newspapers and the fanning of fears for public safety. On the other hand, inaction in response to Gladue means that Aboriginal people continue to go to jail. While this development clearly constitutes "a crisis in the Canadian criminal justice system" in the eyes of the Court, it does not carry the political baggage that being "soft on crime" carries.*[59]

Some may think this is a cynical view of government policy. But how should we consider the actions of the federal government where in introducing legislation which has its specific and avowed purpose to be tough on crime, completely disregards the impact of the legislation on the inescapable facts of Aboriginal overrepresentation and the inconvenient truths that its policies will ineluctably add to the "staggering injustice, "an indictment of the Supreme Court of Canada.

In describing the work of the Royal Commission On Aboriginal Peoples in its report *Bridging the Cultural Divide,* I showed that its dual track agenda for reform, while recommending the implementation of policies within the existing criminal justice system that would ameliorate overrepresentation, looked to the recognition of the constitutional right of Aboriginal peoples to establish their own systems of justice as the long-term reform objective. While *Bridging the Cultural Divide* created a roadmap for this journey and the adoption by the United Nations of the Declaration on the Rights of Indigenous Peoples affirms this right,[60] its implementation lies on the distant horizon. This has led some commentators, more skeptical than I, to question the legitimacy of the reform agenda itself:

> *Aboriginal peoples' estrangement from the justice process is seen as signalling the presence of cultural barriers to the effective application of the criminal law that are to be overcome (a problem of implementation or efficiency), as opposed to deeper structural inequalities that need to be dealt with (a matter of legitimacy). The integration of restorative values and practices into the justice process provides a way of circumventing what are perceived as cultural obstacles to the effective and efficient application of the criminal law without disturbing the larger conceptual and institutional landscape of social control. Moreover, in this scenario, the power to accommodate Aboriginal cultural difference remains in the hands of judges who determine what form that accommodation will take; thus, the existing authority structure remains virtually untouched.*
>
> *Giving Aboriginal communities a stronger voice in sentencing and incorporating restorative values and aims into the sentencing process thus emerges in the government's sentencing reform initiative as a relatively minor form of political*

59 Rudin, at 704

60 Resolution adopted by the General Assembly on 13 September 2007.Article 34 provides:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Online at http://www.ohchr.org/en/Issues/IPeoples/Pages/Declaration.aspx

> *accommodation that enhances the semblance of legitimacy, aimed at improving the justice system's effectiveness, without fundamentally challenging its structural integrity. The turn to restorative justice offers a relatively straightforward and politically palatable response to an issue that is in reality considerably more complex and potentially destabilizing.*[61]

As someone deeply implicated in both tracks of the reform agenda you would expect that I would not share such skepticism. However, in light of the willful blindness of government to the inescapable facts it will likely be the judiciary, and ultimately the Supreme Court Canada, who will have to respond to the now deepening crisis in the criminal justice system and it will fall to counsel for Aboriginal offenders to sharpen up the arsenal of constitutional challenges to bend the ark of justice back towards justice for Aboriginal peoples.[62]

A concluding reflection. In assessing the impact of *Gladue* Jonathan Rudin observed

> *The very real concern that the Court expressed about Aboriginal over-representation is likely one of the reasons that in 2001 the Speech from the Throne stated:*
>
> > *It is a tragic reality that too many Aboriginal people are finding themselves in conflict with the law. Canada must take the measures needed to significantly reduce the percentage of Aboriginal people entering the criminal justice system, so that within a generation it is no higher than the Canadian average.*
>
> *Unfortunately, six years on from the Throne Speech, this target is moving further and further out of reach.*[63]

We are now thirteen years on and counting.

61 Erica A. Frederiksen Aboriginal Peoples and Restorative Justice in Canada: Confronting the Legacy of Colonialism, Presentation at meetings of the Canadian Political Science Association, Concordia University, Montreal, Quebec, June, 2010, at 10 online at 12

62 As to what those challenges might be, particularly under section 12 of the Charter, the cruel and unusual punishment or treatment clause, see Newell, Making Matters Worse, at 229

63 Rudin, supra, at 695