



SUPREME COURT OF CANADA

CITATION: R. v. Ipeelee, 2012 SCC 13

DATE: 20120323

DOCKET: 33650, 34245

BETWEEN:

Manasie Ipeelee

Appellant

and

Her Majesty The Queen

Respondent

- and -

Director of Public Prosecutions and Aboriginal Legal Services of Toronto Inc.

Interveners

AND BETWEEN:

Her Majesty The Queen

Appellant

and

Frank Ralph Ladue

Respondent

- and -

British Columbia Civil Liberties Association and Canadian Civil Liberties

Association

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 98):

LeBel J. (McLachlin C.J. and Binnie, Deschamps, Fish and Abella JJ. concurring)

REASONS DISSENTING IN PART:
(paras. 99 to 157):

Rothstein J.

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R. v. IPEELEE

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Appellant

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Her Majesty The Queen

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v.

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Indexed as: R. v. Ipeelee

2012 SCC 13

File Nos.: 33650, 34245.

2011: October 17; 2012: March 23.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

ON APPEAL FROM THE COURTS OF APPEAL FOR ONTARIO AND BRITISH COLUMBIA

Criminal law — Sentencing — Aboriginal offenders — Breach of condition of long-term supervision order — Principles governing sentencing of Aboriginal offenders — Whether principles outlined in R. v. Gladue apply to breach of long-term supervision order — Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e).

These two appeals involve Aboriginal offenders with long criminal records. Both Aboriginal offenders were declared long-term offenders and had long-term supervision orders (“LTSO”) imposed. The offender I is an alcoholic with a history of committing violent offences when intoxicated. He was sentenced to six years’ imprisonment followed by an LTSO after being designated a long-term

offender. After his release from prison, I committed an offence while intoxicated thereby breaching a condition of his LTSO. He was sentenced to three years' imprisonment, less six months of pre-sentence custody at a 1:1 credit rate. The Court of Appeal dismissed the appeal brought by I. The offender L is addicted to drugs and alcohol and has a history of committing sexual assaults when intoxicated. L was sentenced to three years' imprisonment followed by an LTSO after being designated a long-term offender. After his release from prison, he failed a urinalysis test; thereby breaching a condition of his LTSO. L was sentenced to three years' imprisonment, less five months of pre-sentence custody at a 1.5:1 rate. A majority of the Court of Appeal allowed L's appeal and reduced the sentence to one year's imprisonment.

Held (Rothstein J. dissenting in part): The appeal should be allowed in *Ipeelee*. The appeal should be dismissed in *Ladue*.

Per: McLachlin C.J. and Binnie, **LeBel**, Deschamps, Fish and Abella JJ.

The central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender in particular. Trial judges enjoy a broad discretion in the sentencing process. A sentencing judge has a duty to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code* in order to devise a fit and proper sentence which respects the well-established principles and objectives of sentencing set out in Part XXIII of the *Criminal Code*. Proportionality is the *sine qua non* of a just sanction. Proportionality, the fundamental principle of sentencing, is intimately tied to the fundamental purpose of

sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. An appellate court must be satisfied that the sentence under review is proportionate to both the gravity of the offence and the degree of responsibility of the offender.

The purpose of an LTSO is two-fold: to protect the public and to rehabilitate offenders and reintegrate them into the community. It is the sentencing judge's duty, adopting a contextual approach, to determine which sentencing options will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. Sentencing is an individual process. The severity of a given breach will ultimately depend on all of the circumstances, including the nature of the condition breached, how that condition is tied to managing the particular offender's risk of re-offence, and the circumstances of the breach.

Section 718.2(e) of the *Criminal Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e). Section 718.2(e) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. The enactment of s. 718.2(e) is a specific direction by Parliament to pay particular attention to the circumstances of Aboriginal offenders

during the sentencing process because those circumstances are unique and different from those of non-Aboriginal offenders. To the extent that current sentencing practices do not further the objectives of deterring criminality and rehabilitating offenders, those practices must change so as to meet the needs of Aboriginal offenders and their communities. Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination. Just sanctions are those that do not operate in a discriminatory manner.

When sentencing an Aboriginal offender, a judge must consider the factors outlined in *R. v. Gladue*, [1999] 1 S.C.R. 688: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives

of sentencing in a particular community. The principles from *Gladue* are entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples.

When sentencing an Aboriginal offender, 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. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel. However, these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. The parity principle which is contained in s. 718.2(b) means that any disparity between sanctions for different offenders needs to be justified. To the extent that the application of the *Gladue* principles lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances

which are rationally related to the sentencing process. Counsel has a duty to bring individualized information before the court in every case, unless the offender expressly waives his right to have it considered. A *Gladue* report, which contains case-specific information, is tailored to the specific circumstances of the Aboriginal offender. A *Gladue* report is an indispensable sentencing tool to be provided at a sentencing hearing for an Aboriginal offender and it is also indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.

The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. If the sentencing judge fails to apply the *Gladue* principles in any case involving an Aboriginal offender this would run afoul of this statutory obligation. Furthermore, the failure to apply the *Gladue* principles in any case would also result in a sentence that is not fit and is not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including the breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

In the instant case of I, the courts below made several errors in principle warranting appellate intervention. The courts below erred in concluding that rehabilitation was not a relevant sentencing objective. As a result of this error, the courts below gave only attenuated consideration to I's circumstances as an Aboriginal offender. A sentence of one years' imprisonment should be substituted. In the instant

case of L, the decision of the majority of the Court of Appeal is well founded and adequately reflects the principles and objectives of sentencing. The appeal is dismissed and the sentence of one years' imprisonment is affirmed.

Per Rothstein J. (dissenting in part): In sentencing for the breach of a condition of a LTSO, which is central to the risk of the long-term offender violently reoffending, the protection of the public, more so than the rehabilitation or reintegration of the offender, must be the dominant consideration of the sentencing judge in the determination of a fit and proper sentence. The majority in this case, does not specifically address the issue of the sentencing of Aboriginal offenders who have been found to be long-term offenders and have been found guilty of breaching a condition of a LTSO. They have not taken account of the difference between the objectives and requirements of LTSOs for long-term offenders who abide by the conditions of their LTSO and the objectives and requirements of sentencing long-term offenders who have breached a condition of their LTSO.

The breach of a LTSO raises serious concerns that rehabilitation and reintegration are not being achieved and calls into doubt whether, despite supervision, the long-term offender has demonstrated that the substantial risk of reoffending in a violent manner in the community by the long-term offender can be adequately managed. Section 753.3(1) of the *Criminal Code* provides that a breach of a LTSO constitutes an indictable offence, as opposed to a hybrid offence, with a maximum sentence of ten years. The maximum term is for the breach of the LTSO exclusively

and is not dependant on the long-term offender having been found guilty of another substantive offence, violent or otherwise. The necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time. Where a breach is central to the substantial risk of reoffending, such as where alcohol or substance consumption has been found to be the trigger for violent offences by the long-term offender, the breach must be considered to be very serious.

Section 718.2(e) of the *Criminal Code* requires a sentencing judge to consider background and systemic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders, including long-term Aboriginal offenders. As with all sentencing, this must be done with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge. In the case of long-term offenders, the paramount consideration is the protection of society. This applies to all long-term offenders, including Aboriginal long-term offenders who have compromised the management of their risk of reoffending by breaching a condition of their LTSO.

Once an Aboriginal individual is found to be a long-term offender, and the offender has breached one or more conditions of his or her LTSO, alternatives to a

significant prison term will be limited. The alternatives to imprisonment must be viable and the sentencing judge must be satisfied that they are consistent with protection of society. Alternatives may include returning Aboriginal offenders to their communities. However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of a LTSO goes to the control of the Aboriginal offender in the community, rehabilitation and reintegration into society will have faltered, if not failed. In such case, the sentencing judge may have no alternative but to separate the Aboriginal long-term offender from society for a significant period of time. Nevertheless, during the period of incarceration, the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of re-offending may be controlled.

In this case, it has not been shown that the sentence imposed on the offender I was demonstrably unfit and the appeal should be dismissed. The sentencing judge's findings demonstrate a thorough appreciation of the circumstances. He properly recognized that protection of the public was the paramount concern in breaches of LTSOs. As a long-term offender, I has been found to show a pattern of repetitive behaviour with a likelihood of causing death or physical or psychological injury or a likelihood of causing injury, pain or other evil to

other persons in the future through failure to control his sexual impulses. His alcohol consumption is central to such behaviour.

With respect to the offender L, one year imprisonment was a fit and proper sentence and the appeal should be dismissed. The sentencing judge did not err in focussing on protection of society as the paramount consideration in her sentencing decision. The sentencing judge found that the only way to protect the community, given L's high risk of re-offending sexually and moderate to high risk of re-offending violently, was to emphasize the objective of isolation. She noted that even if L did not commit a substantive offence, his breach was serious. But this was a case where there was a realistic opportunity for rehabilitation that was denied L because of a "bureaucratic error". The sentencing judge does not appear to have considered that it was this error that caused L to be sent to a residential halfway house, which apparently tolerates serious drug abusers and does not provide programs for Aboriginal offenders. This failure meant that L's moral blameworthiness was not properly assessed.

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By LeBel J.

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S.C.R. 486; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163; *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. v. Nelson*, [2007] O.J. No. 5704 (QL); *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228; *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207; *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120; *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50; *R. v. Poucette*, 1999 ABCA 305, 250 A.R. 55; *R. v. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98, 223 Sask. R. 121; *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88; *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245; *R. v. Carrière* (2002) 164 C.C.C. (3d) 569; *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192.

By Rothstein J. (dissenting in part)

Referred to: *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

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Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, S.C. 1995 c. 22, s. 718.

Canadian Charter of Rights and Freedoms, ss. 7, 12.

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Corrections and Conditional Release Regulations, SOR/92-620, r. 161(1).

Criminal Code, R.S.C. 1985, c. C-46, Part XXIII, ss. 718, 718.1, 718.2, Part XXIV, 753.1, 753.2(1), 753.3(1).

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Sharpe and Cronk JJ.A.), 2009 ONCA 892, 99 O.R. (3d) 419, 264 O.A.C. 392, [2009] O.J. No. 5402 (QL), 2009 CarswellOnt 7783, affirming a decision of Megginson J., 2009 CarswellOnt 7864. Appeal allowed, Rothstein J. dissenting.

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Chiasson and Bennett JJ.A.), 2011 BCCA 101, 302 B.C.A.C. 93, 511 W.A.C. 93, 271 C.C.C. (3d) 90, [2011] 2 C.N.L.R. 277, [2011] B.C.J. No. 366 (QL), 2011 CarswellBC 428, reversing a decision of Bagnall Prov. Ct. J., 2010 BCPC 410, [2010] B.C.J. No. 2824 (QL), 2010 CarswellBC 3822. Appeal dismissed.

Fergus J. (Chip) O'Connor, for the appellant Manasie Ipeelee.

Gillian E. Roberts, for the respondent Her Majesty the Queen.

Susanne Boucher and *François Lacasse*, for the intervener the Director of Public Prosecutions.

Jonathan Rudin and *Amanda Driscoll*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Mary T. Ainslie, for the appellant Her Majesty the Queen.

Hovan M. Patey, *Laurence D. Myers, Q.C.*, and *Kristy L. Neurauter*, for the respondent Frank Ralph Ladue.

Written submissions only by *Kent Roach* and *Kelly Doctor*, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Clayton C. Ruby, Nader R. Hasan* and *Gerald J. Chan*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

LEBEL J. —

I. Introduction

[1] These two appeals raise the issue of the principles governing the sentencing of Aboriginal offenders for breaches of long-term supervision orders (“LTSO”). Both appeals concern Aboriginal offenders with long criminal records. They provide an opportunity to revisit and reaffirm the judgment of this Court in *R. v. Gladue*, [1999] 1 S.C.R. 688. I propose to allow the offender’s appeal in *Ipeelee* and to dismiss the Crown’s appeal in *Ladue*.

II. Manasie Ipeelee

A. *Background and Criminal History*

[2] Mr. Manasie Ipeelee is an Inuk man who was born and raised in Iqaluit, Nunavut. His life story is far removed from the experience of most Canadians. His mother was an alcoholic. She froze to death when Manasie Ipeelee was five years old.

He was raised by his maternal grandmother and grandfather, both of whom are now deceased. Mr. Ipeelee began consuming alcohol when he was 11 years old and quickly developed a serious alcohol addiction. He dropped out of school shortly thereafter. His involvement with the criminal justice system began in 1985, when he was only 12 years old.

[3] Mr. Ipeelee is presently 39 years old. He has spent a significant proportion of his life in custody or under some form of community supervision. His youth record contains approximately three dozen convictions. The majority of those offences were property-related, including breaking and entering, theft, and taking a vehicle without consent (joyriding). There were also convictions for failure to comply with an undertaking, breach of probation, and being unlawfully at large. Mr. Ipeelee's adult record contains another 24 convictions, many of which are for similar types of offences. He has also committed violent crimes. His record includes two convictions for assault causing bodily harm and one conviction each for aggravated assault, sexual assault, and sexual assault causing bodily harm. I will describe these offences in greater detail, as they provided the basis for his eventual designation as a long-term offender.

[4] In December 1992, Mr. Ipeelee pleaded guilty to assault causing bodily harm. He and a friend assaulted a man who was refusing them entry to his home. Mr. Ipeelee was intoxicated at the time. During the fight, he hit the victim over the

head with an ashtray and with a chair. He was sentenced to 21 days' imprisonment and one year probation.

[5] In December 1993, Mr. Ipeelee again pleaded guilty to assault causing bodily harm. The incident took place outside a bar in Iqaluit and both Mr. Ipeelee and the victim were intoxicated. Witnesses saw Mr. Ipeelee kicking the victim in the face at least ten times, and the assault continued after the victim lost consciousness. The victim was hospitalized for his injuries. At the time of the offence, Mr. Ipeelee was on probation. He received a sentence of five months' imprisonment.

[6] In November 1994, Mr. Ipeelee pleaded guilty to aggravated assault. The incident involved another altercation outside the same bar in Iqaluit. Once more, both Mr. Ipeelee and the victim were intoxicated. During the fight, Mr. Ipeelee hit and kicked the victim. After the victim lost consciousness, Mr. Ipeelee continued to hit him and stomp on his face. The victim suffered a broken jaw and had to be sent to Montréal for treatment. Mr. Ipeelee was once again on probation at the time of the offence. He was sentenced to 14 months' imprisonment.

[7] Mr. Ipeelee received an early release from that sentence in the fall of 1995. Approximately three weeks later, while still technically serving his sentence, he committed a sexual assault. The female victim had been drinking in her apartment in Iqaluit with Mr. Ipeelee and others, and was passed out from intoxication. Witnesses observed Mr. Ipeelee and another man carrying the victim into her room. Mr. Ipeelee was later seen having sex with the unconscious woman on her bed. Mr. Ipeelee was

sentenced to two years' imprisonment. He remained in custody until his warrant expiry date in February 1999, as Corrections Canada officials deemed him to be a high risk to reoffend.

[8] After serving his sentence, Mr. Ipeelee moved to Yellowknife. He began drinking within one half-hour of his arrival and was arrested for public intoxication that evening, and again 24 hours later. In the six months leading up to his next conviction, he was arrested at least nine more times for public intoxication.

[9] On August 21, 1999 Mr. Ipeelee committed another sexual assault, this one causing bodily harm, which led to his designation as a long-term offender. Mr. Ipeelee, while intoxicated, entered an abandoned van that homeless persons frequented. Inside, a 50-year-old woman was sleeping. She awoke to find Mr. Ipeelee removing her pants. She struggled and Mr. Ipeelee began punching her in the face. When she called out for help, he told her to shut up or he would kill her. He then sexually assaulted her. The victim was finally able to escape when Mr. Ipeelee fell asleep. He was arrested and the victim was taken to the hospital to be treated for her injuries.

[10] At the sentencing hearing for this offence, Richard J. of the Northwest Territories Supreme Court noted that Mr. Ipeelee's criminal record "shows a consistent pattern of Mr. Ipeelee administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication" (*R. v. Ipeelee*, 2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL), at para. 34). The expert evidence produced at the

sentencing hearing indicated that Mr. Ipeelee did not suffer from any major mental illness and had average to above average intelligence. However, he was diagnosed as having both an antisocial personality disorder and a severe alcohol abuse disorder. The expert evidence also indicated that Mr. Ipeelee presented a high-moderate to high risk for violent reoffence, and a high-moderate risk for sexual reoffence. After evaluating all of the evidence, Richard J. concluded that there was a substantial risk that Mr. Ipeelee would reoffend and designated him a long-term offender under s. 753.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. Mr. Ipeelee was sentenced to six years' imprisonment for the sexual assault, to be followed by a ten-year LTSO.

B. *The Current Offence*

[11] Mr. Ipeelee was detained until his warrant expiry date for the 1999 sexual assault causing bodily harm. His LTSO came into effect on March 14, 2007 when he was released from Kingston Penitentiary to the Portsmouth Community Correctional Centre in Kingston. One of the conditions of Mr. Ipeelee's LTSO is that he abstain from using alcohol.

[12] Mr. Ipeelee's LTSO was suspended on four occasions: from June 13 to July 5, 2007 for deteriorating performance and behaviour, and attitude problems; from July 23 to September 14, 2007 for sleeping in the living room and the kitchen, contrary to house rules; from September 24 to October 24, 2007 for being agitated and noncompliant, and for refusing urinalysis; and from October 25, 2007 to May 20, 2008 as a result of a fraud charge being laid against him (the charge was subsequently

withdrawn). Mr. Ipeelee served those periods of suspension at the Kingston Penitentiary.

[13] On August 20, 2008, the police found Mr. Ipeelee riding his bicycle erratically in downtown Kingston. He was obviously intoxicated and had two bottles of alcohol in his possession. He was charged with breaching a condition of his LTSO, contrary to s. 753.3(1) of the *Criminal Code*. Mr. Ipeelee pleaded guilty to that offence on November 14, 2008.

C. *Judicial History*

1. Ontario Court of Justice, 2009 CarswellOnt 7864

[14] On February 24, 2009, Megginson J. of the Ontario Court of Justice sentenced Mr. Ipeelee to three years' imprisonment, less six months of pre-sentence custody at a 1:1 credit rate. He emphasized the serious nature of the offence, stating:

On its facts, this was a serious and not at all trivial breach of a very fundamental condition of the offender's [LTSO]. It is a very central and essential condition, because alcohol abuse was involved, not only in the "predicate" offence, but also in most of the offences on the offender's criminal record. On his history, Mr. Ipeelee becomes violent when he abuses alcohol, and he was assessed as posing a significant risk of re-offending sexually. Defence counsel argued that the facts of the present breach disclose no movement toward committing another sexual offence, but I think that is beside the point. [para. 10]

[15] Megginson J. held that, when sentencing an offender for breach of an LTSO, the paramount consideration is the protection of the public and rehabilitation plays only a small role. With that in mind, he addressed the requirement imposed by s. 718.2(e) of the *Criminal Code* that he consider Mr. Ipeelee's unique circumstances as an Aboriginal offender. He began by noting that Mr. Ipeelee's Aboriginal status had already been considered during sentencing for the 1999 offence giving rise to the LTSO. He went on to conclude that, when protection of the public is the paramount concern, an offender's Aboriginal status is of "diminished importance" (para. 15).

2. Ontario Court of Appeal, 2009 ONCA 892, 99 O.R. (3d) 419

[16] Mr. Ipeelee appealed his sentence on the grounds that it was demonstrably unfit, and that the sentencing judge did not give adequate consideration to his circumstances as an Aboriginal offender. The Court of Appeal dismissed the appeal.

[17] Sharpe J.A., writing for the court, was not convinced that the sentence was demonstrably unfit. He agreed with the sentencing judge's characterization of the offence as a serious breach of a vital condition of the LTSO. Sharpe J.A. found that, despite the sentencing judge's comments, Mr. Ipeelee's Aboriginal status had not factored into the sentencing decision. He did not, however, think this was an error (para. 13):

It is not at all clear to me, however, that in the circumstances of this case, consideration of his aboriginal status should lead to a reduction in his sentence for breach of the long-term offender condition. The appellant's commission of violent offences and the risk he poses for re-offending when under the influence of alcohol make the principles of denunciation, deterrence and protection of the public paramount. This is one of those cases where "the appropriate sentence will ... not differ as between aboriginal and non-aboriginal offenders": *R. v. Carrière* ... (2002), 164 C.C.C. (3d) 569 ([Ont.] C.A.), at para. 17. As the appellant has been declared a long-term offender, "consideration of restorative justice and other features of aboriginal offender sentencing ... play little or no role": *R. v. W. (H.P.)* (2003), A.J. No. 479, 327 A.R. 170 (C.A.), at para. 50.

[18] Sharpe J.A. did concede that Mr. Ipeelee's Aboriginal background and the disadvantages he had suffered provided some insight into his repeated involvement with the criminal justice system. He concluded, however, that these considerations should not affect the sentence. He ended his reasons with a plea to correctional authorities to make every effort to provide Mr. Ipeelee with appropriate Aboriginal-oriented assistance.

III. Frank Ralph Ladue

A. *Background and Criminal History*

[19] Mr. Frank Ralph Ladue, now 49 years old, is a member of the Ross River Dena Council Band, a small community of approximately 500 people located 400 kilometres north-east of Whitehorse in the Yukon Territory. Mr. Ladue's parents had severe alcohol abuse problems, so he was raised by his grandparents. His mother and father both died when Mr. Ladue was still very young, and records indicate that his

mother may have been murdered. When Mr. Ladue was five years old, he was removed from his community and sent to residential school, where he alleges he suffered serious physical, sexual, emotional and spiritual abuse.

[20] When Mr. Ladue was nine years old, he returned to Ross River to resume living with his grandparents. The effects of his residential school experience were readily apparent. He could no longer speak his traditional language, having been forbidden to do so in residential school. Unable to communicate his painful experiences to his family, he began drinking and acting out. Before long, he was living with foster families and spending time in juvenile detention. Mr. Ladue continued to drink heavily throughout his life (with the exception of a six-year period of sobriety in the 1990s which coincided with a period free from criminal convictions). Mr. Ladue also began using heroin, cocaine and morphine while in a federal penitentiary.

[21] Mr. Ladue's life experiences may seem foreign to most Canadians, but they are all too common in Ross River. The community suffered a number of abuses in the 1940s when the United States Army was building a pipeline through the region. There were reports of community members being assaulted or raped by members of the army. The community was further traumatized through the residential school experience. The effects of that collective experience continue to be evident in the high rates of alcohol abuse and violence in the community.

[22] The first offence on Mr. Ladue's criminal record occurred in 1978 when he was 16 years old. His record lists over 40 convictions since that time, approximately ten of which were as a young offender. Some of the offences are property-related, including taking a vehicle without consent, mischief, breaking and entering, and theft. Mr. Ladue also has a series of alcohol-related offences and convictions for failure to comply with various court orders. His violent offences include robbery convictions in 1978 and 1980, and common assault convictions in 1979 and 1982. Mr. Ladue has also been convicted of a number of sexual assaults. These sexual assaults will be described in some detail, as they ultimately led to his designation as a long-term offender.

[23] In 1987, Mr. Ladue entered a woman's bedroom following a party. He sexually assaulted the victim while she was either sleeping or passed out from intoxication. In 1997, Mr. Ladue sexually assaulted another woman who was passed out from intoxication. When she awoke, the bottom half of her clothing was removed and Mr. Ladue was sexually assaulting her. Another incident took place in 1998, although it did not lead to a conviction for sexual assault. Mr. Ladue entered the home of a woman who was sleeping and placed a sleeping bag over her head and shoulders. He was interrupted by the woman's daughter and he fled the residence. Mr. Ladue's sentences for these convictions ranged from four months' imprisonment (for the 1998 offence) to 30 months' imprisonment.

[24] Mr. Ladue committed the offence giving rise to his LTSO on October 6, 2002. On that date, he entered a dwelling house without permission from the occupants. The 22-year-old victim had passed out from alcohol consumption and was lying in the living room. She awoke to find Mr. Ladue touching her breasts over her clothing and attempting to unbutton her pants. She was unable to resist due to her state of intoxication. Fortunately, other residents of the house were awakened by what was going on and Mr. Ladue fled from the home. Mr. Ladue was convicted of breaking and entering and sexual assault.

[25] At the sentencing hearing (2003 YKTC 100 (CanLII)), Faulkner J. of the Yukon Territorial Court noted the similarity surrounding the circumstances of each sexual assault. The psychological assessment prepared for the court indicated that Mr. Ladue was incapable of refraining from the use of alcohol and was unable to control his sexual impulses. He was also diagnosed as a sexual sadist and as having an anti-social personality disorder. Faulkner J. nevertheless concluded that there was some prospect for eventual management in the community, given Mr. Ladue's lengthy period of successful sobriety in the 1990s, which coincided with a period free from criminal activity. Defence counsel conceded that the requirements of s. 753.1 of the *Criminal Code* were met, and Mr. Ladue was designated as a long-term offender. Faulkner J. sentenced Mr. Ladue to three years' imprisonment for breaking and entering and committing sexual assault, after taking into account the 14 months he had spent in custody prior to sentencing. He also imposed a seven-year LTSO.

B. The Current Offence

[26] Mr. Ladue's LTSO began on December 1, 2006 when he was released from prison for the 2002 offence giving rise to the LTSO. The LTSO has been suspended on numerous occasions. In addition, Mr. Ladue's criminal record includes two previous convictions for breaching a condition of the LTSO. On June 5, 2007, he was convicted of two counts of breaching the condition in the LTSO that he abstain from intoxicants. He received concurrent six-month sentences of imprisonment with credit for 4.5 months of pre-sentence custody. On June 19, 2008 he was convicted of breaching the same condition and was sentenced to one day of imprisonment after being credited for one year of pre-sentence custody.

[27] On August 12, 2009, Mr. Ladue was released from prison following a suspension of his LTSO. He was supposed to be released to Linkage House in Kamloops, British Columbia where he anticipated receiving considerable culturally relevant support from an Aboriginal Elder. Instead, Mr. Ladue was arrested at the prison gate on an outstanding DNA warrant. The warrant had been ordered months earlier but, as a result of an administrative error by Crown officials, it was not executed during Mr. Ladue's period of detention. Furthermore, the warrant may have been superfluous as it appears Mr. Ladue had already provided his DNA under a previous warrant. Mr. Ladue was detained until the warrant was executed and, as a result of that delay, he lost his placement at Linkage House. Instead, he was released to Belkin House in downtown Vancouver, despite his concerns over the propriety of

the placement due to the accessibility of drugs both in the residence and in the neighbourhood. Once at Belkin House, Mr. Ladue began associating with another offender who was a known drug user. Mr. Ladue was asked to provide a urine sample on August 19. On August 24, he advised the staff that the urinalysis would come back positive for cocaine, which it did. Mr. Ladue provided a second urine sample on August 27, which also returned positive for cocaine. He was charged with breaching a condition of his LTSO, contrary to s. 753.3(1) of the *Criminal Code* and pleaded guilty to that offence on February 10, 2010.

C. *Judicial History*

1. Provincial Court of British Columbia, 2010 BCPC 410 (CanLII)

[28] At the sentencing hearing, the Crown requested a sentence in the range of 18 months to two years. Bagnall Prov. Ct. J. concluded that this range was inadequate in the circumstances. She emphasized the serious nature of the offence:

Once released from custody, even under close supervision, Mr. Ladue's pattern is to relapse very quickly back into drug or alcohol use. He cannot be managed, nor can he manage himself in the community at the present time. The harm that is likely for another member of the community, or members of the community, if Mr. Ladue consumes intoxicants is very serious. This can be seen from the history that I have detailed. [para. 31]

Bagnall Prov. Ct. J. therefore held that isolation was the most important sentencing objective in the circumstances and imposed a three-year term of imprisonment, less

five months of pre-sentence custody at a 1.5:1 credit rate. Bagnall Prov. Ct. J. referred to the tragic aspects of Mr. Ladue's history, but apparently concluded that they should not impact on his sentence.

2. Court of Appeal for British Columbia, 2011 BCCA 101, 302 B.C.A.C. 93

[29] Mr. Ladue appealed his sentence on the grounds that the sentencing judge failed to adequately consider his circumstances as an Aboriginal offender, and that the ultimate sentence was unfit. The majority of the Court of Appeal allowed his appeal and reduced the sentence to one year's imprisonment. Chiasson J.A., dissenting, would have allowed the appeal and imposed a two-year sentence.

[30] Bennett J.A., writing for the majority, began by reviewing the principles and objectives of sentencing set out in the *Criminal Code*. She discussed, in detail, s. 718.2(e) of the *Code* and this Court's decision in *Gladue*. Bennett J.A. concluded that, although the sentencing judge was alive to Mr. Ladue's unique circumstances as an Aboriginal offender, she did not give any tangible consideration to those circumstances in determining the appropriate sentence. As a result, the sentencing judge had overemphasized the objective of isolation of the offender at the expense of rehabilitation and failed to meet the requirements of s. 718.2(e): "If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed" (para. 64).

[31] Bennett J.A. concluded that a three-year sentence was not proportionate to the gravity of the offence and the degree of responsibility of the offender, especially considering Mr. Ladue's background and how he came to be at Belkin House. At para. 63, she states:

Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his alcohol and drug addiction in the community he will very likely be a threat to the public. Repeated efforts at abstinence are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago.

Bennett J.A. therefore reduced the sentence to one year's imprisonment.

[32] Chiasson J.A. would have allowed the appeal and reduced the sentence to two years' imprisonment. He did not agree with the majority that the sentencing judge had erred in her consideration of Mr. Ladue's Aboriginal circumstances. However, in Chiasson J.A.'s view, the sentencing judge had been wrong in failing to consider that the present breach did not place Mr. Ladue on the path to reoffending. In Chiasson J.A.'s view, a sentence of two years was a sufficient step-up from Mr. Ladue's previous sentence to reflect the severity of the offence. Imposing a sentence of three years, on the other hand, would risk placing Mr. Ladue beyond hope of redemption.

IV. Issues

[33] These two appeals raise issues concerning the application of the principles and objectives of sentencing set out in Part XXIII of the *Criminal Code*. Specifically, the Court must determine the principles governing the sentencing of Aboriginal offenders, including the proper interpretation and application of this Court's judgment in *Gladue*, and the application of those principles to the breach of an LTSO. Finally, given those principles, the Court must determine whether either of the decisions under appeal contain an error in principle or impose an unfit sentence warranting appellate intervention.

V. Analysis

A. *The Principles of Sentencing*

[34] The central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender. In particular, the Court must address whether, and how, the *Gladue* principles apply to these sentencing decisions. But first, it is important to review the principles that guide sentencing under Canadian law generally.

[35] In 1996, Parliament amended the *Criminal Code* to specifically codify the objectives and principles of sentencing (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995 c. 22 (Bill C-41)).

According to s. 718, the fundamental purpose of sentencing is to contribute to “respect for the law and the maintenance of a just, peaceful and safe society”. This is accomplished by imposing “just sanctions” that reflect one or more of the traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[36] The *Criminal Code* goes on to list a number of principles to guide sentencing judges. The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. As this Court has previously indicated, this principle was not borne out of the 1996 amendments to the *Code* but, instead, has long been a central tenet of the sentencing process (see e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.), and, more recently, *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 40-42). It also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society’s standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.

[37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a “fit” sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender “deserved” the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter* scrutiny,

a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this discretion and granted considerable deference to a judge's choice of sentence. As Lamer C.J. stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. [Emphasis in original.]

[39] There are limits, however, to the deference that will be afforded to a trial judge. Appellate courts have a duty to ensure that courts properly apply the legal principles governing sentencing. In every case, an appellate court must be satisfied that the sentence under review is proportionate to both the gravity of *the offence* and the degree of responsibility of *the offender*. I will now turn to an assessment of these factors as they pertain to the present appeals.

B. *The Offence — Sentencing for Breach of a Long-Term Supervision Order*

[40] These two appeals involve persons designated as long-term offenders who are charged with breaching a condition of their LTSO. This is the first time the Court has had the opportunity to discuss this particular offence. In order to weigh the

various principles and objectives of sentencing and reach a conclusion regarding a fit sentence, it is important to understand the long-term offender regime.

[41] Part XXIV of the *Criminal Code* sets out the process for designating offenders as either dangerous or long-term offenders. Special provisions to deal with the unique circumstances of habitual repeat offenders have existed in Canada since the first half of the twentieth century. In 1938, the Archambault Commission recommended that legislation be enacted to provide for the indeterminate detention of hardened criminals (*Report of the Royal Commission to Investigate the Penal System in Canada*). The purpose of this detention, according to the Commission, was to be “neither punitive nor reformatory but primarily segregation from society” (cited in *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 321-22).

[42] In 1947, Canada acted on the recommendations of the Archambault Commission and introduced its first piece of legislation authorizing the indeterminate detention of “habitual criminal[s]” (*An Act to amend the Criminal Code*, S.C. 1947, c. 55, s. 18). Amendments made in 1977 narrowed the scope of the provision to specifically target “dangerous offender[s]” — those convicted of serious personal injury offences (*Criminal Law Amendment Act*, 1977, S.C. 1977, C. 53, s. 14).

La Forest J. described the rationale of the legislation in *Lyons*, at p. 329:

It is thus important to recognize the precise nature of the penological objectives embodied in Part XXI [now Part XXIV]. It is clear that the indeterminate detention is intended to serve both punitive and preventive purposes. Both are legitimate aims of the criminal sanction. Indeed, when society incarcerates a robber for, say, ten years, it is clear that its goal is

both to punish the person and prevent the recurrence of such conduct during that period. Preventive detention in the context of Part XXI, however, simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased. Part XXI merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person. In such circumstances it would be folly not to tailor the sentence accordingly. [Emphasis in original.]

[43] The rationale for the dangerous offender designation can be contrasted with that of the long-term offender provisions, which were not introduced to the *Criminal Code* until 1997. That year, extensive amendments were made to Part XXIV of the *Criminal Code* by Bill C-55 (*An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*, S.C. 1997, c. 17). These amendments, following the recommendations of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders (the “Task Force”), introduced the long-term offender designation and the availability of LTSOs. The Task Force noted that a lacuna existed in the law whereby serious offenders were denied the support of extended community supervision, except through the parole process. LTSOs were designed to fill this gap and supplement the all-or-nothing alternatives of definite or indefinite detention (Report of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders, *Strategies for Managing High-Risk Offenders* (1995)).

[44] Section 753.1(1) of the *Criminal Code* now directs when a court may designate an offender as a long-term offender. The section states:

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

If the court finds an offender to be a long-term offender, it must impose a sentence of two years or more for the predicate offence and order that the offender be subject to long-term supervision for a period not exceeding ten years (*Criminal Code*, s. 753.1(3)).

[45] LTSOs are administered in accordance with the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“*CCRA*”). LTSOs must include the conditions set out in r. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620. In addition, the National Parole Board (NPB) may include any other condition “that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender” (*CCRA*, s. 134.1(2)). A member of the NPB may suspend an LTSO when an offender breaches any of the LTSO conditions, or where the NPB is satisfied that suspension is necessary and reasonable to prevent such a breach or to protect society (*CCRA*, s. 135.1(1)). Offenders serve the duration of the period of suspension in a federal

penitentiary. Failure or refusal to comply with an LTSO is also an indictable offence under s. 753.3(1) of the *Criminal Code*, punishable by up to ten years' imprisonment.

[46] According to the *CCRA*, “[t]he purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens” (*CCRA*, s. 100). The *CCRA* also sets out a number of principles that shall guide the NPB in achieving the purpose of conditional release. These include, *inter alia*, “that the protection of society be the paramount consideration in the determination of any case” and “that parole boards make the least restrictive determination consistent with the protection of society” (*CCRA*, ss. 101(a) and 101(d)). These principles are intended to guide the NPB in its decision making, whereas courts must adhere to the principles set out in the *Criminal Code* when sentencing for breach of an LTSO.

[47] The legislative purpose of an LTSO, a form of conditional release governed by the *CCRA*, is therefore to contribute to the maintenance of a just, peaceful and safe society by facilitating the rehabilitation and reintegration of long-term offenders. This direction is consistent with this Court's discussion at para. 42 of *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, on the distinction between the dangerous offender designation (which does not include a period of conditional release) and the long-term offender designation.

Although they both contribute to assuring public safety, the dangerous offender and long-term offender designations have different objectives. Unlike a *dangerous* offender (s. 753 *Cr. C.*), who will continue to be deprived of liberty, since such offenders are kept in prison to separate them from society (s. 718.1), a *long-term* offender serves a sentence of imprisonment of two years or more and is then subject to an order of supervision in the community for a period not exceeding 10 years for the purpose of assisting in his or her rehabilitation (s. 753.1(3) *Cr. C.*). This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [TRANSLATION] “the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty” (Dadour, at p. 228). [Emphasis in original.]

[48] Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of re offence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*, though it is inextricably entwined with the former. Unfortunately, provincial and appellate courts have tended to emphasize the protection of the public at the expense of the rehabilitation of offenders. This, in turn, has affected their determinations of what is a fit sentence for breaching a condition of an LTSO.

[49] *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, is the leading appellate court decision to consider the matter. In that case, the Alberta Court of Appeal canvassed the purpose of the long-term offender regime and how it bears on

the sentencing process for breach of an LTSO. Ritter J.A. summarized the view of the court, at para. 46, stating:

Because the protection of society is the paramount goal when sentencing an offender who has breached a condition of his long-term supervision order, sentencing principles respecting specific and general deterrence together with separation of the offender from the community are called into play. Rehabilitation has a limited role to play as the status of long-term offender is such that rehabilitation has already been determined to be extremely difficult or impossible to achieve.

Subsequent provincial and appellate court cases have generally adhered to this approach. For example, in *R. v. Nelson*, [2007] O.J. No. 5704 (QL), Masse J. of the Ontario Court of Justice held, at paras. 14 and 21, that “[t]he main consideration in sentencing these offenders is the protection of the public” and that “significant sentences must be imposed even for slight breaches of a long-term supervision order”.

[50] The foregoing characterization of the long-term offender regime is incorrect. The purpose of an LTSO is two-fold: to protect the public *and* to rehabilitate offenders and reintegrate them into the community. In fact, s. 100 of the *CCRA* singles out rehabilitation and reintegration as the purpose of community supervision including LTSOs. As this Court indicated in *L.M.*, rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime. To suggest, therefore, that rehabilitation has been determined to be impossible to achieve in the long-term offender context is simply wrong. Given this context, it would be contrary to reason to conclude that rehabilitation is not an

appropriate sentencing objective and should therefore play “little or no role” (as stated in *W. (H.P.)*), in the sentencing process.

[51] This is not to say that rehabilitation will always be the foremost consideration when sentencing for breach of an LTSO. The duty of a sentencing judge is to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code* in order to devise a sentence that furthers the overall objectives of sentencing. The foregoing simply demonstrates that there is nothing in the provisions of the *Criminal Code* or the *CCRA* to suggest that any of those principles or objectives will not apply to the breach of an LTSO. As with any sentencing decision, the relative weight to be accorded to each sentencing principle or objective will vary depending on the circumstances of the particular offence. In all instances, the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender.

[52] It would be imprudent to attempt to determine in the abstract the gravity of the offence of breaching a condition of an LTSO. The severity of a given breach will ultimately depend on all of the circumstances, including the nature of the condition breached, how that condition is tied to managing the particular offender’s risk of re-offence, and the circumstances of the breach. However, a few comments may be instructive.

[53] Breach of an LTSO is an indictable offence punishable by up to ten years’ imprisonment. This can be contrasted with breach of probation which is a

hybrid offence with a maximum sentence of either 18 months or two years' imprisonment. In each of the present appeals, the Crown places significant emphasis on this distinction, suggesting that the high maximum penalty indicates that breach of an LTSO is a particularly serious offence warranting a significant sentence. My colleague, Rothstein J., reiterates this point at para. 123 of his reasons, concluding that the "necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time".

[54] The lengthy maximum penalty certainly indicates that Parliament views the breach of an LTSO differently (and more seriously) than the breach of a probation order. However, it would be too much to suggest that the mere existence of a high statutory maximum penalty dictates that a significant period of imprisonment should be imposed for any breach of an LTSO. Breaches can occur in an infinite variety of circumstances. Parliament did not see fit to impose a mandatory minimum sentence. Where no minimum sentence is mandated by the *Criminal Code*, the entire range of sentencing options is open to a sentencing judge, including non-carceral sentences where appropriate. In its recommendations, the Task Force specifically stated that a key factor to the success of a long-term offender regime is "a speedy and flexible mechanism for enforcing the orders which does not result in lengthy re-incarceration in the absence of the commission of a new crime" (p. 19 (emphasis added)).

[55] It is the sentencing judge's duty to determine, within this open range of sentencing options, which sentence will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. The severity of a particular breach of an LTSO will depend, in large part, on the circumstances of the breach, the nature of the condition breached, and the role that condition plays in managing the offender's risk of reoffence in the community. This requires a contextual analysis. As Smith J.A. states in *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228, at para. 51, "the gravity of an offence under s. 753.3 must be measured with reference not only to the conduct that gave rise to the offence, but also with regard to what it portends in light of the offender's entire history of criminal conduct". Breach of an LTSO is not subject to a distinct sentencing regime or system. In any given case, the best guides for determining a fit sentence are the well-established principles and objectives of sentencing set out in the *Criminal Code*.

C. The Offender — Sentencing Aboriginal Offenders

[56] Section 718.2(e) of the *Criminal Code* directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". This provision was introduced into the *Code* as part of the 1996 Bill C-41 amendments to codify the purpose and principles of sentencing. According to the then Minister of Justice, Allan Rock, "the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations

of Canada” (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994, at p. 15).

[57] Aboriginal persons were sadly overrepresented indeed. Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, “Locking Up Natives in Canada” (1988-1989), 23 *U.B.C. L. Rev.* 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain Penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989 (Commissioners A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice System and Aboriginal People*, at p. 394). The foregoing statistics led the Royal Commission on Aboriginal Peoples (“RCAP”) to conclude, at p. 309 of its Report, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996):

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 principle 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.

[58] The overrepresentation of Aboriginal people in the Canadian criminal justice system was the impetus for including the specific reference to Aboriginal people in s. 718.2(e). It was not at all clear, however, what exactly the provision required or how it would affect the sentencing of Aboriginal offenders. In 1999, this Court had the opportunity to address these questions in *Gladue*. Cory and Iacobucci JJ., writing for the unanimous Court, reviewed the statistics and concluded, at para. 64:

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

[59] The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have

recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). 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. These matters, on their own, do not necessarily justify a different sentence for

Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.

[61] It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In *Gladue*, Cory and Iacobucci JJ. were mindful of this fact, yet retained a degree of optimism, stating, at para. 65:

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing

judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[62] This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J. V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003), 45 *Can. J. Crim. & Crim. Just.* 211, at p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2008-2009), 54 *Crim. L.Q.* 447, at p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they accounted for 17 percent of federal admissions in 2005 (J. Rudin, "Aboriginal Overrepresentation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going", in J. Cameron and J. Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687, at p. 701). As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the

situation today?” (“Addressing Aboriginal Overrepresentation Post-*Gladue*”, at p. 452).

[63] Over a decade has passed since this Court issued its judgment in *Gladue*. As the statistics indicate, section 718.2(e) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system. Granted, the *Gladue* principles were never expected to provide a panacea. There is some indication, however, from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*. The following is an attempt to resolve these misunderstandings, clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision.

1. Making Sense of Aboriginal Sentencing

[64] Section 718.2(e) of the *Criminal Code* and this Court’s decision in *Gladue* were not universally well-received. Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle

of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(e) of the *Criminal Code*.

[65] Professors Stenning and Roberts describe the sentencing provision as an “empty promise” to Aboriginal peoples because it is unlikely to have any significant impact on levels of overrepresentation (P. Stenning and J. V. Roberts, “Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders” (2001), 64 *Sask. L. Rev.* 137, at p. 167). As we have seen, the direction to pay particular attention to the circumstances of Aboriginal offenders was included in light of evidence of their overrepresentation in Canada’s prisons and jails. This overrepresentation led the Aboriginal Justice Inquiry of Manitoba to ask in its Report: “Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system” (at p. 85); see also RCPA, at p. 33). The available evidence indicates that both phenomena are contributing to the problem (RCAP). Contrary to Professors Stenning and Roberts, addressing these matters does not lie beyond the purview of the sentencing judge.

[66] First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must

change so as to meet the needs of Aboriginal offenders and their communities. As Professors Rudin and Roach ask, “[if an innovative sentence] can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?” (J. Rudin and K. Roach, “Broken Promises: A Response to Stenning and Roberts’ ‘Empty Promises’” (2002), 65 *Sask. L. Rev.* 3, at p. 20).

[67] Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:

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, 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.

(T. Quigley, “Some Issues in Sentencing of Aboriginal Offenders”, in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)

Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.

[68] Section 718.2(e) is therefore properly seen as a “direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process” (*Gladue*, at para. 64 (emphasis added)). Applying the provision does not amount to “hijacking the sentencing process in the pursuit of other goals” (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

[69] Certainly sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge’s fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(e) into an empty promise. The sentencing judge has an admittedly limited, yet important role to play. As the Aboriginal Justice Inquiry of Manitoba put it, at pp. 110-11:

To change this situation will require a real commitment to ending social inequality in Canadian society, something to which no government in Canada has committed itself to date. This will be a far-reaching

endeavour and involve much more than the justice system as it is understood currently

Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.

Cory and Iacobucci JJ. were equally cognizant of the limits of the sentencing judge's power to effect change. Paragraph 65 of *Gladue* bears repeating here:

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.

[70] The sentencing process is therefore an appropriate forum for addressing Aboriginal overrepresentation in Canada's prisons. Despite being theoretically sound, critics still insist that, in practice, the direction to pay particular attention to the circumstances of Aboriginal offenders invites sentencing judges to impose more lenient sentences simply because an offender is Aboriginal. In short, s. 718.2(e) is seen as a race-based discount on sentencing, devoid of any legitimate tie to traditional principles of sentencing. A particularly stark example of this view was expressed by Bloc Québécois M.P. Pierrette Venne at the second reading for Bill C-41 when she

asked: “Why should an Aboriginal convicted of murder, rape, assault or of uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?” (*House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, at p. 5876).

[71] In *Gladue*, this Court rejected Ms. Gladue’s argument that s. 718.2(e) was an affirmative action provision or, as the Crown described it, an invitation to engage in “reverse discrimination” (para. 86). Cory and Iacobucci JJ. were very clear in stating that “s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal” (*Gladue*, at para. 88 (emphasis added)). This point was reiterated in *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 30. There is nothing to suggest that subsequent decisions of provincial and appellate courts have departed from this principle. In fact, it is usually stated explicitly. For example, in *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, the Manitoba Court of Appeal stated, at para. 39:

The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgement that to achieve real equity, sometimes different people must be treated differently.

[72] While the *purpose* of s. 718.2(e) may not be to provide “a remission of a warranted period of incarceration”, critics argue that the *methodology* set out in *Gladue* will inevitably have this effect. As Professors Stenning and Roberts state: “[T]he practical effect of this alternate methodology is predictable: the sentencing of an Aboriginal offender is less likely to result in a term of custody and, if custody is imposed, it is likely to be shorter in some cases than it would have been had the offender been non-Aboriginal” (p. 162). These criticisms are unwarranted. The methodology set out by this Court in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) 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. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as “the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender’s conduct” (*Wells*, at para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal

offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen’s Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, “[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled.” Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*. As Cory and Iacobucci JJ. state in *Gladue*, at para. 69:

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

[74] The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the

effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: “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.” As the RCAP indicates, at p. 309, the “crushing failure” of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to “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.” The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

[75] Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms

this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[76] A third criticism, intimately related to the last, is that the Court's direction to utilize a method of analysis when sentencing Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are otherwise similarly situated. This, in turn, violates the principle of sentence parity. This criticism is premised on the argument that the circumstances of Aboriginal offenders are not, in fact, unique. As Professors Stenning and Roberts put it (at p. 158):

If the kinds of factors that place many Aboriginal people at a disadvantage *vis-à-vis* the criminal justice system also affect many members of other minority or similarly marginalized non-Aboriginal offender groups, how can it be fair to give such factors more particular attention in sentencing Aboriginal offenders than in sentencing offenders from those other groups who share a similar disadvantage?

[77] This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP,

p. 309). As Professor Carter puts it, “poverty and other incidents of social marginalization may not be unique, but how people get there is. No one’s history in this country compares to Aboriginal people’s” (M. Carter, “Of Fairness and Faulkner” (2002), 65 *Sask. L. Rev.* 63, at p. 71). Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in *Gladue*, that “background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender”.

[78] The interaction between s. 718.2(e) and 718.2(b) — the parity principle — merits specific attention. Section 718.2(b) states that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”. Similarity, however, is sometimes an elusory concept. As J.-P. Brodeur describes (“On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts” (2002), 65 *Sask. L. Rev.* 45, at p. 49):

“[H]igh unemployment” has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; “substance abuse” is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; “loneliness” is not experienced in a similar way in bush reservations and urban ghettos.

[79] In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the

same crime in the exact same circumstances. Section 718.2(b) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e). As Professor Quigley cautions (at p. 286):

Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.

It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

2. Evaluating Aboriginal Sentencing Post-*Gladue*

[80] An examination of the post-*Gladue* jurisprudence applying s. 718.2(e) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.

[81] First, 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. The decision of the Alberta Court of Appeal in *R. v. Poucette*, 1999 ABCA 305, 250 A.R. 55, provides one example. In that case, the court concluded, at para. 14:

It is not clear how Poucette, a 19 year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, *Gladue* requires that their influences be traced to the particular offender. Failure to link the two is an error in principle.

(See also *R. v. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98, 223 Sask. R. 121.)

[82] This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:

There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence....

As expressed in *Gladue*, *Wells* and *Kakekagamick*, s. 718.2(e) requires the sentencing judge to “give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts”: *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.

(See also *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

[83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[84] The second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences. As Professor Roach has

indicated, “appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments — paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders” (K. Roach, “One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal” (2008-2009), 54 *Crim. L.Q.* 470, at p. 472). The passage in *Gladue* that has received this unwarranted emphasis is the observation that “[g]enerally, 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” (*Gladue*, at para. 79; see also *Wells*, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).

[85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear, at para. 82, that sentencing judges have a *duty* to apply s. 718.2(e): “There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.” Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that

[t]he 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. In

each case, the sentencing judge must look to the circumstances of the aboriginal offender.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192).

[86] In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the

sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

VI. Application

A. *Manasie Ipeelee*

[88] Megginson J. sentenced Mr. Ipeelee to three years' imprisonment, less credit for pre-sentence custody. The Court of Appeal upheld that sentence. Both courts emphasized the serious nature of the breach, given the documented link between Mr. Ipeelee's use of alcohol and his propensity to engage in violence. As a result, both courts emphasized the objectives of denunciation, deterrence, and protection of the public.

[89] In my view, the courts below made several errors in principle warranting appellate intervention. First, the courts reached the erroneous conclusion that protection of the public is the paramount objective when sentencing for breach of an LTSO and that rehabilitation plays only a small role. As discussed, while protection of the public is important, the legislative purpose of an LTSO as a form of conditional release set out in s. 100 of the *CCRA* is to rehabilitate offenders and reintegrate them into society. The courts therefore erred in concluding that rehabilitation was not a relevant sentencing objective.

[90] As a result of this error, the courts below gave only attenuated consideration to Mr. Ipeelee's circumstances as an Aboriginal offender. Relying on *Carrière*, the Court of Appeal concluded that this was the kind of offence where the sentence will not differ as between Aboriginal and non-Aboriginal offenders, and relying on *W. (H.P.)*, held that features of Aboriginal sentencing play little or no role when sentencing long-term offenders. Given certain trends in the jurisprudence discussed above, it is easy to see how the court reached this conclusion. Nonetheless, they erred in doing so. These errors justify the Court's intervention.

[91] It is therefore necessary to consider what sentence is warranted in the circumstances. Mr. Ipeelee breached the alcohol abstention condition of his LTSO. His history indicates a strong correlation between alcohol use and violent offending. As a result, abstaining from alcohol is critical to managing his risk in the community. That being said, the conduct constituting the breach was becoming intoxicated, not

becoming intoxicated and engaging in violence. The Court must focus on the actual incident giving rise to the breach. A fit sentence should seek to manage the risk of reoffence he continues to pose to the community in a manner that addresses his alcohol abuse, rather than punish him for what might have been. To engage in the latter would certainly run afoul of the principles of fundamental justice.

[92] At the time of the offence, Mr. Ipeelee was eighteen months into his LTSO. He was living in Kingston, where there were few culturally-relevant support systems in place. There is no evidence, other than one isolated instance of refusing urinalysis, that he consumed alcohol on any occasion prior to this breach. Mr. Ipeelee's history indicates that he has been drinking heavily since the age of 11. Relapse is to be expected as he continues to address his addiction.

[93] Taking into account the relevant sentencing principles, the fact that this is Mr. Ipeelee's first breach of his LTSO and that he pleaded guilty to the offence, I would substitute a sentence of one year's imprisonment. Given the circumstances of his previous convictions, abstaining from alcohol is crucial to Mr. Ipeelee's rehabilitation under the long-term offender regime. Consequently, this sentence is designed to denounce Mr. Ipeelee's conduct and deter him from consuming alcohol in the future. In addition, it provides a sufficient period of time without access to alcohol so that Mr. Ipeelee can get back on track with his alcohol treatment. Finally, the sentence is not so harsh as to suggest to Mr. Ipeelee that success under the long-term offender regime is simply not possible.

B. *Frank Ralph Ladue*

[94] Bagnall Prov. Ct. J. sentenced Mr. Ladue to three years' imprisonment, less credit for pre-sentence custody. The majority of the Court of Appeal intervened and substituted a sentence of one year's imprisonment. Bennett J.A., writing for the majority, held that the sentencing judge made two errors warranting appellate intervention.

[95] First, the majority of the Court of Appeal held that the sentencing judge failed to give sufficient weight to Mr. Ladue's circumstances as an Aboriginal offender. Although she acknowledged Mr. Ladue's Aboriginal status in her reasons for sentence, she failed to give it any "tangible consideration" (para. 64). In my view, the Court of Appeal was right to intervene on this basis. The sentencing judge described Mr. Ladue's history in great detail, but she failed to consider whether and how that history ought to impact on her sentencing decision. As a result, she failed to give effect to Parliament's direction in s. 718.2(e) of the *Criminal Code*. As the Court of Appeal rightly concluded, this was a case in which the unique circumstances of the Aboriginal offender indicated that the objective of rehabilitation ought to have been given greater emphasis:

Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his alcohol and drug addiction in the community he will very likely be a threat to the public. Repeated efforts at abstinence

are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago. [para. 63]

[96] Second, the majority of the Court of Appeal held that a sentence of three years' imprisonment was not proportionate to the gravity of the offence and the degree of responsibility of the offender. The Court of Appeal placed particular emphasis on the manner in which Mr. Ladue came to arrive at Belkin House rather than Linkage House. In my view, this emphasis was entirely warranted. Mr. Ladue is addicted to opiates — incidentally, a form of the same drug he first began using while incarcerated in a federal penitentiary. He had arranged to be released to Linkage House where he would have access to culturally-relevant programming and the resources of an Elder. Instead, as a result of errors made by correctional officials, he was released to Belkin House where he was immediately tempted by drugs. The Court of Appeal was therefore justified in reaching the following conclusion:

I acknowledge that Mr. Ladue's repeated failure to abstain from substances while on release required some time back in prison. However, in my respectful opinion, a sentence of one year would properly reflect the principles and purpose of sentencing. I say this because it is enough time for Mr. Ladue to achieve sobriety, and enough time for the correctional staff to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. In addition, a one-year sentence is more reflective of and more proportionate to the nature of his offence and his circumstances. ...

[T]he circumstances of Mr. Ladue's background played an instrumental part in his offending over his lifetime and his rehabilitation is critical to the protection of the public. [paras. 81-82]

[97] The judgment of the Court of Appeal is well founded. Bennett J.A. cogently analysed this Court's decisions in *Gladue* and *L.M.* and correctly applied those principles to the facts of the specific case. A sentence of one year of imprisonment adequately reflects the principles and objectives of sentencing set out in the *Criminal Code*. As a result, I would dismiss the Crown's appeal and affirm the sentence of one year's imprisonment imposed by the majority of the Court of Appeal.

VII. Conclusion

[98] For the foregoing reasons, I would allow the offender's appeal in *Ipeelee* and substitute a sentence of one year's imprisonment. I would dismiss the Crown's appeal in *Ladue*.

The following are the reasons delivered by

ROTHSTEIN J. —

I. Introduction

[99] I have had the opportunity of reading the reasons of my colleague Justice Lebel. While I am in agreement with much of what my colleague has written in the context of general sentencing principles and application of those principles to Aboriginal offenders, I am of the respectful opinion that he does not specifically address the issue of the sentencing of Aboriginal offenders who have been found to

be long-term offenders and have been found guilty of breaching a condition of a long-term supervision order (“LTSO”).

[100] I believe that LeBel J.’s reasons conflate the purpose and objective of LTSOs with the purpose and objective of sentencing for breaches of such orders. My concern is that the message they send to sentencing judges as to the weight to be given to considerations relevant to the sentencing for breaches in such cases is not consistent with Parliamentary intent. In my opinion, Parliament has said that protection of society is the paramount consideration when it comes to such sentencing. Elevating rehabilitation and reintegration into society to a more significant factor diverts the sentencing judge from adhering to the expressed intention of Parliament.

[101] With respect to sentencing of Aboriginal offenders, I agree that s. 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to Aboriginal offenders, is mandatory and must be applied in all cases, including the case of long-term Aboriginal offenders. However, once an Aboriginal individual is found to be a long-term offender, and the offender has breached one or more conditions of his or her LTSO, alternatives to a significant prison term will be limited. The risk the Aboriginal offender poses in the community is substantial and the management of that risk has been compromised. That is the reality facing the judge charged with fixing an appropriate sentence in such circumstances.

II. Facts

A. *Manasie Ipeelee*

[102] Manasie Ipeelee, an Inuk, was born on December 28, 1972 in Iqaluit and grew up in that community. He suffered a tragic upbringing, which saw the death of his alcoholic mother when he was a child and the development of his own serious alcohol addiction by the time he was 12 years old. His life is marked by an ever-present alcohol addiction coupled with a propensity to inflict brutal violence on those with whom he comes into contact while intoxicated.

[103] From the age of 12 to 18, he accumulated a record of 36 convictions, mostly property related. As an adult, Mr. Ipeelee continued to commit property offences, but added to them a series of increasingly violent crimes. The series of violent offences began in September 1992, when he was 19. On this occasion, he attacked a man with an ashtray and chair when he was refused entry into the victim's home. He pled guilty to assault causing bodily harm and was sentenced to 21 days' imprisonment followed by one year probation.

[104] In August 1993, he committed a second assault causing bodily harm when, while on probation for the prior offence, he beat an individual unconscious outside a bar in Iqaluit, kicking him in the face at least ten times and continuing the assault after the individual had lost consciousness. This attack left the victim hospitalized. Less than one year later he pled guilty to yet another aggravated assault. This time the victim was hospitalized after being beaten to unconsciousness by Mr. Ipeelee, who then continued to stomp on his face. Mr. Ipeelee was sentenced to 5

months' imprisonment for the August 1993 offence and 14 months for the subsequent offence.

[105] Three weeks after receiving early release from prison for this attack, he committed a sexual assault in which he and another man raped a woman who had passed out from intoxication at a party. He pled guilty and received a sentence of two years in prison. A consecutive 8 month sentence was added for his escape from prison two days before the plea and sentencing hearing. In the six months after his release for this offence, he was arrested at least nine times for public intoxication.

[106] In August 1999, he committed a sexual assault causing bodily harm when he raped a homeless woman, during the course of which he threatened to kill her, and punched her repeatedly in the face. The woman required treatment in hospital for her injuries. It was this crime that led to his designation as a long-term offender. At the hearing the sentencing judge noted (2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL)):

This summary of Mr. Ipeelee's crimes of violence shows a consistent pattern of Mr. Ipeelee administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication. [para. 34]

Mr. Ipeelee was sentenced to six years' imprisonment for this offence to be followed by a 10 year LTSO.

[107] The offence that led to this appeal occurred in August 2008 after Mr. Ipeelee had been on release for 17 months. On this occasion, police found Mr. Ipeelee intoxicated in downtown Kingston and he was charged with breaching the abstention from intoxicants condition of his LTSO. He pled guilty on November 14, 2008 and received a sentence of three years in prison.

B. *Frank Ralph Ladue*

[108] Frank Ladue is a member of the Ross River Dena Council, an Aboriginal community of approximately 500 individuals located 400 kilometres northeast of Whitehorse. He was born in 1962 and, like Mr. Ipeelee, suffered a tragic childhood, with both alcoholic parents dying while he was quite young. At the age of five, he was sent to a residential school and on his return, he lived with his grandparents. It was then, at the age of nine, that he began drinking. He has continued to have serious problems with alcohol and drugs throughout his life, with the exception of a six-year period of sobriety in the 1990s, a time when he was also free of convictions.

[109] Mr. Ladue has a criminal record of 40 convictions. It includes a lengthy list of property and impaired driving offences. He has two convictions for robbery, and two convictions for common assault. His most serious convictions stem from a series of sexual assaults. The first occurred in 1987 when he sexually assaulted an unconscious woman at a party. In 1998, he was convicted of breaking and entering. During the break and enter, he placed a sleeping bag over a sleeping woman's head and shoulders, but fled when her daughter interrupted him. Although he was not

convicted of sexual assault, the sentencing judge at Mr. Ladue's 2003 hearing, where he was designated a long-term offender, found the incident "eerily similar" to the previous sexual assaults (2003 YKTC 100 (CanLII), at para. 7). In June of 1999, he was found guilty of sexually assaulting yet another unconscious woman. For the 1987 conviction, he was sentenced to imprisonment for 23 months, for the 1998 conviction four months and for the 1999 conviction 30 months.

[110] His most recent sexual assault occurred in 2002. On this occasion he entered a dwelling house without permission from the occupants and found a 22-year-old woman in the living room unconscious due to alcohol consumption. When she awoke, Mr. Ladue was assaulting her and attempting to remove her pants. She was unable to resist due to her intoxication, but the attack was interrupted when other residents of the house were awakened by what was happening and Mr. Ladue escaped from the home. He was convicted following a trial for break and enter and sexual assault and sentenced to three years' imprisonment. It was this offence that caused him to be found a long-term offender.

[111] Mr. Ladue was released under a 7 year LTSO in December 2006. During the time between his release and the breach in question in this appeal, he was convicted for breaching his LTSO by consuming intoxicants on three occasions and sentenced in total to two years in prison, with sixteen and a half months credited for pre-sentence custody. On May 23, 2009, he had his LTSO suspended for the tenth

time between December 2006 and May 2009 and remained in custody until August 12, 2009.

[112] Upon release he was designated by the Correctional Services of Canada (“CSC”) to be sent to Linkage House in Kamloops, British Columbia, where he would receive culturally specific support from an Aboriginal Elder. However, an outstanding warrant requiring Mr. Ladue to submit to a DNA test was discovered at the time of his release. Apparently, due to a bureaucratic error, the warrant had not been executed during his period of detention and, according to counsel for Mr. Ladue in this Court, may have been altogether unnecessary, as a DNA sample may have been provided under a previous warrant. The warrant required that he appear in Surrey, B.C. This resulted in Mr. Ladue being sent to Belkin House, in downtown Vancouver, which did not offer the specialized support of Linkage House in Kamloops. Upon arrival, he was informed that his residency status did not allow an immediate transfer to Linkage House and that he would have to remain at Belkin House until the National Parole Board made the necessary change to his status. Within one week of his arrival at Belkin House, he reoffended and was subsequently charged with breaching his LTSO by consuming intoxicants. He pled guilty in February 2010 and received a sentence of three years in prison.

III. General Principles of Sentencing

[113] The statutory provisions referred to in these reasons are set out in the Appendix in full. Section 718 of the *Criminal Code* codifies the objectives and

principles of sentencing. They apply to the sentencing of all offenders including long-term offenders who breach their LTSOs.

[114] I agree with Justice LeBel that a fundamental principle of sentencing must be proportionality and that the weight given to the different objectives of sentencing must respect that fundamental principle. The first question that arises in this case is how these objectives and principles are to be applied when a judge is required to fix a sentence for a long-term offender who has breached one or more conditions of his LTSO.

IV. Long-Term Offenders

[115] Section 753.1(1) of the *Criminal Code* sets out three criteria for finding an individual to be a long-term offender:

753.1 (1) The court may ... find an offender to be a long-term offender if it is satisfied that

(a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

(b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

[116] Section 753.1(1)(b) requires a finding that there be a substantial risk that the offender will reoffend. Section 753.1(2) provides the criteria for a finding of substantial risk of re-offending by the offender. The court must be satisfied that the

offender has committed a specified sexual offence or a violent offence that involves a sexual element and a pattern of repetitious behaviour or previous conviction for a sexual offence, thereby showing a likelihood of causing death, injury, inflicting psychological damage, pain, or other evil in the future. The criminal history of these individuals and their propensity to reoffend demonstrates the extraordinary danger they pose to society.

V. Long-Term Supervision Orders

[117] The distinction between dangerous offenders, who are incarcerated indefinitely, and long-term offenders is the finding that there is a reasonable possibility for eventual control in the community of the long-term offender's substantial risk of reoffending. If the court finds an offender to be a long-term offender, it shall order that the offender be subject to long-term supervision for up to ten years (s. 753.1(3)(b)), during which he or she is to be supervised in the community, by a parole supervisor (s. 753.2(1)). Thus, instead of indefinite detention, long-term offenders will return to the community under supervision and be subject to a series of conditions prescribed in s. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620, as may be modified or supplemented by the National Parole Board under s. 134.1(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA"). Section 134.1(2) provides that the

conditions prescribed by the Board are to be reasonable and necessary for both the protection of society and the successful reintegration into society of the offender.

[118] Section 100 of the *CCRA* states:

The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

[119] Section 100 applies to all offenders, including long-term offenders. The maintenance of a just, peaceful and safe society is the purpose of a release with conditions. Decisions on the timing and conditions of release that will best facilitate rehabilitation and reintegration into society are the means by which the purpose is to be effected. However, to achieve the purpose of conditional release, s. 101(a) of the *CCRA* states

that the protection of society be the paramount consideration in the determination of any case.

The principle of protection of society is, of course, especially important in the case of long-term offenders because of their substantial risk of violently reoffending.

[120] To this point, my only difference with Justice LeBel is that I read the relevant legislation as providing that protection of the public is the paramount consideration in setting the timing and conditions for release. I do not view

rehabilitation and reintegration into society as an equal consideration. Rather, if the objectives of rehabilitation and reintegration are met, they will be the most effective and permanent methods to achieve the protection of the public. However, there is no guarantee that rehabilitation and reintegration will be achieved with long-term offenders in view of their history of repetitive sexual or violent behaviour. Therefore, in accordance with s. 101(a), protection of the public must stand as the paramount consideration in fixing the timing and conditions of release, especially in the case of long-term offenders, who pose a threat of serious violence and harm to other members of society.

VI. Breaches of Long-Term Supervision Orders

[121] Where I part serious company with my learned colleague is with respect to the proper approach to sentencing for breaches of an LTSO. In my respectful opinion, LeBel J. has not taken account of the difference between the objectives and requirements of LTSOs for long-term offenders who abide by the conditions of their LTSO and the objectives and requirements of sentencing long-term offenders who have breached a condition of their LTSO.

[122] The breach of the LTSO raises serious concerns that rehabilitation and reintegration are not being achieved and calls into doubt whether, despite supervision, the long-term offender has demonstrated that the substantial risk of reoffending in a violent manner in the community by the long-term offender can be adequately managed. Therefore, protection of society must be the dominant consideration in

sentencing for breaches of an LTSO. Indeed, if protection of the public is the paramount consideration when setting the conditions of release, it logically must remain the paramount consideration when sentencing for a breach of those conditions.

[123] In this context, it is significant that s. 753.3(1) of the *Criminal Code* provides that a breach of an LTSO constitutes an indictable offence, as opposed to a hybrid offence, with a maximum sentence of ten years. The maximum term is for the breach of the LTSO exclusively and is not dependant on the long-term offender having been found guilty of another substantive offence, violent or otherwise. The necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time. In effect, Parliament requires a sentencing judge not to wait until a long-term offender wounds, maims, sexually assaults, or kills someone before receiving a significant sentence.

[124] Of course, while all conditions of an LTSO are intended to minimize the risk of reoffending, breach of some conditions will be more important than others. As Ritter J.A. pointed out in *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, at para. 44:

I also recognize that the seriousness of any breach will be greatly diminished if the breach is purely technical. For example, a breach regarding a reporting requirement should be regarded as nominal if the offender, for reasons beyond his control, was a few minutes late for a reporting appointment.

[125] On the other hand, where a breach is central to the substantial risk of reoffending, such as where alcohol or substance consumption has been found to be the trigger for violent offences by the long-term offender, the breach must be considered to be very serious. Such a breach demonstrates that management of the offender in the community has been less than effective and the substantial risk of a violent reoffence is heightened. Therefore, in sentencing for the breach of a condition of an LTSO, which is central to the risk of the long-term offender violently reoffending, the protection of the public, more so than the rehabilitation or reintegration of the offender, must be the dominant consideration of the sentencing judge in the determination of a fit and proper sentence.

VII. Sentencing Principles Applicable to Aboriginal Offenders

[126] I agree with Lebel J. that s. 718.2(e) requires a sentencing judge to consider background and systemic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders. These factors operate, not as an excuse or justification for criminal conduct, but rather as context for the sentencing judge to determine an appropriate sentence. They do not create a race-based discount in sentencing and do not mandate remedying over-representation by artificially reducing incarceration rates.

[127] Cory and Iacobucci JJ. pointed out in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 65, that sentencing judges have only a limited role in remedying injustice

against Aboriginal peoples in Canada. This limited role, however, does not mean they do not have an important role. Sentencing judges must guard against racial discrimination in sentencing. I do not go so far as to endorse the academic commentary cited by my colleague, but I do agree that racial discrimination in sentencing, such as the propensity of Aboriginal offenders to receive unjustifiably longer sentences than non-Aboriginals or imprisonment when non-Aboriginals would not be imprisoned, is something for which sentencing judges must remain vigilant.

[128] The role of a sentencing judge in remedying such injustice may most effectively be carried out through alternative sentencing. However, this requires that they be presented with viable sentencing alternatives to imprisonment that may play a stronger role “in restoring a sense of balance to the offender, victim, and community, and in preventing future crime” (*Gladue*, at para. 65). As with all sentencing, this must be done with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge.

VIII. The Application of Section 718.2(e) and *Gladue* to Long-Term Offenders

[129] The particular circumstances of long-term offenders leads me to disagree with my colleague when it comes to sentencing Aboriginal long-term offenders for breaches of conditions of their LTSOs. At para. 79 of *Gladue*, Cory and Iacobucci JJ. observed:

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.

I agree with LeBel J. that these comments are not to be read by sentencing judges as a justification not to apply s. 718.2(e) or to ignore the unique situation of Aboriginal offenders (paras. 84-85). But, in the context of s. 718.2(e), sentencing judges are obliged to exercise their discretion as to the appropriate sentence, having regard to all relevant considerations. Obviously, the substantial risk a long-term offender poses to the community is a relevant consideration in sentencing for the breach of an LTSO.

[130] I have set out my views above that in the case of long-term offenders, the paramount consideration is the protection of society. This applies to all long-term offenders, including Aboriginal long-term offenders who have compromised the management of their risk of reoffending by breaching a condition of their LTSO. In these circumstances, the alternatives to imprisonment become very limited.

[131] I do not rule out alternatives. However, the alternative must be viable. The sentencing judge must be satisfied that they are consistent with protection of society. Alternatives may include returning Aboriginal offenders to their communities. However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of an LTSO goes to the control of the Aboriginal offender in the community, rehabilitation

and reintegration into society will have faltered, if not failed. In such a case, the sentencing judge may have no alternative but to separate the Aboriginal long-term offender from society for a significant period of time. Nevertheless, during the period of incarceration, the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of re-offending may be controlled.

IX. Application

A. *Ipeelee*

[132] The sentencing judge, Justice Megginson, sentenced Mr. Ipeelee to three years' imprisonment (2009 CarswellOnt 7864). The Court of Appeal upheld Justice Megginson's decision (2009 ONCA 892, 99 O.R. (3d) 419). The question is whether this is a fit and proper sentence.

[133] In my opinion, Justice Megginson's findings demonstrate a thorough appreciation of the circumstances. He considered Mr. Ipeelee's circumstances, his personal and criminal history, and his efforts at rehabilitation and reintegration while in the community. He acknowledged that Mr. Ipeelee was Inuit and entitled to consideration of his Aboriginal status. He noted that crafting an alternative sentence would be difficult, as Mr. Ipeelee had been refused residency at a facility in Iqaluit.

In my view, he properly recognized that protection of the public was the paramount concern in breaches of LTSOs.

[134] Lebel J. finds at paras. 89 and 95 of his reasons that in this appeal and in *Ladue*, the courts erred in concluding that rehabilitation was not a relevant factor in their sentencing decisions. I do not read their decisions or the decision of the Ontario Court of Appeal in that way. On my reading of those decisions, all judges considered the principle of rehabilitation in sentencing, only to ultimately find that it should play a small role given that Mr. Ipeelee and Mr. Ladue are long-term offenders and as both had breached conditions of their LTSOs.

[135] In *Ipeelee*, the Crown requested a sentence of three to five years, while Mr. Ipeelee requested a sentence not exceeding twelve months. Justice Megginson imposed a sentence of three years, at the low end of the range proposed by the Crown, which, in his opinion, adequately reflected Mr. Ipeelee's Aboriginal status and the mitigating effect of his guilty plea.

[136] Justice LeBel minimizes the significance of Mr. Ipeelee's breach because it only involved intoxication, not becoming intoxicated and engaging in violence. With respect, this ignores the basic fact that Mr. Ipeelee's intoxication is the precursor to his engaging in violence and it is the management of the high risk of a violent reoffence that has been compromised by his alcohol consumption.

[137] As a long-term offender, Mr. Ipeelee has been found to show a pattern of repetitive behaviour with a likelihood of causing death or physical or psychological injury or a likelihood of causing injury, pain or other evil to other persons in the future through failure to control his sexual impulses. His alcohol consumption is central to such behaviour. I emphasize that s. 753.3(1) provides that breach of an LTSO is an indictable offence with a maximum sentence of up to ten years and no substantive offence, violent or otherwise, need have also been committed. Parliament obviously considered the breach of an LTSO, by itself, a serious offence. That is what the sentencing judge considered relevant, and I can find no fault in his so doing.

[138] The exercise of discretion by a sentencing judge is entitled to significant deference from an appellate court. Deference is appropriate as sentencing judges have important advantages over appellate courts in crafting a particular sentence. Those advantages were well set out by Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500:

A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of

and in the community. The discretion of a sentencing judge should thus not be interfered with lightly. [para. 91]

[139] Lamer C.J. outlined the limited role of appellate courts in matters of sentencing:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. [para. 90]

[140] I find no error in principle, no failure to consider relevant factors or an overemphasis on the appropriate factors by Justice Megginson. I cannot say the sentence he imposed was demonstrably unfit. I would dismiss this appeal.

B. *Ladue*

[141] In this case, Judge Bagnall sentenced Mr. Ladue to three years' imprisonment (2010 BCPC 410 (CanLII)). The majority of the Court of Appeal reduced the three year sentence to one year. Chiasson J.A., dissenting in the Court of Appeal, would have ordered a sentence of two years (2011 BCCA 101, 302 B.C.A.C. 93).

[142] The sentencing judge commented on Mr. Ladue's particular background. She quoted from his pre-sentence report which referenced his "horrible and tragic" experience in a residential school and commented on his bleak future (para. 22). She

also referred to his appraisal report, which further documented his residential school experience and that he had been the victim of abuse.

[143] With regard to his LTSO, she observed that Mr. Ladue had been previously convicted three times for breaching the order by consuming intoxicants. She noted that he was initially scheduled to be released to Linkage House, in Kamloops, but, because of an outstanding DNA warrant, was sent to Belkin House in downtown Vancouver to have it attended to. She acknowledged Mr. Ladue's submission that being placed at Belkin House minimized his chance for successful rehabilitation, but did not accept it. She said that, upon arrival at Belkin House, he was warned not to associate with a particular offender, but did so and slipped almost immediately back into drug and alcohol use. He was given a second chance at Belkin House, but to no avail, and eventually admitted to using cocaine and morphine since his arrival. This led to the charge of breaching his LTSO.

[144] A community assessment report compiled by a parole officer in September 2009 for the benefit of the Kamloops Parole Office was critical of Mr. Ladue's placement at Belkin House.

[Mr. Ladue] desperately needs to get away from downtown Vancouver. He requires the onsite resources of an Elder and ceremony. He needs to get immediately in touch with a residential school trauma counsellor.

...

The purpose of this report is to re-screen Mr. Ladue into Linkage House for potential residence while serving his Long-Term Supervision Order (LTSO).

...

Mr. Wolkosky continues to believe Mr. Ladue could be managed at Linkage House. It is expected that Mr. Ladue's negative associates will not be located in the Kamloops region. Substance abuse is not tolerated at Linkage and consequences can be expected if this were to occur. Mr. Wolkosky feels CSC, JHS and RCMP can work together (sic) to assist Mr. Ladue with successful reintegration. [A.R., at pp. 139-40]

[145] An appraisal report dated September 2009 noted that Mr. Ladue had participated in Aboriginal programs to address "his need areas", but none were sufficient to address his risk. In the end, the report found that his "risk to the community is high and currently unmanageable" (A.R., at p. 136).

[146] The Crown sought a sentence of eighteen months to two years. Mr. Ladue asked for a much shorter sentence. The sentencing judge found that the only way to protect the community, given Mr. Ladue's high risk of reoffending sexually and moderate to high risk of reoffending violently, was to emphasize the objective of isolation. She found that in spite of successful completion of treatment, he was unable or unwilling to abstain from the consumption of intoxicants and that he was much more likely to reoffend in such circumstances. She noted that the indictable nature of the breach and the maximum sentence of ten years indicate Parliament's view that this is a serious offence and that, even if Mr. Ladue did not commit a substantive offence, his breach was serious. The judge found the eighteen to twenty-four month range recommended by the Crown inadequate and sentenced Mr. Ladue to three years' imprisonment.

[147] In reducing Mr. Ladue's sentence to one year, the majority of the Court of Appeal found that the sentencing judge did not give sufficient weight to the circumstances of Mr. Ladue as an Aboriginal offender, overemphasised the principle of separating the offender and gave insufficient weight to the principle of rehabilitation. The majority said that the sentencing judge did not give Mr. Ladue's Aboriginal heritage tangible consideration "which will often impact the length and type of sentence imposed. ... There is nothing to indicate that [Mr. Ladue] had come close to engaging in the violent sexual behaviour.... [T]he role of rehabilitation will depend on the circumstances of the offender and is not dependent on his or her designation" (paras. 64, 68 and 71).

[148] The majority also observed that the corrections report found that Linkage House in Kamloops offered the best chance at rehabilitation for Mr. Ladue. However,

[b]ecause of a bureaucratic error, he was not sent there following his last release. Instead, he was sent to Belkin House, which placed him back into a milieu where he was sorely tempted by drugs. [para. 76]

[149] In the opinion of the majority, a one-year sentence would be enough time for Mr. Ladue to deal with his substance abuse problem and for CSC to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. They observed that his prior sentence for violation of his LTSO was based on time served on remand. An increase to three years was found to be excessive.

[150] In dissent, Chiasson J.A. was of the opinion that the sentencing judge did not err in her consideration of the Aboriginal circumstances of Mr. Ladue but did fail to recognize that his breach of condition did not lead him on a path of reoffending. He would have imposed a sentence of two years.

[151] I agree with Chiasson J.A. that Mr. Ladue's Aboriginal background was considered and weighed in the sentencing judge's decision. As I noted in the case of Mr. Ipeelee, it is not open to an appellate court to interfere with a sentence simply because it would have weighed the relevant factors differently. It is only when it can be said that the exercise of discretion was unreasonable that the appeal court may interfere with the sentence.

[152] While I do not entirely agree with the reasoning of the majority of the Court of Appeal, nonetheless, in my respectful opinion, there is another reason to agree with the one-year sentence they imposed.

[153] The distinguishing aspect of this case is what the Court of Appeal called the "bureaucratic error" (para. 76). Because of that error, Mr. Ladue was sent to Belkin House in downtown Vancouver rather than Linkage House in Kamloops. The sentencing judge does not appear to have considered that it was this error that caused Mr. Ladue to be sent to Belkin house, which apparently tolerates serious drug abusers and does not provide programs for Aboriginal offenders.

[154] I do not absolve Mr. Ladue of responsibility for his own conduct. However, CSC said that Linkage House was the appropriate location for Mr. Ladue. It was their error that caused him to be placed in an environment where, having regard to his known addiction, he was especially vulnerable to breaching his LTSO.

[155] The sentencing judge does not refer to the fact that the cause of Mr. Ladue being sent to Belkin House rather than Linkage House was a “bureaucratic error”. In my respectful opinion, she failed to take account of this relevant consideration. Due to no fault of his own and contrary to the recommended course of rehabilitation, Mr. Ladue was sent to a facility that placed him in harm’s way.

[156] Section 718.1 of *Criminal Code* provides:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This is not a situation where the offender failed to take up an opportunity that the criminal justice system had given him to rehabilitate. Rather, the system’s bureaucratic error deprived him of that opportunity. CSC must bear some “degree of responsibility” for Mr. Ladue’s breach.

[157] For the reasons that I have given, the sentencing judge did not err in focussing on protection of society as the paramount consideration in her sentencing decision. But this was a case where there was a realistic opportunity for rehabilitation

that was denied Mr. Ladue by the system's "bureaucratic error". This relevant consideration was not taken into account by the sentencing judge. This failure meant that Mr. Ladue's moral blameworthiness was not properly assessed (see *M. (C.A.)*, at para 79, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42). In the circumstances and having regard to the fact that the CSC must bear some responsibility for Mr. Ladue's breach, I would agree with the result reached by the majority of the Court of Appeal and Justice LeBel and find that one year was a fit and proper sentence. I would dismiss this appeal.

APPENDIX

Criminal Code, R.S.C. 1985, c. C-46

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.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

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 or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
 - (v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

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

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

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

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

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

(3) If the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving

(a) the sentence for the offence for which the offender has been convicted; and

(b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a).

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

Corrections and Conditional Release Regulations, SOR/92-620

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

(a) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;

(b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;

(c) obey the law and keep the peace;

(d) inform the parole supervisor immediately on arrest or on being questioned by the police;

(e) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(f) report to the police if and as instructed by the parole supervisor;

(g) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately

(i) any change in the offender's address of residence,

(ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,

(iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and

(iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;

(h) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor; and

(i) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

(2) For the purposes of subsection 133(2) of the Act, every offender who is released on unescorted temporary absence is subject to the following conditions, namely, that the offender

(a) on release, travel directly to the destination set out in the absence permit respecting the offender, report to a parole supervisor as directed by the releasing authority and follow the release plan approved by the releasing authority;

(b) remain in Canada within the territorial boundaries fixed by the parole supervisor for the duration of the absence;

(c) obey the law and keep the peace;

(d) inform the parole supervisor immediately on arrest or on being questioned by the police;

(e) at all times carry the absence permit and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(f) report to the police if and as instructed by the releasing authority;

(g) return to the penitentiary from which the offender was released on the date and at the time provided for in the absence permit;

(h) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor.

Corrections and Conditional Release Act, S.C. 1992, c. 20

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are

(a) that the protection of society be the paramount consideration in the corrections process;

(b) that the sentence be carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;

(c) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;

(d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

(e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(f) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

(g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

(i) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and

(j) that staff members be properly selected and trained, and be given

(i) appropriate career development opportunities,

(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

(iii) opportunities to participate in the development of correctional policies and programs.

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(a) that the protection of society be the paramount consideration in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

134.1 (1) Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the *Corrections and Conditional Release Regulations*, with such modifications as the circumstances require.

(2) The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(3) A condition imposed under subsection (2) is valid for the period that the Board specifies.

(4) The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,

(a) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or

(b) in respect of conditions imposed under subsection (2), remove or vary any such condition.

134.2 (1) An offender who is supervised pursuant to a long-term supervision order shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, or given by the offender's parole supervisor, respecting any conditions of long-term supervision in order to prevent a breach of any condition or to protect society.

(2) In this section, "parole supervisor" means

(a) a staff member as defined in subsection 2(1); or

(b) a person entrusted by the Service with the guidance and supervision of an offender who is required to be supervised by a long-term supervision order.

Appeal 33650 allowed, ROTHSTEIN J. dissenting. Appeal 34245 dismissed.

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