

# Conditional Sentencing and the Overrepresentation of Aboriginal Offenders in Penal Institutions

(The research in this article is current to March 2000.)

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## Introduction

Amendments to Part XXIII of the Criminal Code of Canada<sup>1</sup> (hereinafter Criminal Code or Code) represent what has been described as a “major overhaul of the sentencing process.”<sup>2</sup> A key feature of this overhaul is reduced reliance upon “imprisonment as a disposition.”<sup>3</sup> Even where imprisonment is considered necessary, the amendments provide for the use of community-based sentences as alternatives to imprisonment, except in the most serious cases.<sup>4</sup> Pursuant to section 742 of the Code, for example, the courts have the discretion to issue a “conditional sentence order” whereby the offender is required to serve his or her sentence in the community, rather than a penal institution.<sup>5</sup> This legislative reform, encouraging reduced reliance on imprisonment and increased emphasis on community-based alternatives, reflects a response to concerns with prison overcrowding, the high cost of incarceration, and the overrepresentation of Aboriginal<sup>6</sup> offenders in penal institutions.<sup>7</sup>

This article critically assesses the likelihood that the conditional sentencing provision will satisfactorily remedy the mischief it was designed to address. The premise of the article is that because the provision is available for all offences, other than those which require a minimum period of imprisonment, it should, theoretically, be able to address the problems of overcrowding, costs and the over-incarceration of Aboriginal offenders. However, there are a number of issues which render this outcome suspect. In so arguing, this article does not advocate repeal of the conditional sentencing provision itself. Rather, it suggests that further legislative amendment and additional education are necessary to clarify the interpretation and application of the conditional sentencing provision.

## Part I. Overview

Canada currently ranks third among western countries, after the United States and Switzerland, for the highest rate of imprisonment, with 92 persons incarcerated per 100,000.<sup>8</sup> Canada’s over-reliance on imprisonment<sup>9</sup> has proven costly -- in terms of both dollars and lives.<sup>10</sup> The Canadian Sentencing Commission's report estimates the ratio of money spent on incarceration to money spent on community supervision as ten or fifteen to one.<sup>11</sup> And while Aboriginal peoples comprise approximately 1.5 to 2% of the Canadian population, they comprise approximately 8 to 10% of the federal correctional institutional population and a “considerably higher percentage in provincial and territorial institutions, particularly in northwestern Ontario and the western provinces.”<sup>12</sup> A high proportion of those persons are imprisoned for property offences and defaults in fine payments.<sup>13</sup>

In view of the foregoing, it would appear that any provision which allows for an alternative to imprisonment for all offences, other than those in which a minimum term of imprisonment is mandated, should alleviate overcrowding and reduce costs. And since particular attention must be paid to the situation of Aboriginal offenders under section 718.2(e) of the Code (incorporated into the conditional sentencing regime at section 742.1(b) ), the overrepresentation of Aboriginal offenders should also be affected by conditional sentencing.

However, the likelihood that conditional sentencing will satisfactorily remedy the mischief it was designed to address is threatened in a number of ways. The perception that conditional sentencing is a panacea for the problems plaguing the penal system is fundamentally misleading. The success of the conditional sentencing provision is also compromised by the degree to which the provision is available as a practical matter; the challenge conditional sentencing poses to the existing retributive paradigm and associated principles informing the sentencing process; concerns with community safety; and the use of the provision in relation to Aboriginal offenders. In addition, the objectives of the conditional sentencing provision contain their own inherent limitations which undermine the likelihood of success of section 742. But despite these reasons for scepticism, the conditional sentencing provision is valuable because it establishes a basis upon which to build further reform.

## **Part II. Critical Assessment**

### **A. The Availability of Section 742**

Section 742.1 provides that a court may order an offender to serve his or her sentence in the community:

[w]here a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

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

(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.<sup>14</sup>

Therefore, while a conditional sentence is technically available for many offences, whether a conditional sentence is appropriate in a particular situation can generate a great deal of controversy.

According to Justice Mercier, in *REGINA v. Ferguson*, appellate courts have understood that Parliament “clearly envisaged that a conditional sentence would be available even in crimes of violence provided they are not punishable by a minimum term of imprisonment.”<sup>15</sup> In *REGINA v. Wismayer*, the Ontario Court of Appeals stated that the conditional sentencing provision extends to asexual offences involving children and to serious drug offences.<sup>16</sup> Allan Gold, president of the Criminal Lawyers’ Association of Ontario, notes that the British Columbia Court of Appeals (B.C.C.A.), in *REGINA v. Urssel*,<sup>17</sup> understood the conditional sentencing provision to encompass “even violent offenders.”<sup>18</sup> The basis for this reasoning is reflected in Justice Mercier’s observation in *W.(L.F.)* that “[i]t is a principle of statutory interpretation that Parliament is presumed to legislate with knowledge of the existing state of the law.”<sup>19</sup>

Evidence that the conditional sentencing regime was intended to include such a wide ambit of disparate offences is reflected in Parliament’s enactment of Bill C-68, the Firearms Act.<sup>20</sup> The Act “impose[d] a mandatory term of four years imprisonment where certain offences, among them manslaughter, are committed with a firearm.”<sup>21</sup> The Act did not, however, render the conditional

sentencing provision inapplicable to manslaughter in general. Where manslaughter is committed with a knife, for example, a conditional sentence is still available.<sup>22</sup> Yet, arguably, manslaughter is a violent offence. Thus, in imposing a minimum penalty for violent offences committed within certain parameters, Parliament has rendered the conditional sentencing provision inapplicable to such offences. However, by leaving the punishment for manslaughter otherwise untouched, Parliament has conveyed its intention that the conditional sentencing provision remain available for violent offences generally.

Despite the technical availability of the conditional sentencing regime for all offences, other than those for which a minimum term of imprisonment is provided, some courts have held that allowing an offender to serve his or her sentence in the community, rather than in a penal institution, is inappropriate for certain offences. For example, in *REGINA v. Ly and Nguyen*, for example, the Ontario Court of Appeals stated that the conditional sentencing provision “will be looked to only rarely in cases of drug trafficking.”<sup>23</sup> In *REGINA v. Berbeck*, Chief Justice McMurtry, writing for the Ontario Court, stated that since the offender had served four months of his conditional sentence and had completed the requisite 200 hours of community service, the court was not prepared to overturn the sentencing decision of the trial judge.<sup>24</sup> The Chief Justice did, however, cite the decision in *Ly and Nguyen* to deny that “conditional sentences are ordinarily appropriate for drug importing offences.”<sup>25</sup> Accordingly, the rationale advanced for not extending conditional sentencing to certain offences has been the need to adhere to sentencing principles.<sup>26</sup> In *REGINA v. Delorme*, for example, Justice Carter observed that Sherstobitoff, Tallis, and Gerwing (Appellate Justices of the Saskatchewan Court of Appeal) “are of the opinion that conditional sentences, generally speaking, are not proportionate to the gravity of the offence” and “do not adequately deter or denounce.”<sup>27</sup>

The position of the Saskatchewan Court conflicts with the thinking of the Ontario Court of Appeals in *Wismayer*, however. Therein, Justice Rosenberg, speaking for a unanimous court, stated that “the enactment of the conditional sentence regime represents a concession to the view that the general deterrent effect of incarceration has been and continues to be somewhat speculative and that there are other ways to give effect to the objective of general deterrence.”<sup>28</sup>

The *Wismayer* court also rejected the notion that specific deterrence and societal denunciation can only be satisfactorily provided by a period of imprisonment served in a penal institution.<sup>29</sup> In so doing, Appellate Justice Rosenberg referred to the decision of the Supreme Court of Canada (SCC) in *REGINA v. M.(C.A.)*,<sup>30</sup> wherein the court stated that, in the context of parole:

[t]he goal of specific deterrence is still advanced, since the offender remains supervised to the extent and degree necessary to prevent possible crime, and since the offender remains under the shadow of re-incarceration if he or she commits another crime. As well, the goal of denunciation continues to operate, as the offender still carries the societal stigma of being a convicted offender who is serving a criminal sentence.<sup>31</sup>

The Saskatchewan Court of Appeals recognized this principle in *REGINA v. Wesnoski*, in which the offence of possession of marijuana for the purposes of trafficking raised issues of specific deterrence and denunciation. But by adding stringent conditions to the conditional sentencing order, these objectives were addressed.<sup>32</sup>

In *Delorme*, Justice Carter also noted that Justices Sherstobitoff, Tallis, and Gerwing of the Saskatchewan Court believed that the conditional sentencing provision “violate[d] the principle of parity.”<sup>33</sup> Parity essentially requires that offenders in similar situations receive similar sentences.<sup>34</sup> According to this principle, if a typical sentence for an offence has involved incarceration, then a similar sentence continues to be required, despite the establishment of a new sentencing regime.

The Saskatchewan justices’ position on parity, however, conflicts with the position adopted by the Ontario Court of Appeals in *Wismayer*. The *Wismayer* court stated that the conditional sentencing provision was applicable even for those offences in which incarceration had been the norm.<sup>35</sup> In fact, Justice Rosenberg stated that a court’s refusal to order conditional sentences for offences that normally attract jail sentences “would frustrate Parliament’s goal of addressing the overpopulation problem for non-violent offenders.”<sup>36</sup> Similarly, in *REGINA v. Horvath*, Justice Bayda stated that “[t]o find otherwise would be to render section 742.1 meaningless.”<sup>37</sup>

The serious split developing among courts concerning the application of the conditional sentencing provision is cause for concern. The refusal of some justices to seriously entertain the application of the conditional sentencing provision to all offences, other than those for which a minimum penalty is provided, may lead to a sentencing patchwork, disparity in results, and unpredictability. These results should be avoided. Justice Sherstobitoff, for example, noted that “[i]n disparity lies injustice.”<sup>38</sup> In addition, reliance on institutional incarceration alone to effectuate sentencing principles -- in particular the principle of deterrence -- reflects archaic thinking that emphasizes institutional incarceration as the only method capable of satisfying retributivist sentencing principles. Yet it was the status quo which generated the need for the conditional sentencing provision in the first place. It is very unlikely that the judiciary, which has vastly contributed to the current situation of overrepresentation through its emphasis on traditional retributivist philosophy, will readily incorporate elements of restorative justice into its sentencing practices. Moreover, as Roberts and von Hirsch note, “[s]imply suggesting that judges consider other sentencing options is unlikely to have much impact upon sentencing practices across the country” since “[i]n all possibility, judges already consider alternatives to incarceration before they imprison offenders.”<sup>39</sup>

If the prevailing judicial attitude is maintained, there will be little movement on the problems of overcrowding, costs, and the overrepresentation of Aboriginal offenders in penal institutions. Therefore, in order that the conditional sentencing provision be allowed to effectively remedy the mischief it was designed to address, it is essential that all actors<sup>40</sup> in the justice system rethink sentencing from a philosophical vantage point.

## **B. The Safety of the Community**

One factor to be considered by a sentencing judge in determining whether to issue a conditional sentence is whether the serving of the sentence in the community would endanger the safety of the community.<sup>41</sup> While this factor is an essential consideration, controversy over how the statute should be interpreted poses an obstacle to the success of the conditional sentencing provision.<sup>42</sup> When section 742.1 was first enacted, it stated:

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

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.<sup>43</sup>

Under this wording, the issue for the courts was limited to consideration of whether an offender was likely to re-offend and, if so, whether this would endanger the safety of the community.<sup>44</sup> Subsequently, however, section 742.1(b) was amended to state:

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

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

- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community *and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 [see infra, Part II. C.]*

the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.<sup>45</sup> (Emphasis added.)<sup>46</sup>

The addition of the requirement that the conditional sentence be "consistent with the fundamental purpose and principles of sentencing"<sup>47</sup> is significant in terms of how the provision should be interpreted. This, in turn, will impact upon the provision's likelihood of success.<sup>48</sup>

In *Pierce*, for example, defence counsel argued that “if the particular accused does not pose a threat to the safety of the community in the sense of re-offending” then the issue of whether the offender would “endanger the safety of the community was satisfactorily addressed.”<sup>49</sup> This argument was informed by the philosophy underlying the original version of section 718.2(e). Appellate Justice Finlayson, for example, stated that the defence interpretation resulted from limiting consideration of sentencing principles to the first of a “two-stage approach”<sup>50</sup> – determination of the term of the sentence. The actual determination of whether or not an offender ought to be able to serve his or her sentence in the community -- the second stage -- was arrived at without resort to sentencing principles.<sup>51</sup> The Crown, however, adopted the position that the phrase “endanger the safety of the community” encompassed consideration of the effect of a conditional sentence on “the public’s respect for the justice system and its perception of receiving protection from the sentencing process.”<sup>52</sup> Thus, the Crown’s interpretation appeared to be based on the extent to which sentencing principles informed the sentencing process. While not incompatible with the two-stage approach, the Crown’s interpretation considered the principles of sentencing throughout the sentencing process -- including at the stage of determining whether an offender’s serving his or her sentence in the community would endanger the safety of the community.<sup>53</sup>

Appellate Justice Finlayson’s preference for the “simpler approach” that avoided the “rigid two-step process in the first place”<sup>54</sup> has been disregarded and the Crown’s position as outlined in *Pierce* continues to be influential.<sup>55</sup> In *Ferguson*, for example, Justice Mercier noted that “[i]n effect, the [*Pierce*] court decided that where the actual sentence imposed, after considering the offender, and all the sentencing guidelines in the Criminal Code, is deemed proper, regard should still be had to all those sentencing guidelines to determine if a conditional sentence is appropriate.”<sup>56</sup>

The effect of the phrase “endanger[ing] the safety of the community,” then, is not to be confined to the likelihood that an offender would re-offend, but also encompasses consideration of any danger posed by “those who may be inclined to engage in similar conduct.”<sup>57</sup> While this broad interpretation of the phrase “endangers the safety of the community” is understandable from the standpoint of the safety of the community, it is also problematic. One difficulty lies in the presupposition that all potential offenders (or a good portion of same) will actually be deterred if the offender in question is required to serve his or her sentence in a penal institution. But the historic reliance upon incarceration to achieve deterrence has resulted in the problems of overcrowding, excessive costs, and the overrepresentation of Aboriginal persons in penal institutions -- factors which resulted in the need for the conditional sentencing provision. The conditional sentencing regime represented a movement *away* from the use of imprisonment as the penal sanction of choice -- a concession that “the general deterrent effect of incarceration has been and continues to be somewhat speculative.”<sup>58</sup>

Furthermore, there are a number of ways to achieve deterrence. The key is to be creative with respect to sentencing submissions and to have a receptive sentencing judge. In addition, the idea that deterrence actually stops prospective offenders, and thus somehow keeps the community safe, creates a false sense of security. At best, the value of deterrence is based on speculation.

As the foregoing suggests, however, judicial interpretation of the phrase “endanger the safety of the community” at section 742.1(b) indicates that it is unlikely conditional sentencing will satisfactorily remedy the mischief it was designed to address.

### C. Aboriginal Offenders

The overrepresentation of Aboriginal offenders in Canadian penal institutions is a complex issue. LaPrairie, for example, cautions that assuming that the overrepresentation of Aboriginal peoples is a problem to be addressed by the criminal justice system is “simplistic and misleading and impedes finding real and long-lasting solutions to the overrepresentation problem.”<sup>59</sup> The complexity of the problem is also captured by Quigley, who writes that:

Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, [and] 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. This is systemic discrimination.<sup>60</sup>

Judicial opinion that the socioeconomic factors articulated by Quigley warrant the imposition of a penal sentence,<sup>61</sup> where such factors disproportionately and negatively impact upon Aboriginal peoples,<sup>62</sup> together with general judicial overreliance on incarceration,<sup>63</sup> implies that the judiciary has played a critical role in the overrepresentation of Aboriginal offenders in penal institutions.

While the causes of Aboriginal overrepresentation may be complex, however, there is no dispute as to the *fact* of Aboriginal overrepresentation. Michael Jackson’s observation that, in the province of Saskatchewan, “prison has become for young native men the promise of a just society which high school and college [or university] represent for the rest of us”<sup>64</sup> attests to the magnitude of this tragedy. In order for section 742.1 to have any meaningful effect on the overrepresentation crisis, the judiciary will need to take an active role. But in light of the judiciary’s contribution to the problem, any expectation that the judiciary will do so is naïve.<sup>65</sup> Accordingly, it is unlikely that the conditional sentencing provision will remedy the overrepresentation of Aboriginal persons in penal institutions. Since this overrepresentation is also responsible for overcrowding and the high cost of warehousing offenders, it is unlikely that conditional sentencing will satisfactorily address these issues either.

One could argue that the amendment to section 742.1(b) of the Code should be of assistance in addressing the situation of Aboriginal offenders. As noted earlier, section 742.1(b) refers a court to the sentencing principles provided at sections 718 through to 718.2. Section 718.2(e) requires that particular attention be paid to the circumstances of Aboriginal offenders. These sections provide:

## Purpose of Sentencing

§ 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.<sup>66</sup>

## Fundamental Principle of Sentencing

§ 718.1: A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.<sup>67</sup>

## Other Sentencing Principles

§ 718.2: 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 of 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 paid to the circumstances of [A]boriginal offenders.<sup>68</sup>

However, as the following discussion will illustrate, the interpretation of who falls within the scope of the term “Aboriginal” and what is meant by the phrase “circumstances of [A]boriginal offenders” at section 718.2(e) will affect the use of conditional sentencing. Consequently, the likelihood that section 718.2(e) -- and thus section 742.1 -- will be successful in reducing the overrepresentation of Aboriginal offenders in penal institutions, high costs, and overcrowding will also be affected.

In *REGINA v. Gladue*, for example, the trial judge construed the scope of “Aboriginal offenders” as applying only to Aboriginal persons living on reserves.<sup>69</sup> The Court of Appeals quoted the trial judge as follows:

The factor that is mentioned in the Criminal Code is that particular attention to the circumstances of [A]boriginal offenders should be considered. In this case, both the deceased and the accused were [A]boriginal, but they are not living within the [A]boriginal 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 [A]boriginal status and so I am not giving any special consideration to background in the passing of this sentence.<sup>70</sup>

The Court of Appeals rejected the trial court’s conclusion that section 718.2(e) is inapplicable to Aboriginal persons not living within the Aboriginal community. However, Appellate Justice Esson, in a short opinion concurred in by Appellate Justice Prowse, concluded that the trial judge had not erred in holding that there was no basis for giving special consideration to Ms. Gladue’s Aboriginal background.<sup>71</sup> The court did not elaborate, except to state, “To put it another way, the particular circumstances could not reasonably support a conclusion that the sentence, if a fit one for a non-[A]boriginal person, would not also be fit for an [A]boriginal person.”<sup>72</sup> Thus, the court, while allowing Ms. Gladue’s appeal, dismissed it.<sup>73</sup>

The comparative fitness of the sentence, however, does not appear to fall within the ambit of section 718.2(e), nor, more specifically, within the meaning of the phrase “the circumstances of Aboriginal offenders.”<sup>74</sup> Nor does section 718.2(e) contain a residency requirement.<sup>75</sup> Thus, while

the court appears to disagree with the trial judge's "broad proposition in relation to the unavailability of section 718.2(e) for Aboriginal offenders not living on reserves," the court's decision rings hollow.<sup>76</sup> The court's interpretation effectively guts section 718.2(e) of its intended meaning and ignores Parliament's intention to reduce the overrepresentation of Aboriginal persons in the justice system.<sup>77</sup>

Appellate Justice Rowles, however, while agreeing that the trial judge's interpretation of section 718.2(e) was incorrect,<sup>78</sup> wrote a lengthy opinion in support of a broad interpretation of the provision, noting that there is no reserve residency requirement at section 718.2(e).<sup>79</sup> Specifically, she noted that "[t]he fact that the appellant was not living on the reserve did not alter her [A]boriginal heritage or her cultural ties and it did not alter the significance of those factors in her rehabilitation."<sup>80</sup> While conceding that "assessing the impact of an [A]boriginal offender's heritage may be more complex where the offender does not live on a reserve,"<sup>81</sup> she stated that the offender's heritage "cannot be regarded as irrelevant in the sentencing process."<sup>82</sup>

Appellate Justice Rowles also discussed, at length, factors that affect the circumstances of Aboriginal peoples.<sup>83</sup> She wrote, for example, that section 718.2(e) "invites recognition and amelioration of the impact systemic discrimination has on [A]boriginal people."<sup>84</sup> Therein, she relied on Quigley's succinct description of the factors which inform this systemic discrimination, outlined *supra*.<sup>85</sup>

Appellate Justice Rowles' opinion was heavily influenced by the legislative intent underlying section 718.2(e).<sup>86</sup> Accordingly, Appellate Justice Rowles wrote that:

From the many commission reports and the parliamentary debates on Bill C-41 [the amending legislation], I think it is clear that the mischief subsections 718.2(d) and 718.2(e) were designed to remedy was the excessive use of incarceration in the criminal justice system in Canada and the disproportionately high number of aboriginal people who are incarcerated.<sup>87</sup>

As authority for her opinion, Appellate Justice Rowles cited the Supreme Court's statement in *REGINA v. Heywood* that "legislative debates may be considered for the general purpose of determining the mischief Parliament was attempting to remedy with the legislation."<sup>88</sup> Thus, she would have granted leave to appeal and reduced the sentence from three years to two years less a day, to be followed by three years probation.<sup>89</sup>

Although comprehensive and well-reasoned, Appellate Justice Rowles' opinion was a minority opinion. If this is any indication of the prospects for success of section 718.2(e) -- and, by implication, section 742.1(b) -- one might expect that section 718.2(e) will simply become a box to check off on a checklist of items to ensure that a judge has considered "the circumstances of [A]boriginal offenders"<sup>90</sup> when pronouncing sentence.

The Court of Appeal's decision in *Gladue* was recently heard by the Supreme Court of Canada.<sup>91</sup> This development is significant because it represents the first time that Canada's highest court has had an opportunity to interpret section 718.2(e). The SCC identified a number of errors at the trial and appellate court level, including the trial court's limitation of the application of section 718.2(e) to the circumstances of Aboriginal offenders living in rural areas or on-reserve; the trial court's failure to consider systemic or background factors that may have influenced Ms. Gladue to

engage in criminal conduct; the possibly distinct concept of sentencing held by the offender, the victim's family and their community; and the appellate court's dismissal of Ms. Gladue's application to introduce new evidence. The Supreme Court stated that, under different circumstances, these errors would have been sufficient to send the matter back to the trial level for a new sentencing hearing in order to review the circumstances as an Aboriginal offender. However, due to the seriousness of the offence, the SCC held that the sentence of three years' imprisonment was not unreasonable. The Court therefore dismissed Ms. Gladue's appeal.<sup>92</sup>

In *Gladue*, the SCC not only agreed that the trial court had erred in limiting the scope of section 718.2(e) to Aboriginal peoples living on reserves, it also adopted Appellate Justice Rowles' liberal interpretation of section 718.2(e). Justice Turpel-Lafond has described the SCC's decision in *Gladue* as a "watershed."<sup>93</sup> In construing section 718.2(e), the SCC observed that, while innovations in sentencing cannot "remove the causes of [A]boriginal offending and the greater problem of [A]boriginal alienation from the criminal justice system,"<sup>94</sup> sentencing judges have an integral role to play in remedying the injustice that has been, and continues to be, wrought against Canada's Aboriginal peoples.<sup>95</sup> The Court stated, for example, that sentencing judges are the

decision-makers who have the power to influence the treatment of [A]boriginal offenders in the justice system. They determine most directly whether an [A]boriginal 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.<sup>96</sup>

According to the SCC, Parliament, through the sentencing reform evidenced at section 718 of the Criminal Code, and through specific sentencing directives in relation to Aboriginal offenders, "has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to [A]boriginal peoples."<sup>97</sup> Thus, while sentencing remains an individual process, and a sentencing court must strive to find the sentence appropriate for the particular accused and for the particular offence committed in his or her community, "a critical component of s[ection] 718.2(e)"<sup>98</sup> is the judicial duty to *apply* section 718.2(e): "There is no discretion as to whether to consider the unique situation of the [A]boriginal offender; the only discretion concerns the determination of a just and appropriate sentence."<sup>99</sup> Hence, judges have a "judicial duty to give its remedial purpose real force."<sup>100</sup>

Despite the SCC's broad interpretation of section 718.2(e), and its finding that judges have a duty to consider the circumstances of Aboriginal offenders, Quigley notes that, in reality, "there is much less discretion to avoid sentencing an offender to a term of imprisonment"<sup>101</sup> than suggested by the SCC. The reason for this is that provincial appellate courts "act as policy-making bodies and as the final arbiters of the quantum of sentence."<sup>102</sup> Quigley explains:

Courts of appeal established starting point sentences for particular

offences as guidelines for trial judges. Because of the doctrine of stare decisis, those guidelines become mandatory guidelines in the sense that a trial judge can only deviate from the starting point according to the presence of aggravating or mitigating factors. Otherwise, the sentence is very likely to be overturned on appeal on the ground of unexplained disparity with the sentences normally imposed in that jurisdiction for that offence.<sup>103</sup>

While Quigley notes that this policy is firmly embedded in the Saskatchewan Court of Appeals, a similar policy is entrenched among appellate courts across Canada. This lack of discretion on the part of trial and appellate courts may be a significant reason why judges are reluctant to give section 718.2(e) the remedial force contemplated by the SCC in *Gladue*.

Thus, the broad interpretation of section 718.2(e) adopted by the SCC in *Gladue* suggests, in theory, that section 718.2(e) and, by extension, section 742.1, could remedy the overrepresentation of Aboriginal offenders in penal institutions, and the resulting overcrowding and high cost of warehousing offenders. However, the limitations noted above suggest that optimism should be tempered with caution, particularly when one recalls Roberts and von Hirsch's warning that simply suggesting that judges "consider alternatives to imprisonment will not significantly impact traditional sentencing practices."<sup>104</sup> While this is problematic in itself, it is even more troubling when one considers the potential backlash that Aboriginal peoples may experience due to the perception of their 'special treatment' pursuant to section 718.2(e) of the Code.<sup>105</sup>

## **D. Inherent Limitations**

### **(i) Other Minority Offenders**

The preceding section discussed a number of factors impeding the use of the conditional sentencing and suggested that the mischief that the sentencing amendments were designed to address may not be so readily resolved. It is also evident, however, that "in some provinces, such as Ontario, it is not native Canadians who are overrepresented in the provincial jails, but visible minorities such as urban Blacks."<sup>106</sup> The Commission on Systemic Racism in the Ontario Criminal Justice System indicates that "the prison admission rate in 1992-93 for [B]lacks was twice as high as it was for [A]boriginals."<sup>107</sup> For "high frequency offences (i.e. drug trafficking) the rate of prison admissions for Whites was 32/100,000 versus 701/100,000 for Blacks."<sup>108</sup>

Thus, while the attempt to ameliorate Aboriginal overrepresentation in Canadian penal institutions is a step in the right direction, and may reduce the number of Aboriginals incarcerated, it does not go far enough. In addition to Aboriginal offenders, other minority groups are also over-incarcerated. The failure to recognize the circumstances of other minority groups suggests that

prison overcrowding and excessive costs may not be so readily resolved by the sentencing amendments.

To remedy this problem, an amendment should be added to section 718.2(e) providing that the particular circumstances of various minority groups be taken into consideration when sentencing these offenders. In view of the historic over-incarceration of Aboriginal peoples, an additional subsection should be added to section 718.2 to address the situation of other minority offenders. Furthermore, in view of the difficulties that have arisen in interpreting the term “Aboriginal,” any reference to minority persons should be clearly defined.

## (ii) Judicial Use of Conditional Sentencing

The conditional sentencing provision creates a sort of “penological paradox”<sup>109</sup> for judges. On the one hand, an offender may be sentenced to incarceration, while on the other hand, under a conditional sentence order, the offender, though still sentenced to a term of imprisonment, does not serve time in an actual prison but at home, in the community. This creates what has been described as a “*reductio ad absurdum*.”<sup>110</sup>

Although Appellate Justice Rousseau-Houle, in *REGINA v. Maheu*, stated that “it is wrong to consider a conditional sentence order as a lenient sentence,”<sup>111</sup> a judge may still perceive it as such. As a result, he or she may not employ the conditional sentence order at all, or may issue a longer conditional sentence order than the time the offender might have been required to serve in a provincial prison.<sup>112</sup> The conditional sentence order, for example, may be treated as a “robust probation order.”<sup>113</sup> McDermott notes that “[c]onditional sentences could be seen as a happy medium for all sides with a decent-sounding whack without the whack.”<sup>114</sup> A review of the length of conditional sentences (not including probation) suggests that 26% of conditional sentences were imposed for periods under three months, while 56% of conditional sentences were for terms of six months or less.<sup>115</sup>

If this is the case, there is a danger that persons who would otherwise have received an absolute discharge, conditional discharge, fine and probation, or a suspended sentence will instead receive a term of imprisonment in a provincial institution, but, pursuant to a conditional sentence order, serve their sentence in the community. Evidence of this “net widening” effect<sup>116</sup> exists in Canada and elsewhere. In Canada, for example, evidence of this effect is notable in the use of community service orders [hereinafter CSO’s]. While CSO’s were originally developed “as a sentencing alternative to short terms of imprisonment,” they later became a tool “to make the system harsher, and to increase control over offenders who otherwise would have received a lesser punishment.”<sup>117</sup> Evidence of this net widening phenomenon has also been observed in England in the context of the “suspended sentence.”<sup>118</sup> There, it has been estimated that between 50 to 60 percent of offenders who were never at risk of imprisonment to start with received a suspended sentence.<sup>119</sup> It is noteworthy that, “[a]pparently, out of concern that [courts] were using the suspended sentence too often, the U.K. Criminal Justice Act [of] 1991 added the requirement that [a suspended sentence] only be ordered in exceptional circumstances.”<sup>120</sup>

The existence of this net widening phenomenon is obviously problematic because it brings into the incarceration web increased numbers of offenders who, but for the conditional sentencing provision, would not have been considered for a jail sentence. The more frequently offenders receive conditional sentence orders, the greater the likelihood that at least some offenders will breach the terms of the orders. Pursuant to section 742.6(9), a number of options are available to the court when an offender breaches the conditions of a conditional sentence order.<sup>121</sup> A court may take no action at all;<sup>122</sup> change the optional conditions attached to the order;<sup>123</sup> suspend the conditional sentence order, direct that the offender serve a portion of the unexpired term of imprisonment in custody,<sup>124</sup> and order the resumption of the conditional sentence when the offender is released from custody, with or without changes to the optional conditions;<sup>125</sup> or terminate the conditional sentence order<sup>126</sup> and direct that the offender serve the remainder of his or her sentence in custody.<sup>127</sup> If incarceration is imposed, then the cycle of incarceration continues to spin its web. For example, of the 1,712 known breaches of conditional sentences in Canada between September 6, 1996, and March 31, 1999, 68 percent were addressed either through imprisonment or partial imprisonment for the period of time remaining in the conditional sentence order.<sup>128</sup> This cycling effect will only augment the overcrowding and cost problems. In addition, as Andrea Tuck-Jackson notes, use of an inflated sentence<sup>129</sup> “poses a risk to offenders who face punishment for subsequent offences.”<sup>130</sup>

In view of the consequences that may arise from the breach of conditional sentence orders, it is essential that longer sentences than would otherwise be required not be imposed. Since the tendency to issue a longer sentence may stem from the perception that the conditional sentence order is “lenient,” ongoing judicial education is necessary. And to the extent that public opinion constitutes the backdrop against which sentencing occurs, the public must also be educated on the nature of, and philosophy underlying, a conditional sentence order.

Lack of attention to public education is a clear weakness in the conditional sentencing regime. In *REGINA v. Parker*, Appellate Justice Bateman stated that:

[I]t may be fair to assume that given the newness of the conditional sentence provision, the public will initially view it as a lenient disposition when compared to institutional imprisonment. To that extent, it is unfortunate that the implementation of the legislation was not accomplished by a public education program. In my view, however, a conditional sentence can in certain circumstances, effect a more restrictive and lengthier period of confinement and control than the offender would experience if institutionalised.<sup>131</sup>

Appellate Justice Bateman has also stated that:

The extent to which the public accepts the deterrent and denunciative value of a conditional sentence will only be measured over time. Judicious use of the conditional sentence will provide the

public with an opportunity for first hand observation of its impact upon the liberty of an offender. A properly informed public, in my view, will not perceive a conditional sentence, such as that imposed here, to be a lenient disposition. The essence of institutional incarceration is a deprivation of liberty. The conditional sentence ordered here effects a substantial deprivation of liberty.<sup>132</sup>

### **(iii) Costs.**

From a cost-per-offender perspective, community alternatives to incarceration will generally always appear cost-effective.<sup>133</sup> In the case of conditional sentence orders, for example, serving a term of imprisonment in the confines of one's home and community would appear to cost the state very little. Similarly, mandatory conditions attached to a conditional sentence order, such as the requirement that an offender keep the peace and be of good behaviour<sup>134</sup> are not cost intensive.<sup>135</sup> Baumer and Maxfield caution, however, that this appearance of economy "is an artefact of the way in which the costs are calculated and disregards the cost of correctional supervision necessary to monitor offenders for compliance to the terms attached to community sentence orders."<sup>136</sup> For example, optional terms such as abstention from alcohol or other intoxicating substances,<sup>137</sup> abstention from unauthorised drugs,<sup>138</sup> and abstention from owning or carrying a weapon<sup>139</sup> entail costs if compliance with these conditions is to be monitored.<sup>140</sup>

Another example is provided in section 742.3(2)(f), a blanket provision that permits the court to require that an offender comply with other reasonable conditions that the court considers necessary and desirable in order to secure "the good conduct of the offender" and to prevent the offender from committing the same or other offences.<sup>141</sup> LaPrairie reports in her study of conditional sentence orders issued between September 6, 1996 and March 31, 1999 that this was the most frequent optional condition imposed.<sup>142</sup> Next in preference were requirements that an offender receive treatment, perform community service work, comply with a curfew, and make restitution.<sup>143</sup>

One condition that might be imposed by a conditional sentence order pursuant to the latter provision is the requirement that an offender wear an electronic monitoring device as a prerequisite to serving a sentence in the community.<sup>144</sup> In Ontario, increasing reliance is being placed on electronic monitoring devices to keep track of offenders.<sup>145</sup> One of the concerns with electronic monitoring, however, is "that it would be so easy to implement that judges would use it in the manner of the proverbial child with a hammer, hitting everything and everybody within reach."<sup>146</sup>

The ability to monitor offenders has been likened to an "Orwellian new age of surveillance and its capacity to compromise privacy."<sup>147</sup> In *Wesnoski*, for example, one of the terms of the

conditional sentence order required the accused to “permit entry and inspection by the R.C.M.P. [Royal Canadian Mounted Police] of his residence, vehicle and property no more than once every two weeks. Such inspection is to be carried out only at reasonable hours.”<sup>148</sup> While strict enforcement conditions may be applauded for putting teeth into conditional sentencing and attracting public support for the provision, “the more stringently ISP (Intensive Supervision Probation and Parole) programs enforce their punitive conditions, the more likely they are to exacerbate prison crowding and to approach the costs of imprisonment.”<sup>149</sup>

Baumer and Maxfield note that unless a program such as electronic monitoring “will completely recover its cost through user fees, prevent construction of a new facility, or allow the jurisdiction to close an existing facility, there will almost always be a net additional cost.”<sup>150</sup> Experience in the United States and abroad, however, suggest that cost recovery is problematic. Petersilia and Turner, for example, observe that intensive supervision programs in the United States resulted “in costs up to twice as high as for routine supervision.”<sup>151</sup> In England and Wales, “the Home Office conducted an evaluation of a modest pilot project, and, in its aftermath, decided not to adopt electronic monitoring.”<sup>152</sup> In view of the desire for cost savings, ironically, one of the drawbacks to electronic monitoring programs in England and Wales was cost. Other problems included the need to effect a national program and to gain the confidence of the actors involved.<sup>153</sup> In this regard, Ruby also notes that while an alternative such as a community sentence order theoretically minimises the financial hardship on the offender, the actual time necessary to complete the sentence may have an adverse economic impact.<sup>154</sup> In addition to higher costs associated with monitoring for offender compliance, there are costs associated with the processing of recidivists.<sup>155</sup> The key to cost savings appears to be the philosophy regarding violations: where violations are ignored, the costs are lower, but where violations are routinely and rigidly enforced, the cost of community supervision is higher.<sup>156</sup>

Thus, while section 718.2(e) may appear to address the problem of Aboriginal overrepresentation, and thus relieve overcrowding and excessive costs, problems with the sentencing amendments suggest that the mischief intended to be addressed by the amendments may not be so readily resolved. To evaluate the effectiveness of the conditional sentencing provision, a number of issues should be examined, including what the provision was designed to accomplish; the prioritisation of its goals; whether the public supports the goals and priorities; how to measure results; and whether the costs of accomplishing those results are affordable.<sup>157</sup> Such an evaluation is essential before embarking on additional spending on enforcement programs.<sup>158</sup>

## **E. Additional Limitations.**

### **(i) Recidivism.**

In addition to inherent limitations, there are additional features that raise issues concerning the ability of the conditional sentencing provision to remedy the mischief it was designed to redress.

It is generally too early to project whether the use of the conditional sentencing provision will result in a high recidivism rate in Canada. Analyses of rates of recidivism where similar programs have been used in the United States have yielded mixed results.<sup>159</sup> Some results suggest that offenders serving time in the community pose no more risk than offenders on probation.<sup>160</sup> One observer hypothesizes that studies suggesting that there is no appreciable difference in risk might be explained by the fact that the offenders being studied are “low-risk” offenders.<sup>161</sup> Another possible explanation is that increased surveillance has the effect of preventing new offences.<sup>162</sup>

Similarly, studies which reveal a higher rate of recidivism for offenders serving time in the community than for offenders on probation may be due to the fact that the offenders were simply “high risk” offenders.<sup>163</sup> Another finding arising from studies of ISP programs in the United States indicates that programs similar to the conditional sentencing regime, while not reducing recidivism rates, did have the potential to achieve some cost savings.<sup>164</sup>

A number of conclusions can be drawn from the U. S. experience. First, it is likely that high-risk offenders that are not weeded out of the conditional sentencing process will continue to re-offend.<sup>165</sup> And while low-risk offenders may also re-offend, there may still be some cost savings in having them serve their sentences in the community.<sup>166</sup> While conclusive results concerning recidivism and Canada’s conditional sentencing regime will not be forthcoming for some time, the results from the United States suggest benefits as well as problems. Richard Will’s observation that a reduction in recidivism rates may result from a combination of close supervision, counselling and treatment is promising.<sup>167</sup> This latter finding suggests that “some funds now expended on monitoring and incarcerating high risk offenders for technical violations might be spent more productively on drug and alcohol treatment and job placement.”<sup>168</sup>

## (ii) Societal Reaction.

The *Maheu* court has stated that a conditional sentence order should not be viewed as a lenient sentence, but as a “sword of Damocles” which “hangs over the offender” in the form of a threat of imprisonment.<sup>169</sup> In *REGINA v. G. (K.R.)*, Justice Donnelly stated that “[a] conditional order must be, and must be seen to be, more onerous than suspended sentence by way of probation.”<sup>170</sup> Consequently, on the continuum of severity, a conditional sentence falls somewhere between a conventional sentence of imprisonment, in which the offender is required to serve the sentence in a provincial institution, and a suspended sentence.<sup>171</sup>

Despite the foregoing model of the conditional sentence, it is unclear whether the general public will be convinced that a conditional sentence is not a lenient sentence. Since the general public already perceives that offenders receive lighter sentences than they actually receive,<sup>172</sup> convincing the public to accept conditional sentencing as a legitimate sentencing tool will require effort.

Although sentencing need not appease the public, public confidence in the judicial system is important if the system is to operate effectively and command respect. Thus, there is an immediate need for education of both the legal community and the general public regarding the purpose of the conditional sentencing provision. Both the legal community and the general public have a responsibility to acknowledge that the status quo is simply not working, and that a more effective alternative is not only desirable, but essential.

In addition, societal reaction to conditional sentencing may vary with the community that one belongs to and whether or not a particular offence involved violence.<sup>173</sup> In the case of *REGINA v. Deane*,<sup>174</sup> a white police officer was convicted of criminal negligence in the shooting death of an Aboriginal man.<sup>175</sup> The police officer, Dudley George, received a sentence of two years less a day, and was ordered to serve his sentence in the community pursuant to a conditional sentence order.<sup>176</sup> Family members of the victim were quite upset.<sup>177</sup> A reporter covering the sentencing hearing quoted family members as stating that the sentence implies that it is “OK to go out and kill a native,” and that the sentencing was “another example of the courts favouring White Canadians over First Nations’ people.”<sup>178</sup> Alex Akiwenzie of the Ottawa Native Concerns Committee stated that, in addition to the pain and hurt Aboriginal people felt, what was important to him and other “Indian peoples” was the reaction of white society. Akiwenzie simply asked, “Did white society believe that what Mr. Deane did was wrong and that the ‘sentence’ that Mr. Deane received was fair?”<sup>179</sup>

The foregoing suggests that society may have mixed feelings concerning the conditional sentencing provision, whether one is Aboriginal or not. Notwithstanding, conditional sentencing must attempt

to “provide a credible community sanction at less cost than incarceration and without endangering public safety.”<sup>180</sup> And the court issuing the sentence must apply the provision in the midst of controversy, while remaining impartial and maintaining “independence from public clamour.”<sup>181</sup>

## **Conclusion.**

The sentencing amendments to the Criminal Code have the potential to address serious issues identified in the criminal justice system. However, in view of concerns with the success of both the conditional sentencing provision at section 742.1, and the provision reducing reliance on imprisonment at section 718.2(e), a number of factors suggest that the mischief that the sentencing amendments were designed to address may not be so readily resolved. While these concerns may be addressed by further legislative reform and educational efforts, inherent limitations in the provisions themselves are also problematic. Despite the limitations, however, if conditional sentencing fails to achieve its purposes, it will not be because the tools to achieve reform were unavailable. Rather, the failure may be attributable to a combination of factors, including but not limited to archaic thinking, which emphasises institutional incarceration as the sentencing method of choice, and a bias against extending conditional sentences to Aboriginal offenders. The greatest hurdle may be the fact that the sentencing amendments are being asked to do the impossible -- to effect change when the values inherent in the justice system and society are simply not prepared to depart from the status quo. However, the conditional sentencing provision should not be repealed. Conditional sentencing may not be the perfect solution, but the new provisions do form a solid basis upon which to implement further reform.

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Table X - Judicial Responses to Breaches.

Tables appear as numbered here in C. LaPrairie, *Conditional Sentence Orders By Province and Territory: September 6, 1996 - March 31, 1999 - Final Report* (Ottawa: Department of Justice, 1999).

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<sup>1</sup> Revised Statutes of Canada (R.S.C.) ch. C-46 (1985), as amended by Bill C-41, An Act to Amend the Criminal Code (sentencing) and other Acts in consequence thereof, Statutes of Canada (S.C.) ch. C-22 (1995) (in force September 3, 1996); as further amended by Bill C-17, the Criminal Law Improvement Act, 1996 Canada Gazette (C.

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Gaz.) Part 111, ch. 18, §107.1 (1997) (in force May 12, 1997). Unless otherwise indicated, all subsequent references to the “Criminal Code” or “Code” refer to R.S.C. ch. C-46 (1985), as amended.

<sup>2</sup> See C. T. Griffiths & S. N. Verdun-Jones, *CANADIAN CRIMINAL JUSTICE* 432 (2d ed. Harcourt Brace & Co., 1994).

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See R.S.C. ch. C-46, § 742.1 (1985).

<sup>6</sup> I have opted to use the term “Aboriginal” when referring to Canada's First Peoples for the sake of consistency with other materials referred to herein.

<sup>7</sup> These concerns have been expressed in various reports over the years. See, e.g., the Canadian Sentencing Commission, *Report of the Canadian Sentencing Commission* (Ottawa: Ministry of Supply and Services Canada, 1966); and the House of Commons Standing Committee on Justice and the Solicitor General's *Report of the Standing Committee on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Ministry of Supply and Services Canada, 1988).

<sup>8</sup> See S. Mihoeran and S. Lipinski, *International Incarceration Patterns, 1980-1990*, 12 *Juristat Service Bulletin* 12 (1992), as cited in J. V. Roberts and A. von Hirsch, *Statutory Sentencing Reform: The Purpose and Principles of Sentencing*, 37 *Crim. L. Q.* 220, 228-229 (1995).

<sup>9</sup> See Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* xiii (Ottawa: Minister of Supply and Services Canada, 1987).

<sup>10</sup> See *id.* at 233.

<sup>11</sup> See *Report of the Canadian Sentencing Commission*, *supra* note 7 at 42-44. The Commission estimates that the cost of warehousing an offender in a federal institution during the 1984-1985 period was \$40,672, compared to \$4,508 for parole supervision. See *id.* A similar comparison applies to the costs of provincial incarceration *vis a vis* the costs of probation. See *id.* at 358-359. Rosenberg, J. A. (Appellate Justice), writing for the Ontario Court of Appeals, has stated that, since the costs per inmate have remained constant since 1984-85, this comparative data is likely to be relevant to the date of the decision in *Wismayer*. See *REGINA v. Wismayer*, [1997] 33 *Ontario Reports* (3d) (O.R.3d) 225 (Ont. C.A.) at 243.

<sup>12</sup> See C. LaPrairie, *The Role Of Sentencing In The Overrepresentation Of Aboriginal People In Correctional Institutions*, *CDN. J. CRIM.* 429 (1990).

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<sup>13</sup> See J. V. Roberts and A. von Hirsch, *supra* note 8 at 228-229.

<sup>14</sup> See *supra* note 5.

<sup>15</sup> See Court File No. 93-080132, Dominion Reporting Service No. 9711205, [May 5, 1997] (Ont. Crt. Gen. Div.) at para. 106 (reported on QuickLaw).

<sup>16</sup> See *Wismayer*, *supra* note 11 at 247-248. Rosenberg, J. A., writing for the court in *Wismayer*, also cites with approval the words of Justice Mercier in *REGINA v. W.(L.F.)*, [1996] 146 Newfoundland and Prince Edward Island Reports (Nfld. & P.E.I.R.) 298 (Nfld. T.D.) at 306.

<sup>17</sup> [1997] 117 Canadian Criminal Cases (C.C.C.) (3d) 289 (B.C.C.A.).

<sup>18</sup> See Allan Gold, Newsletter (18 August 1997), Issue 50.

<sup>19</sup> See *W.(L.F.)*, *supra* note 16 at 306 (cited with approval by Rosenberg, J. A., in *Wismayer*, *supra* note 11 at 247-248).

<sup>20</sup> S.C. ch. 39, § 141 (1995) (in force January 1, 1996).

<sup>21</sup> See *supra* note 15 at ¶ 123.

<sup>22</sup> The “Summary” section of the Firearms Act does provide, however, that “[w]eapons and other things that are not firearms, but pose safety concerns serious enough to warrant restrictions (*i.e.*, silencers, certain knives) will also be subject to controls.” See *supra* note 20.

<sup>23</sup> [1997] 32 O.R.3d 392 (Ont. C.A.) at 400.

<sup>24</sup> See Court File No. 26711, Dominion Reporting Service No. 97-16473, June 16, 1997 (Ont. C.A.) at ¶ 1 (reported on QuickLaw).

<sup>25</sup> See *id.*

<sup>26</sup> Section 742.1(b) provides that a court, in considering whether or not a conditional sentence is appropriate, must be satisfied that the decision to issue a conditional sentencing order would be “consistent with the fundamental purpose and principles of sentencing set out in §§ 718 to 718.2.” See *supra* note 5.

<sup>27</sup> See Court File No. 2084479, Dominion Reporting Service No. 97-15820, September 12, 1997 (Sask. Prov. Crt.) at ¶ 4 (reported on QuickLaw).

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<sup>28</sup> See *Wismayer*, *supra* note 11 at 241.

<sup>29</sup> See *id.* at 244.

<sup>30</sup> See [1996] 1 Supreme Court Reports (S.C.R.) 500, 105 C.C.C. (3d) 327, 46 Criminal Reports (C.R.) (4th) 269, 194 National Reporter 321 (hereinafter cited to C.C.C.).

<sup>31</sup> See *id.* at 359-360 (Lamer, C.J.C.) (cited in *Wismayer*, *supra* note 11 at 245). While the comments in *M.(C.A.)* are made in the context of parole, they may readily be applied to a conditional sentencing order, since it would be possible to use the conditional sentence such that the objectives identified in *M.(C.A.)* could be addressed.

<sup>32</sup> See [1997] 152 Saskatchewan Reports (Sask. R.) 265 (Sask. C.A.).

<sup>33</sup> See *supra* note 27.

<sup>34</sup> Black's Law Dictionary defines "parity" as "equality." See BLACK'S LAW DICTIONARY 1271 (rev. 4th ed., St. Paul, Minn.: West Publishing Co., 1968).

<sup>35</sup> See *Wismayer*, *supra* note 11 at 247-248.

<sup>36</sup> See *id.* at 247.

<sup>37</sup> See *REGINA v. Horvath*, [1997] 152 Sask. R. 277 (Sask. C.A.) at ¶ 25-26, cited in *Delorme*, *supra* note 23 at ¶ 6.

<sup>38</sup> See *REGINA v. Schneider*, [1994] 123 Sask. R. 162 (Sask. C.A.), cited with approval by Sherstobitoff, J.A., in *REGINA v. Keller*, [1997] 158 Saskatchewan Reports (Sask. R.) 181 (Sask. C.A.) at ¶ 13. While the *Schneider* decision pre-dated the new sentencing provisions, Sherstobitoff and Lane, JJ. A., agreed that the decision "remained sound." See *Keller* at ¶14.

<sup>39</sup> See J. V. Roberts and A. von Hirsch, *supra* note 8 at 231.

<sup>40</sup> See J. Gemmell, *The New Conditional Sentencing Regime*, 39 CRIM. L.Q. 334, 361 (1997). Gemmell refers to "participants" in the justice system, where "participants" is meant to include judges, Crown attorneys, defence lawyers, correctional officials, probation officers, and conditional sentence supervisors.

<sup>41</sup> See section 742.1, *supra* note 5.

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<sup>42</sup> See, e.g., *REGINA v. Pierce*, [1997] 32 O.R.3d 321.

<sup>43</sup> See R.S.C. ch. C-45, § 742.1 (1985), as amended by S.C. ch. C-22 (1995).

<sup>44</sup> See *Pierce*, *supra* note 42.

<sup>45</sup> See R.S.C. ch. C-45, section 742.1 (1985), amended by S.C. ch. 18, section 107.1 (1997).

<sup>46</sup> See A. Manson, *The Appeal of Conditional Sentences of Imprisonment*, 5 C.R. (CRIMINAL REPORTS) (5th) 279, 290 (1997). The amendment to section 742.1(b) of the Code was proposed and enacted without any debate outside of Parliament, a process that Manson describes as “shocking.” Manson notes, however, that the language used to amend the provision “likely does not detract from ideas contained in the majority of appellate decisions.”

<sup>47</sup> See *supra* note 5.

<sup>48</sup> See, e.g., *Pierce*, *supra* note 42.

<sup>49</sup> See *id.* at 331.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 329.

<sup>52</sup> See *id.* at 332-333.

<sup>53</sup> See *id.* at 331.

<sup>54</sup> See *id.* at 336. Under this approach, general sentencing principles were to be employed to determine whether or not a reformatory or penitentiary sentence was appropriate under the circumstances. See *id.* Where the circumstances called for a penitentiary sentence, the conditional sentence provision was not an option. However, where the situation either did not necessitate a penitentiary sentence, or where this was not clear, then resort was to be had to “the full panoply of sentencing guidelines” in order to arrive at a determination of the “appropriate sentence.” See *id.* Finlayson, J. A., makes a point of stating that resort to the principles was not to be limited to a determination of the length of the sentence but the “ultimate sentence” itself. See *id.*

<sup>55</sup> See *supra* note 15 at ¶ 104.

<sup>56</sup> See *id.*

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<sup>57</sup> *See id.*

<sup>58</sup> *See Wismayer, supra* note 11 at 243.

<sup>59</sup> *See supra* note 12 at 436.

<sup>60</sup> *See* T. Quigley, *Some Issues in Sentencing of Aboriginal Offenders*, in J. Y. Henderson, CONTINUING POUNDMAKER AND RIEL'S QUEST (Saskatoon: Purich Publishing, 1994) at 275-276.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See* Canadian Sentencing Commission, *supra* note 9.

<sup>64</sup> *See* M. Jackson, *Locking Up Natives in Canada*, 23 U.B.C. L. REV. 215, 216 (1989).

<sup>65</sup> *See* J. V. Roberts and A. von Hirsch, *supra* note 8 at 231.

<sup>66</sup> *See supra* note 1.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> Decision of February 13, 1997, British Columbia Trial Court [unreported], as cited by the British Columbia Court of Appeal in *REGINA v. Gladue*, [1997], 98 British Columbia Appeal Cases (B.C.A.C.) 120, affirmed by the Supreme Court of Canada, [1999] 1 S.C.R. 688. At trial, following a guilty plea to manslaughter in the stabbing death of her common law husband, Ms. Gladue, an Aboriginal woman, received a sentence of three years imprisonment. On appeal, the majority granted leave to appeal, but dismissed the appeal. The minority would have permitted the appeal against sentence, by reducing the sentence to two years less a day, to be followed by a three-year probation period, with conditions. There is no indication that a conditional sentence would have been ordered.

<sup>70</sup> *See Gladue*, 98 B.C.A.C. at ¶ 88.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

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<sup>73</sup> See *Gladue*, *supra* note 69.

<sup>74</sup> See Section 718.2(e), *supra* note 68.

<sup>75</sup> See *Gladue*, *supra* note 69 at ¶ 69 (Rowles, J. A., dissenting).

<sup>76</sup> See *Gladue*, *supra* note 69.

<sup>77</sup> This opinion is the author's.

<sup>78</sup> See *Gladue*, *supra* note 69 at ¶ 68 (Rowles, J. A., dissenting).

<sup>79</sup> See *id.* at ¶ 69.

<sup>80</sup> See *id.* at ¶ 70.

The fact that the lack of support/community programs is a 'concern' used to deny an Aboriginal offender a remedial provision is somewhat ironic, given that where programs such as anger management are unavailable due to a lack of resources for other offenders, a similar concern is not nearly so prevalent. V. Edwards. (Victoria Edwards is a Métis woman, community activist, and webmaster of *Go Circle*, an Aboriginal website found at <<http://ncf.davin.ottawa.on.ca/freeport/sigs/people/first-people/menu>>. Ms. Edwards's home page is found at <[www.ncf.ca/~ae606](http://www.ncf.ca/~ae606)>).

An additional point is that offenders serving "interim sentences" pursuant to section 737(1)(c) of the Criminal Code (which permits a judge who sentences an offender to a period of incarceration not exceeding 90 days to allow service of the sentence on weekends) are frequently sent home due to overcrowding of provincial institutions. See *supra* note 1. Overcrowding is itself due, in part, to the frequent use of interim sentences. See *supra* note 2 at 367. Yet, judges continue to rely on such sentences. See *id.* This is the result of the decision in *REGINA. v. Wortzman*, [1979] 12 O.R.3d 115 (Ont. C.A.), that the trial court cannot entertain the position of provincial correctional authorities in relation to overcrowded conditions when arriving at an appropriate sentence. See *supra* note 2 at 367. This may also account for orders that offenders attend anger management programs, when such programs are available.

<sup>81</sup> See *Gladue*, *supra* note 69 at ¶ 63 (Rowles, J. A., dissenting).

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at ¶ 47-71.

<sup>84</sup> See *id.* at ¶ 56.

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<sup>85</sup> *See id.* at ¶ 55.

<sup>86</sup> *See id.* at ¶ 54.

<sup>87</sup> *See id.*

<sup>88</sup> *See* [1994] 3 S.C.R. 761, 787-789, cited with approval in minority opinion in *Gladue*, *supra* note 69 at ¶ 53.

<sup>89</sup> *See Gladue*, *supra* note 69 at ¶ 84 (Rowles, J. A., dissenting).

<sup>90</sup> Section 718.2(e), *supra* note 1. The observation is the author's.

<sup>91</sup> *See Gladue*, *supra* note 69.

<sup>92</sup> A key aggravating factor was the fact that the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. The SCC wrote that the latter aggravating factor “must be taken into account in the sentencing of the Aboriginal appellant as it would be for any offender.” *See id.* at 740-741.

<sup>93</sup> *See* Justice M.E. Turpel-Lafond, *Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue*, 4(3) JUSTICE AS HEALING (Fall 1999) (also located at [http://www.usask.ca/nativelaw/jah\\_turpel-lafond.html](http://www.usask.ca/nativelaw/jah_turpel-lafond.html) ).

<sup>94</sup> *See Gladue*, *supra* note 69 at 723.

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.* at 729.

<sup>98</sup> *See id.* at 731.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.* at 707.

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<sup>101</sup> See *supra* note 60 at 162-163.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 277.

<sup>104</sup> See J. V. Roberts and A. von Hirsch, *supra* note 8 at 231.

<sup>105</sup> In addition, Carol LaPrairie cautions that understanding the overrepresentation of Aboriginal persons in the criminal justice system simply as a problem to be addressed by the judicial system is “simplistic and misleading and impedes finding real and long-lasting solutions to the overrepresentation problem.” See *supra* note 12 at 436.

<sup>106</sup> See J. Roberts and C. LaPrairie, *Sentencing Circles: Some Unanswered Questions*, 39 CRIM. L. Q. 69, 78 (1996).

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *supra* note 40 at 336.

<sup>110</sup> See *id.* at 337.

<sup>111</sup> [1997] 116 C.C.C.(3d) 361 (Qué. C.A.) at ¶ 49, as cited in *Wismayer*, *supra* note 11 at 245.

<sup>112</sup> However, a judge's decision to issue a longer sentence when the offender is ordered to serve it in the community flies in the face of Appellate Justice Finlayson's statement in *Pierce*, see *supra* note 48 at 336, that “[t]he length of a sentence served in the community should not necessarily be the same length of that served in custody.”

<sup>113</sup> See *supra* note 40 at 345.

<sup>114</sup> See C. Harper, *Sentencing Becomes More Challenging Under New Guidelines, Conference Told*, LAWYERS WEEKLY NEWS (1 November 1996).

<sup>115</sup> See C. LaPrairie, *Conditional Sentence Orders By Province and Territory: September 6, 1996 - March 31, 1999 - Final Report* 6 and Table V at 17 (Ottawa: Department of Justice, 1999).

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<sup>116</sup> See *supra* note 40 at 340, n.28.

<sup>117</sup> See C. Ruby, SENTENCING 288 (4<sup>th</sup> ed. Markham, Ont.: Butterworths Canada, 1994).

<sup>118</sup> See *Gemmell*, *supra* note 40 at 341; see also A.E. Bottoms, *The Suspended Sentence in England, 1967-1978*, BRITISH J. CRIMINOLOGY 1 (1981).

<sup>119</sup> See *supra* note 40 at 342.

<sup>120</sup> See A. Manson, *Finding a Place for Conditional Sentences*, 3 CRIMINAL REPORTS (C.R.) (5th) 283, 285 (1997).

It is interesting to note that Bill C-19, the precursor to Bill C-41, promoted the conditional sentence “as an alternative to or replacement of the suspended sentence.” Manson notes, however, that “the suspended sentence revocation procedure was described as too cumbersome.” See *id.*

<sup>121</sup> Section 742.6 of the Criminal Code outlines the procedure to be followed in the event of a breach of a condition of a conditional sentence order. Pursuant to section 742.6(9), where a breach is alleged, the Crown has the burden of establishing that such a breach occurred on a balance of probabilities. The onus of proof then shifts to the offender to establish that he or she had a reasonable excuse for the breach. See section 742.6(9), *supra* note 1. The alleged breach must also be supported by a written report of the supervisor. See section 742.6(4), *supra* note 1. The report must include, where appropriate, the signed statements of the witness(es) alleging the breach. See section 742.6(4), *supra* note 1.

<sup>122</sup> See section 742.6(9)(a), *supra* note 1.

<sup>123</sup> See section 742.6(9)(b).

<sup>124</sup> See section 742.6(9)(c)(i).

<sup>125</sup> See section 742.6(9)(c)(ii).

<sup>126</sup> See section 742.6(9)(d).

<sup>127</sup> Where an offender serving a conditional sentence is subsequently imprisoned for committing another offence, whether or not that offence was committed before or after the offence resulting in the conditional sentence, the conditional sentence is suspended during the period the offender is incarcerated for the other offence, unless the court otherwise directs. See section 742.7, *supra* note 1.

<sup>128</sup> See C. LaPrairie, *supra* note 115 at 7 and Table X at 25.

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<sup>129</sup> See C. Ruby, *supra* note 117 at 289, citing Tuck-Jackson.

<sup>130</sup> Another concern is how the conditional sentence is recorded on criminal records. See Harper, *supra* note 114.

<sup>131</sup> See [1997] 159 Nova Scotia Reports (N.S.R.) (2d) 166 (N.S.C.A.) at ¶ 53-54, as cited in *REGINA v. McKay*, [1997] 157 Sask. R. 168 (Sask. Q.B.).

<sup>132</sup> See *Parker* at ¶ 50.

<sup>133</sup> See T. L. Baumer and M. G. Maxfield, *Electronically Monitored Home Detention*, in M. Tonry and K. Hamilton, *INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES* 106 (Boston: Northeastern University Press, 1995).

<sup>134</sup> See section 742.3(a), *supra* note 1.

<sup>135</sup> Other mandatory conditions attached to a conditional sentence order include the requirement that an offender appear before the court when required by the court to do so, *see* section 742.3(b); reporting requirements generally, *see* sections 742.3(b) and (c); and jurisdictional issues, *see* sections 742.3(d) and (e).

<sup>136</sup> See *supra* note 133.

<sup>137</sup> See section 742.3(2)(a)(i), *supra* note 1.

<sup>138</sup> See section 742.3(2)(a)(ii).

<sup>139</sup> See section 742.3(2)(b).

<sup>140</sup> Other optional conditions that may be attached to a conditional sentence order include the requirements that an offender provide for the support or care of dependants, *see* section 742.3(2)(c); perform up to 240 hours of community service over a period not exceeding 18 months, *see* section 742.3(2)(d); attend a provincially approved treatment program, *see* section 742.3(2)(e); and a blanket provision requiring an offender to comply with other conditions that the court believes are desirable in order to secure the “good conduct of the offender” and in order to “prevent a repetition by the offender of the same offence or the commission of other offences,” *see* section 742.3(2)(f).

An offender may also be required to comply with a firearms prohibition order should such an order be prescribed by the court. Section 742.2(1) provides that prior to imposing a conditional sentence under section 742.1, the court shall consider whether section 100, the provision governing firearms prohibitions, is applicable. Section 742.2(2) provides that a firearms prohibition order issued pursuant to section 742.3(2)(b) does not affect the operation of section 100.

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<sup>141</sup> See section 742.3(2)(f).

<sup>142</sup> See C. LaPrairie, *supra* note 115 at 6 and Table VIII at 22.

<sup>143</sup> See *id.*

<sup>144</sup> See G. Crone, *More Criminals To Wear Their Jail On Their Ankles*, OTTAWA CITIZEN, at A5 (15 November 1997).

<sup>145</sup> M. Harris, *Electronic Tags To Keep Track Of Ontario Criminals*, OTTAWA CITIZEN, at A4 (14 April 2000).

<sup>146</sup> See M. G. Maxfield and T. L. Baumer, *Electronic Monitoring in Marion County, Indiana*, in M. Tonry and K. Hamilton, INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 114, *supra* note 133.

<sup>147</sup> See *id.*

<sup>148</sup> See *supra* note 32 at ¶ 5.

<sup>149</sup> See J. Petersilia and S. Turner, *Evaluating Intensive Supervision Probation and Parole*, in M. Tonry and K. Hamilton, INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 94, *supra* note 133.

<sup>150</sup> See *supra* note 133.

<sup>151</sup> See *supra* note 149 at 99.

<sup>152</sup> See M. Tonry and K. Hamilton, *Intensive Supervision and Electronic Monitoring: Introduction*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 88, *supra* note 133.

<sup>153</sup> See G. Mair, *Electronic Monitoring in England and Wales*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 120, *supra* note 133.

<sup>154</sup> See Ruby, *supra* note 117 at 289.

<sup>155</sup> See *supra* note 149 at 95.

<sup>156</sup> See *id.* at 99.

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<sup>157</sup> *See id.* at 102.

<sup>158</sup> *See supra* note 149 at 94.

<sup>159</sup> *See* R. Will, *Intensive Supervision Probation*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 91, *supra* note 133.

This observation was made in the context of intensive supervision and electronic monitoring programs.

<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See* R. Will, *California ISP Programs Evaluated*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 91, *supra* note 133.

<sup>165</sup> Based on Will's observation in the context of ISP programs. *See id.* at 93.

<sup>166</sup> *See id.*

<sup>167</sup> *See id.* at 94.

<sup>168</sup> *See id.*

<sup>169</sup> *See Wismayer, supra* note 11 at 245 (citing *Maheu, supra* note 111 at ¶ 49).

<sup>170</sup> [1996] 16 Ontario Trial Cases (O.T.C.) 47 (Ont. Ct. Gen. Div.) (as cited in *Wismayer, supra* note 111 at 243).

<sup>171</sup> In issuing a suspended sentence, the court does not pronounce a specific sentence and then suspend it; rather, the passing of the sentence is suspended altogether. *See, e.g., REGINA v. Polywjanyj*, [1982], 1 C.C.C. (3d) 161. With a conditional sentence, however, a term of imprisonment is imposed by the sentencing judge, but rather than ordering the offender to serve the sentence in a penal institution, the judge issues a conditional sentence order, directing the offender to serve time confined to the home, or in the community. *See* section 742.1, *supra* note 1.

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<sup>172</sup> See *supra* note 2 at 419-422.

<sup>173</sup> Ruby, for example, notes that “the courts have acknowledged that current thinking is that non-violent offences should not attract custodial sentences. It is wrong, bearing in mind the penalties available, including fines, probation orders for community service, and others, to regard the imposition of something less than imprisonment as lenient.” See *supra* note 117 at 317.

<sup>174</sup> [1997], 35 Weekly Case Bulletins (W.C.B.) (2d) 498 (Ont. Ct. Prov. Div.).

<sup>175</sup> The Crown has appealed the sentence while the defence has appealed the conviction. See Pearce Bannon, *Tale Of Two Sentences: Two Men Convicted Of Identical Criminal Charges Received Vastly Different Sentences*, OTTAWA CITIZEN at A5 (14 September 1997).

<sup>176</sup> See *id.*

<sup>177</sup> See Pearce Bannon, *Officer Who Shot Native Can Walk Free, Judge Rules*, OTTAWA CITIZEN at A3 (4 July 1997).

<sup>178</sup> See *id.*

<sup>179</sup> September 25, 1997, during a presentation of the author and Lynn Commanda Bench. Alex Akiwenzie uses the term “Indian” as opposed to “Aboriginal” because the term is used in the Indian Act. See R.S.C. ch. I-5 (1985). It is also noteworthy that the officer was not required to serve a sentence of incarceration, in view of the high percentage of Aboriginal peoples warehoused in penal institutions.

<sup>180</sup> See Will, *supra* note 159 at 89.

<sup>181</sup> See *REGINA v. Knockaert*, [1982] 16 Manitoba Reports (Man. R.) (2d) 313 (C.A.), as cited in Ruby, *supra* note 117 at 253.