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Section 718.2(e) of the Criminal Code and Aboriginal Overrepresentation in Canadian Prisons

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ABSTRACT

Aboriginal peoples have been recognized as statistically overrepresented in the Canadian prison system, incarcerated at a rate nearly ten times the rate of the non-Aboriginal population. Despite their overrepresentation being recognized in academic literature, government reports, and Supreme Court rulings, the rate of Aboriginal incarceration has not decreased. In 1996, section 718.2(e) of the Canadian *Criminal Code* was enacted. Its purpose was to address the overrepresentation of Aboriginal peoples in Canadian prisons by requiring sentencing judges to consider sanctions other than imprisonment for all offenders, and specifically pay attention to the unique circumstances of Aboriginal offenders. In 1999, the Supreme Court of Canada's decision in *R v Gladue* reaffirmed the application and importance of this section for sentencing judges. This paper addresses the question: what was the legislative purpose of enacting s.718.2(e) of the *Criminal Code*, and why has it failed up to this point? It is argued that the Supreme Court's clarifications and section 718.2(e) alone cannot remedy the issue of Aboriginal overrepresentation as the section only applies to sentencing, one aspect of the larger institutional criminal justice structure. In enacting this provision, the Canadian government overlooked the systemic social, financial, and historic inequalities that contribute to Aboriginal criminality. Thus, section 718.2(e) alone is unable to reduce the disproportionate incarceration rates as the root causes of Aboriginal criminality continue to go unaddressed.

In Canada in 2011, 1.4 million people identified as Aboriginal, around three percent of the adult population. However, in the same year, 27 percent of adults in provincial and territorial prisons, and 20 percent in federal prisons were Aboriginal.[1] Aboriginal peoples have been recognized as statistically overrepresented in the Canadian prison system, incarcerated at a rate of 756 per 100,000 people, nearly ten times the rate of the non-Aboriginal population, at 76 per 100,000 people.[2] This overrepresentation has been acknowledged in academic literature, government reports, and Supreme Court rulings, yet the rate of Aboriginal incarceration has not decreased. In 1996, the Canadian government introduced sentencing reforms in Bill C-41, which included a specific provision, s.718.2(e), aimed at reducing this disproportionate rate of Aboriginal incarceration. This section requires sentencing judges to consider sanctions other than imprisonment for all offenders, but specifically paying attention to the circumstances of Aboriginal offenders.[3] Once implemented however, this section received little attention until the Supreme Court of Canada (SCC) decision in *R v Gladue* in 1999, that outlined how sentencing judges should apply s.718.2(e) and when it should be used.[4]

Despite these sentencing changes and clarification by the SCC in *Gladue*, the rate of Aboriginal peoples' incarceration has only increased since the implementation of s.718.2(e). As a result, this paper will address the question of: What was the legislative purpose of enacting s.718.2(e) of the *Criminal Code*, and why has it failed up to this point? It will be argued that s.718.2(e) was established in response to various commissioned reports that outlined the prevalence of Aboriginal overrepresentation in the Canadian criminal justice system. By choosing to implement sentencing reforms, the Canadian government tasked the judiciary with the reduction of Aboriginal over-incarceration rates. This would be achieved by requiring judges to consider alternative sentencing options focused on restoration and rehabilitation. However, Parliament did

not provide direction to the judiciary in applying s.718.2(e), and sentencing is only one aspect of the larger institutional structure that contributes to Aboriginal overrepresentation. So, by doing this, the Canadian government overlooked the systemic social, financial, and historic inequalities that contribute to Aboriginal criminality. As a result, s.718.2(e) alone is unable to reduce the disproportionate incarceration rates, as the root causes of Aboriginal overrepresentation and criminality continue to be unaddressed.

This paper will take a three-step approach. First, the legislative reasons for the enactment of s.718.2(e), will be outlined, with a brief overview of the history of the rise in Aboriginal incarceration rates. Then, the SCC decision in the case *R v Gladue*, and the corresponding *"Gladue* principles" will be reviewed, specifically focusing on Supreme Court's determination of the use of s.718.2(e). Finally, an assessment on the use of s.718.2(e) post-*Gladue* will be conducted, with a focus on the reasons why the provision has been unsuccessful.

The enactment of Bill C-41 and s.718.2(e) was the culmination of many decades of commissioned reports and inquiries on sentencing and use of imprisonment in Canada. The Ouimet Report, published in 1965, was one of the original studies to recommend reforms to sentencing legislation due to systemic discrimination against Aboriginal peoples.[5] This report achieved widespread attention, and led to several follow-up reports over the next two decades. Ultimately, it was the 1980s reports by the Law Reform Commission of Canada and the Canadian Sentencing Commission that led the government to consider reviewing the sentencing provisions in the *Criminal Code*. These reports recommended reforms that would more explicitly identify the purpose and principles of sentencing.[6] By the 1980s, the overrepresentation of Aboriginal peoples in Canadian prisons was becoming more widely acknowledged. Reports specifically focusing on Aboriginal peoples in the justice system led to an understanding of the scale of their

overrepresentation. By the 1990s, Canada was ranked third out of 15 Western nations for highest incarceration rates, with disproportionate rises in the number of Aboriginal peoples in prisons, despite falling rates of criminally charged adults.[7] Prior to these reports, little consideration was given to the idea of remedying this overrepresentation through legislation. However, with the results of these specific reports recommending that cultural factors being consistently accounted for, and non-carceral sentences considered, there was a move to address Aboriginal overrepresentation through sentencing reforms.[8]

The result was the enactment of Bill C-41 in 1996, which codified the purpose and objectives of sentencing. Through s.718.2(e), sentencing judges were compelled to consider the option of non-carceral sentences where reasonably appropriate, and give attention to the specific circumstances of Aboriginal offenders. The Minister of Justice at the time stated that the legislative purpose of this bill was to address the disproportionate rates of Aboriginal peoples' incarceration in Canada and encourage sentencing judges to seek alternatives to prison terms.[9] However, Parliament did not specifically address how sentencing judges should begin to apply s.718.2(e) to cases with Aboriginal offenders, nor how this provision should be interpreted to affect sentencing decisions.

The 1999 case *R v Gladue* was the first opportunity for the SCC to address the interpretation and application of s.718.2(e). Gladue, an Aboriginal woman, was celebrating her 19th birthday with some family and friends at her home, which she shared with her common-law husband. Gladue suspected her husband to have engaged in sexual relations with her sister, and she confronted him with these accusations. In response, the victim and Gladue verbally fought, with the victim telling Gladue that she was fat and ugly and not as good as others, before fleeing from the home. Gladue ran towards the victim with a knife and stabbed him twice, once in the chest and

once in the arm. At the time of the stabbing, Gladue had a blood alcohol content that was double the legal limit.[10]

At her trial, Gladue was convicted of manslaughter and sentenced to three years in prison. During the trial, Gladue's counsel did not raise the fact she was an Aboriginal offender, with this only being affirmed by Gladue when asked explicitly by the trial judge. The trial judge also asked if the town where Gladue grew up was an Aboriginal community, to which her counsel replied it was a "regular community."[11] Beyond this, no further submissions were made about her Aboriginal heritage. The trial judge did take into account several mitigating factors such as Gladue's age, no criminal record, supportive family, fact that she was a mother, and her attendance at alcohol abuse counselling while on bail.[12] Aggravating circumstances were also identified, including that she stabbed the victim twice and that she made remarks that she intended to harm the victim. The trial judge concluded that Gladue was not afraid of the victim as she was the aggressor.[13] In terms of sentencing, the trial judge did not see this case as requiring consideration of s.718.2(e) because while Gladue and the victim were Aboriginal, they were not living in an Aboriginal community. He also found that the offence was serious and thus a conditional sentence was not appropriate.[14]

Gladue appealed this sentence to the British Columbia Court of Appeal on the grounds that the trial judge did not give appropriate consideration to her circumstances as an Aboriginal offender. The appeal court found that the trial judge should have applied s.718.2(e) to this case, even though Gladue and the victim did not live on a reserve. However, they did not find any error in the trial judge's decision not to afford special sentencing consideration due to the seriousness of her offence.[15] It was concluded that the appeal should be dismissed.

The issue on appeal to the SCC was the proper interpretation and application to be given to s.718.2 (e).[16] The court ultimately determined that Gladue's appeal should be dismissed, as her

sentence was determined to be fair given the severity of the case. However, in their decision, the SCC outlined the considerations which should be taken into account by sentencing judges for Aboriginal offenders. They emphasized that the requirement of sentencing judges to consider all sanctions other than imprisonment, and pay attention to specific circumstances of Aboriginal offenders was not just a codification of existing jurisprudence, but designed to begin to rectify the issue of Aboriginal peoples' overrepresentation in prisons and encourage use of restorative approaches.[17] They also stressed that it is the duty of the judiciary to enforce the corrective purpose of the provision by undertaking a more individual perspective to sentencing, taking the differing and unique circumstances of Aboriginal people into account. They specifically outlined that judges must consider "unique systemic or background factors which may have played a part in bringing the particular offender before the courts," and the "types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender."[18] To do this effectively, judges are to acquire information pertaining to the accused, and take notice of systemic and background factors affecting Aboriginal people, and the priority given to restorative approaches to sentencing. Additionally, the court found that in order to address over-incarceration rates, if there is no appropriate alternative sentence, the length of the carceral term should be considered, and could result in a shorter time than may be imposed on a non-Aboriginal offender in the same circumstances.[19] With this they did stress that s.718.2(e) did not automatically mean that Aboriginal offenders should receive shorter sentences, nor that their sentence was more lenient because incarceration was not imposed. They also noted that in serious cases, it is likely that similar terms for Aboriginal and non-Aboriginal offenders will be imposed. Finally, the court found that s.718.2(e) applied to all Aboriginal persons, regardless of their place of residence.[20]

The SCC decision in *Gladue* provided a positive step in the use of s.718.2(e) by the courts. By explicitly outlining the meaning, purpose, and application of s.718.2(e), the SCC eliminated any discretion exercised by sentencing judges in deciding to consider an Aboriginal offender's unique circumstances. Instead making it clear that they always had to be considered.[21] The SCC also established that just acknowledging that an offender is Aboriginal is not enough to be considered a proper assessment of unique circumstances. The use of reports, known as *Gladue* reports, would ensure that all applicable background and systemic factors were taken into account and known by the judge before sentencing. The SCC also explicitly brought to attention the reality of systemic discrimination and disadvantage facing Aboriginal offenders and required sentencing judges to consider broader social implications. Ultimately, establishing that equality for Aboriginal offenders in the criminal justice system includes differential treatment and more individualized sentences.[22] This decision emphasized that the legislative goal was to reduce Aboriginal overrepresentation in prisons and reinforced that it is a judicial duty to look to restorative and alternative approaches to sentencing. In doing this, it was established that judges could allocate conditional sentences or community sanctions in the place of prison terms so long as this was in the best interest of the offender, community, and victim. Finally, the SCC ensured that sentencing judges did not limit the scope of s.718.2(e) by explicitly stating that the provision had to be applied to all Aboriginal offenders, regardless of where they were living. This emphasized that ties to a community should not only be recognized as living on a reserve.[23]

Together, this decision and its clarifications on the purpose and application of s.718.2(e) would be expected to result in considerable reductions in the rate of incarceration and overall number of Aboriginal offenders. However, such results have not been realized. Instead, Aboriginal incarceration rates have increased in the years since the *Gladue* decision. Furthermore, there have

been recorded increases in the number of Aboriginal peoples taken into police custody since the implementation of s.718.2(e), with Aboriginal offenders now more likely to be imprisoned than before the provision's implementation.[24] Literature on s.718.2(e) and the *Gladue* principles attributed these increases and overall lack of success to the complexities that underline Aboriginal overrepresentation.

First, addressing disproportionate incarceration rates only through modifications to legislation in the *Criminal Code* fails to address the larger systemic social issues that contribute to Aboriginal criminality.[25] Colonization has created disastrous consequences for Aboriginal peoples through displacement and assimilation tactics carried out through relocation, residential schools and prohibitions on cultural practices. The colonization process has led to systemic and intergenerational harms including community fragmentation, poor social and economic conditions and anger. This has translated into high unemployment rates, poverty, lower educational attainment and few opportunities for advancement.[26] Dire social and economic conditions are widely noted criminogenic variables, contributing to the increase in criminality in Aboriginal communities. Presently, differences in levels of education attainment is stark, with 54 percent of Aboriginal populations not having achieved a high school diploma, compared to 34 percent of the non-Aboriginal population.[27] In addition, unemployment levels are considerably higher in Aboriginal populations, at a rate of 24 percent compared to the 10 percent national average, with astonishingly low rates of employment in northern communities at only 20 percent.[28] This contributes to Aboriginal peoples' lower than average incomes, creating welfare dependency and social deprivation, key contributors to criminality. These factors are exacerbated by the lower than average median age of Aboriginal populations, with large numbers of young adults. As criminality is more associated with younger populations, having a large demographic that is in this vulnerable

stage of life, combined with the aforementioned social inequalities, exacerbates the likelihood of resorting to criminal behaviour. As emphasis has been placed on a sentencing based approach, the role of colonialism and its social consequences, the social drivers of criminality, have gone unaddressed. Thus, the incarceration rates of Aboriginal peoples have not decreased as the factors causing them to end up at the sentencing stage have not been remedied.

Second, sentencing reforms concentrate on the judiciary as the key contributor to Aboriginal over incarceration, while in reality the courts and sentencing judges play only one part in the larger criminal justice system. Decisions of people at the earlier levels of the criminal justice system, that come into contact with Aboriginal offenders, have been found to have more of an impact on Aboriginal over-incarceration than the judiciary itself.[29] While sentencing judges do have the power to determine if an offender receives a carceral sentence, they alone are not able to address the disproportionate rate at which Aboriginal offenders end up in the courts and require sentencing decisions. The Royal Commission on Aboriginal Peoples found that over policing and systemic discrimination at all levels of the criminal justice system, combined with social and economic deprivation, are main contributors to higher criminality rates.[30] In addition, because of social and economic disparities leading to higher rates of criminality in Aboriginal communities, it is more likely that an Aboriginal offender will have a prior criminal record. In a study of post-*Gladue* cases, it was found that seriousness of the offence and past criminal record are the key determinants of the type and duration of sentence given to offenders. Because Aboriginal offenders are more likely to have served prison sentences before, and are disproportionately convicted of crimes against the person, sentencing judges are often unable to justify non-carceral sentences.[31] As a result, sentencing judges' consideration of alternatives to carceral sentences have not been effective in lowering prison populations, as Aboriginal offenders still typically receive a prison

term, albeit sometimes shortened, due to the serious nature of their offences. As a result, s.718.2(e) has been ineffective even when applied, as sentencing judges have few options for alterative sentences. This, in tandem with over policing and close scrutiny placed on Aboriginal populations contributes to their disproportionate arrest levels, resulting in their greater prospect of imprisonment.[32]

Third, despite the SCC providing direction to sentencing judges on the purpose and application of s.718.2(e), there has still been confusion in its application in post-*Gladue* cases. One key point of confusion is that the SCC failed to specifically denote how Aboriginal background and circumstances, and the emphasis on restorative justice should be balanced with the legal objectives of sentencing like deterrence and denunciation.[33] This is typically an area of concern in cases of violent or serious crimes. The SCC in *Gladue* said that sentencing decisions for Aboriginal offenders of serious crimes may not substantially differ from those given to non-Aboriginal offenders. Reviews of post-*Gladue* cases were found to have mixed decisions by sentencing judges on the use of carceral versus non-carceral sentences. In making sentencing determinations, it was found that Aboriginal identity and background was a factor that was referenced, but sometimes this was minimized when the nature of the offense was deemed to be serious and sentences similar to those of non-Aboriginal offenders were applied.[34] A further problem arises because of the weak language of s.718.2(e), stating that alternative sentencing methods "should be considered." If sentencing judges are making inconsistent assessments of what constitutes a serious offence, and choosing not to consider alternative methods based on severity of the crime or past criminal record, it is likely that carceral sanctions will be applied.[35] Because of this weak wording, and the fact that the SCC in *Gladue* left the determination of serious offenses or at risk offenders and use of alternative sentencing approaches to the discretion of the sentencing judge, s.718.2(e) has only had

limited success in compelling judges to assign non-carceral sentences to Aboriginal offenders. By not establishing the requirement of thorough consideration for all offences, the SCC has reduced the effectiveness and scope of s.718.2(e) by effectively allowing its exemption to the offenders who are likely in most need of restorative and rehabilitative approaches.[36]

Finally, in tandem with this previous limitation, the use of restorative and alternative sentences has been limited. This is due in part to past criminal records and the seriousness of offenses that many Aboriginal offenders are charged with, disqualifying them from these approaches. However, in some cases, even if the offender does qualify, judges have chosen not to assign a conditional sentence because the community does not have the resources, institutions or social infrastructure to provide adequate supervision and rehabilitation to offenders.[37] In addition, when offenders have been granted conditional sentences, this lack of resources and higher levels of crime on reserves compared to the general population, has increased the likelihood of the offender breaching the conditions of their sentence. As the conditions on these sentences are harsh, breaches will typically result in prison terms, sometimes longer than they would have received if they had gone to prison for their original crime.[38] As a result, the use of alternative methods has been limited, and even when applied has not been effective in actually reducing overall incarceration rates of Aboriginal peoples.

This paper addressed the question: What was the legislative purpose of enacting s.718.2(e) of the *Criminal Code*, and why has it failed up to this point? In answering this question, it was demonstrated that s.718.2(e) was enacted in response to the commissioned reports that shone a light on the severity of Aboriginal overrepresentation in Canadian prisons. The SCC case, *R v Gladue*, that established the purpose and application of s.718.2(e), and the conditions outlined in the decision for its proper use were summarized. However, in the years since the *Gladue* decision,

it was found that Aboriginal incarceration rates were not reduced, despite overall prison rates decreasing. To understand this, four key factors were outlined to explain why s.718.2(e) has not been effective in achieving its mandate. First, by only addressing Aboriginal over-incarceration through sentencing legislation, the systemic and social issues that underline Aboriginal criminality go unaddressed. Thus, not reducing the number of Aboriginal people who enter the criminal justice system. Second, because of the emphasis placed on sentencing as the solution to reducing incarceration rates, the other levels of the criminal justice system that interact with and contribute to Aboriginal over-incarceration are left out. This places limits on the reduction of overrepresentation rates that the judiciary are capable of achieving alone. Third, despite clarification on the purpose and application of s.718.2(e), there has still been confusion over the application of the *Gladue* principles. This has resulted in a limited use of the provision for the types of crimes most often committed by Aboriginal offenders. Finally, because of the seriousness of the crimes and past criminal record often seen in cases of Aboriginal offenders, use of alternative sentencing methods has been limited. As a result, while changes to sentencing provisions and the requirement to address specific Aboriginal circumstances is a needed start to reducing overrepresentation of Aboriginal peoples in Canadian prisons, s.718.2(e) alone will not contribute to the dramatic decrease in disproportionate incarceration rates that the Canadian government predicted.

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