

Gladue in Quebec

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1. Introduction

In its 1999 decision *R. v. Gladue*,¹ the Supreme Court of Canada decried in the strongest terms the overincarceration of aboriginal offenders in Canada's criminal justice system, and explicitly endorsed the use of restorative and community-based approaches to justice that, in its view, better fit Aboriginal conceptions of justice. The decision generated much hope and much controversy. Mary-Ellen Turpel-Lafond called the decision an "important watershed" insofar as it prioritized healing as a normative value for sentencing aboriginal offenders, a value that judges "*must* weigh in every case involving an Aboriginal person in order to build a bridge between their unique personal and community background experiences and criminal justice".² At the same time, reservations were expressed about a number of issues. Does the overrepresentation of aboriginal offenders in the criminal justice system really result from discrimination from within that system, or does it come from broader societal injustices that are beyond the role of courts to address? Does the decision do any more than offer a "sentencing discount" to Aboriginal offenders that might be denied to other overrepresented populations? And if *Gladue* is as much about better tailored sentences for Aboriginal offenders as it is about addressing numerical overrepresentation, how are judges expected to understand an offender's experiences as an Aboriginal person and incorporate restorative, community-based elements into their sentencing decisions while remaining within the limits of

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1. *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5th) 197.
2. Judge M.E. Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (2000), 43 C.L.Q. 34.

their proper role? This article considers how some of these questions have played out in the ten years of Quebec jurisprudence that have followed the decision.

It would be understandable if *Gladue* had generated somewhat less change in Quebec than in other provinces. Much of the Supreme Court's decision focused on the overrepresentation of aboriginal offenders in the Canadian prison system, citing shocking statistics from a number of provinces but making no specific mention of Quebec.³ And indeed, the representation of Aboriginal offenders in Quebec prisons seems to be closest to their representation in the general population (3% versus 2%). Western provinces, by contrast, tend to have incarceration rates for Aboriginal offenders that are grossly disproportionate to their representation in the general population, notably Saskatchewan (79% versus 15%) and Manitoba (71% versus 16%).⁴

Of course, all judges in Canada, including those in Quebec, are bound by s. 718.2(e) of the *Criminal Code* and its interpretation in *Gladue* to consider background or systemic factors in sentencing Aboriginal offenders. The statistical overincarceration of Aboriginal populations may have informed the remedial purpose of s. 718(2)(e) identified by the Supreme Court in *Gladue*. But the requirement to consider systemic and background factors related to a person's experiences as an Aboriginal person is geared toward ensuring that sentences are appropriate to the circumstances of Aboriginal offenders, requiring recognition and attention to the "different conceptions of appropriate sentencing procedures and sanctions held by Aboriginal people".⁵ Sentences with a restorative, community-based focus may be considered more appropriate for any given Aboriginal offender, regardless of whether they live in a province where aboriginal people are overrepresented in the criminal justice system.

Nonetheless, *R. v. Gladue* does not appear to have brought about a revolution in Aboriginal criminal justice in Quebec. No specialized courts have been created as they have in other

3. *Gladue*, *supra*, footnote 1, at paras. 58-65.

4. Juristat Adult Correctional Services Statistics 2005-2006, Vol. 28(6).

5. *Gladue*, *supra*, footnote 1, at para. 70.

jurisdictions, for example. Since the decision was issued in 1999, it has been directly cited in some 28 published decisions sentencing Aboriginal offenders in Quebec courts;⁶ yet in many of these decisions, as set out below, restorative and community-based justice figure in limited ways. Moreover, a number of published Quebec sentencing decisions in the last ten years involving Aboriginal offenders make passing or no mention of *Gladue* at all.⁷

This article provides a cursory snapshot of published judicial sentencing decisions of Aboriginal offenders in Quebec courts in order to shed some light onto the factors limiting the impact of *Gladue* in Quebec. Next, it briefly examines the ways in which judges have endeavoured to incorporate restorative elements into their sentences in Quebec. It concludes with a modest set of issues raised by the decision and its context. These are questions

6. See *R. v. Ittoshat*, [1999] Q.J. No. 2792 (QL), [2000] 2 C.N.L.R. 172 (Que. Ct.), revd 32 C.R. (5th) 371, [2000] 2 C.N.L.R. 186 (Que. C.A.); *LSJPA-074*, 2007 QCCQ 4637 (Que. Ct.); *LSJPA-0827*, 2008 QCCA 1180 (C.A.); *R. v. Amitook*, [2006] 3 C.N.L.R. 249 (Que. Ct.); *R. v. Angutigirk* (unreported, 1999, Que. Ct.); *R. v. Annahatak*, 2007 QCCQ 7788 (Que. Ct.); *R. v. Bastien*, [2003] R.J.Q. 1695, 12 C.R. (6th) 163 (Que. C.A.); *R. v. Blacksmith*, 2006 QCCQ 4919 (Que. Ct.); *R. v. Conway*, 2006 QCCS 1214 (Que. Ct.); *R. v. Diamond*, 2006 QCCQ 2252 at p. 20 (Que. Ct.); *R. v. Flemming* (unreported, 2002, Que. Ct.) (in relation to a dangerous offender application); *R. v. R. (G.)* (unreported, April 8, 2005, Que. Ct., SOQUIJ AZ-50312666); *R. v. Happyjack*, 2006 QCCQ 8275 at pp. 65 and 70 (Que. Ct.) (*Happyjack 1*); *R. v. Happyjack*, 2006 QCCQ 8276 at p. 62 (Que. Ct.) (*Happyjack 2*); *R. v. Jacobs*, 2007 QCCS 4118 at para. 21 (Que. S.C.); *R. v. D. (J.-M.)*, 2005 CanLII 18427 (Que. Ct.) (dangerous offender application); *R. v. Jean-Pierre*, 2001 CanLII 24257 (Que. Ct.); *R. v. O. (J.)*, 2007 QCCQ 716 at paras. 64 and 78 (Que. S.C.); *R. v. Novalinga*, 2003 CanLII 30505 (Que. S.C.); *R. v. Ogushing*, 2005 CanLII 633 at para. 20 (Que. Ct.); *R. v. Pépabano*, 2005 CanLII 48584 (Que. Ct.); *R. v. Petawabano*, 2008 QCCQ 6141 at paras. 9 and 48 (Que. Ct.); *R. v. Petiquay*, 2006 QCCQ 506 (Que. Ct.); *R. v. Shecapio*, 2006 QCCQ 13164 at para. 23 (Que. Ct.); *R. v. Sivuarapik*, 2003 CanLII 10911 (Que. Ct.); *R. v. V. (R.)*, 2002 CanLII 31592 at para. 19 (Que. S.C.); *R. v. S. (T.)*, 2005 CanLII 1160 (Que. Ct.); *R. v. Trapper*, 2007 QCCQ 7790 at paras. 22 and 40 (Que. Ct.) (*R. v. Gladue* is, of course, cited in other decisions for numerous other purposes including the general preference for non-carceral sentences).
7. See *R. v. B. (A.C.)*, [2004] R.J.Q. 1371 (Que. Ct.); *R. v. S. (A.)* (unreported, 2003, SOQUIJ AZ-50195669); *R. v. Alaku*, 2008 QCCS 1573 (Que. Ct.); *R. v. Ammituk* (unreported, Que. C.A., SOQUIJ AZ-50165696); *R. v. Auclair*, 2006 QCCQ 7093 (Que. Ct.); *R. v. Bérubé-Hamilton*, 2008 QCCQ 4810 (Que. Ct.); *R. v. Daye*, 2007 QCCQ 4583 (Que. Ct.); *R. v. McLean*, 2003 CanLII 13698 (Que. C.A.); *R. v. V. (R.)*, 2007 QCCQ 15340 (Que. Ct.).

that warrant further exploration if the vision reflected in *Gladue* is to be realized.

2. Factors Limiting the Impact of *Gladue* in Quebec

(1) Perceptions that *Gladue* Has No Impact for Sentences for Serious Offences

Perhaps most significantly, a number of Quebec cases make reference to *Gladue* only to find that it has no impact on sentencing given the seriousness of an offence. This determination typically relies (often inappropriately) on two passages from *Gladue* and *R. v. Wells*.⁸ In *Gladue*, after a lengthy discussion on the importance of restorative principles in Aboriginal conceptions of justice, the Supreme Court made the following qualification:⁹

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

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

In *R. v. Wells*, the Supreme Court reaffirmed that a sentencing judge must explore the alternative of community-based sanctions in sentencing Aboriginal offenders.¹⁰ The court went on to clarify, however, that notwithstanding the

8. *R. v. Wells*, [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368, 30 C.R. (5th) 254.

9. *Gladue*, *supra*, footnote 1, at paras. 78-79.

10. *R. v. Wells*, *supra*, footnote 8, at para. 38.

differences between Aboriginal and non-Aboriginal conceptions of sentencing,¹¹

it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant *to the offender's community* . . . [T]o the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.

Based on these passages, a number of Quebec decisions make reference to *Gladue* simply to exclude its application based on seriousness of the offence. Thus, in *R. v. Jacobs*, a Quebec Court judge summarized the thrust of *Gladue* and *Wells* as recognizing that "the more violent and serious the offence, then all communities, aboriginal or non-aboriginal, *will* share the view that the sentencing goals of denunciation and deterrence are to be accorded increased importance".¹² The court determined, without any meaningful examination of the accused's community or his experiences as an Aboriginal person, that the seriousness of the second-degree murder offence meant the offender's Aboriginal status would have no effect on his sentence.

Similarly, in *R. v. D. (J-M.)*, a Quebec Court judge considering a dangerous offender application noted the need to consider "less restrictive" sentences. The court then went on to refer to the paragraph in *Wells* permitting a trial judge to give primacy to the principles of denunciation and deterrence where the crime is serious.¹³ The case made no further mention of the accused's circumstances as an Aboriginal offender.

Several other cases — notably *R. v. Shecapio*,¹⁴ *R. v. Trapper*,¹⁵ *R. v. Ogushing*,¹⁶ *R. v. S. (T.)*¹⁷ *R. v. Bastien*,¹⁸ *R. v. Bérubé-Hamilton*,¹⁹ *R. v. O. (J.)*²⁰ and *R. v. L. (E.)*²¹ — make

11. *Wells*, *ibid.*, at para. 42 (emphasis added).

12. *R. v. Jacobs*, *supra*, footnote 6, at para. 21 (emphasis added).

13. *Supra*, footnote 6, at para. 16.

14. *Supra*, footnote 6, at para. 23.

15. *Supra*, footnote 6, at para. 22.

16. *Supra*, footnote 6, at paras. 20 and 21.

17. *Supra*, footnote 6, at paras. 81-90.

18. *Supra*, footnote 6, at para. 56.

similar use of these passages in *Gladue* and *Wells* to exclude any careful consideration of community-based justice or shorter terms of incarceration for Aboriginal offenders.

It is important to note that the above-cited passages from *Gladue* and *Wells* in no way relieve sentencing judges of their duty to explore the appropriateness of community-based sanctions for serious offences when sentencing Aboriginal offenders. To the extent that these decisions imply that a person's circumstances as an Aboriginal offender become irrelevant for serious offences, they misapprehend the Supreme Court's instruction. The court in *R. v. Jacobs*, for example, would have been faithful to *Gladue* had it examined the views of Jacobs' community to determine the relative importance of denunciation and deterrence under the circumstances. As the Supreme Court stated in *Gladue*, "As with all sentencing decisions, the sentencing of Aboriginal offenders must proceed on an individual (or a case-by-case) basis: for *this* offence, committed by *this* offender, harming *this* victim, what is the appropriate sanction under the *Criminal Code*."²²

Moreover, restorative or community-based sanctions may, under some circumstances, be appropriately denunciatory or deterrent, as was recognized in *Gladue* itself.²³

(2) Burden Placed on Defence Counsel to Adduce Circumstances of Aboriginal Offenders

Another set of cases seems to reject the Supreme Court's exhortation that judges take judicial notice of the circumstances of Aboriginal offenders and place the burden on defence counsel.

Thus, *R. v. McLean*, one of the few Quebec Court of Appeal decisions on the sentencing of Aboriginal offenders, defence counsel was reproached for not having brought up an accused's Aboriginal heritage soon enough in proceedings. *McLean* had been convicted for trafficking, with the help of his partner, 8.7 grams of heroin into Donnacona penitentiary where he resided

19. *Supra*, footnote 7, at para. 19.

20. *Supra*, footnote 6, at paras. 77 and 81.

21. *R. v. L. (E.)*, 2001 CanLII 15584 (Que. Ct.).

22. *Gladue*, *supra*, footnote 1, at para. 80.

23. *Ibid.*, at para. 72.

at the time. He was sentenced to three years' incarceration. The Quebec Court of Appeal noted that the sentencing judge erred in failing to take into account the fact that the accused was Aboriginal, but refused to alter the sentence on this account, stating that defence counsel had brought up the matter too late and had done enough to explain how the accused's Aboriginal status ought to affect sentence.²⁴

Il semble que l'information fut fournie au juge à la toute fin des plaidoiries et que l'avocat de l'appelant n'avait aucune information utile à fournir à cet égard. Même à l'audience devant nous, l'avocat de l'appelant n'a pu nous renseigner quant à la personne de l'appelant, ni n'a pu nous suggérer des formules de rechange à l'emprisonnement. De fait l'avocat de l'appelant ne recherchait qu'une diminution de la période de réclusion sans nous dire en quoi en l'espèce le fait que l'appelant était un autochtone militait en faveur d'une réduction de la période d'emprisonnement.

This line of reasoning was adopted by the Quebec Court of Appeal in *LSJPA-0827*. Although the court granted that it was a formal error for the sentencing judge to fail to consider the offender's Aboriginal status, it nonetheless refused to find the sentence unfit, again because defence counsel had in its view failed to demonstrate how the offender's Aboriginal status might be relevant.²⁵

Similarly, in *R. v. Bérubé-Hamilton*, the Court of Quebec refused to consider the Aboriginal status of a man convicted of aggravated assault in his sentencing largely because defence counsel had failed to satisfy the court as to how the offender's Aboriginal status mattered. The court stated: "Enfin, *sans indiquer en quoi ce fait pourrait avoir une influence sur la peine*, son procureur mentionne le fait que l'accusé est autochtone."²⁶ It concluded:²⁷

Le statut d'autochtone n'a aucune incidence sur la peine à imposer en l'instance. Ce fait n'a été signalé au tribunal par son procureur qu'au moment des représentations sur sentence, et ce dernier ne nous a rien mentionné qui puisse nous inciter à imposer une peine distincte de celle imposée à toute autre personne ayant commis le même délit. L'application de l'article 718.2(e) du C.cr. n'entraîne pas automatiquement la

24. *R. v. McLean*, *supra*, footnote 7.

25. *Supra*, footnote 6, at para. 25.

26. *R. v. Berube-Hamilton*, *supra*, footnote 7, at para. 12 (emphasis added).

27. *Ibid.*, at para. 19.

réduction de la peine, et nonobstant le fait que l'article 718.2 poursuive un objectif réparateur visant à régler le problème de surpopulation carcérale des délinquants autochtones, cet article ne modifie pas l'obligation du juge d'infliger une peine appropriée au délinquant selon l'enseignement de la Cour suprême dans l'arrêt *Wells*.

Where judges might defer to joint submissions as to sentence without sufficiently considering the circumstances of Aboriginal offenders, they likewise abdicate their responsibilities under *Gladue*. In *R. v. Alaku*, a judge rejected without reasons a joint submission as to sentence of an Inuk offender who pleaded guilty to assault. The Quebec Superior Court accepted the Crown's appeal as to sentence and imposed the terms of the joint submission. Counsel had agreed that an order not to threaten, disturb or harass the victim and to perform 70 hours of community service was appropriate. The trial judge, however, rejected the community service portion and instead substituted an order that the offender place a sign in the home in Innuktitut indicating that the offenders would curb their drug use.²⁸ The Superior Court determined that the sentencing judge's decision violated principles of deference to joint submissions and was manifestly unreasonable given the gravity of the offence. *Gladue* and s. 718.2(e) were not mentioned in the decision.²⁹ This case illustrates the concern that trial judges might rely on deference to joint sentencing submissions to avoid their role of ensuring proper attention to a person's Aboriginal status in determining a fit sentence. In *R. v. R. (G.)*, by contrast, Judge Bonin accepted a joint submission as reasonable only after an independent consideration of s. 718.2(e) and a determination that the offender's Aboriginal heritage was a mitigating factor in the sentence.³⁰ This seems to be the appropriate approach given the mandatory requirements in s. 718.2(e).

In fact, a distinguishing and indeed controversial³¹ feature of *Gladue* was that it placed the primary responsibility on *judges*, not counsel, to ensure that there is sufficient information

28. *R. v. Alaku*, *supra*, footnote 7, at paras. 2-3.

29. *Ibid.*, at paras. 16-18.

30. *Supra*, footnote 6, at para. 15.

31. See P. Healy and W.J. Vancise, "Judicial Notice in Sentencing" (2002), 65 Sask. L. Rev. 97.

available to the court to take systemic and background factors and the circumstances of the offender as an Aboriginal person into account.³²

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

Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing.

(3) Lack of Access to Community Views on Restorative Justice

A related obstacle to the thorough application of the principles in *Gladue* concerns lack of access to community views and resources on the appropriateness of restorative approaches.³³

In *R. v. Amitook*, which involved drug trafficking to Northern Quebec, Quebec Court Judge Westmoreland-Traoré made do with limited information from the community. She noted that the court “would have benefited from a pre-sentence report and recommendations from a sentencing circle or justice committee held to address the issues of this particular accused, his particular community and victims”.³⁴ She strongly criticized the Attorney General’s choice to bring the proceedings in Montreal rather than closer to the offender’s community, which resulted in “serious

32. *Gladue*, *supra*, footnote 1, at paras. 84 and 85.

33. See, e.g., *R. v. Pépabano* and *R. v. Jean-Pierre*, *supra*, footnote 6 (“La collectivité de l’accusée n’a pas exprimé son point de vue”).

34. *R. v. Amitook*, *supra*, footnote 6, at para. 56.

logistical obstacles, in particular distance, to obtaining the view of the community on the sentencing of the accused".³⁵ She also remarked that convening a justice committee or a healing circle was of limited possibility, if not impossible, given that the proceedings took place in Montreal.³⁶ Nonetheless, acknowledging her duty to consider these factors even in the absence of the most complete information, Judge Westmoreland-Traoré relied on evidence given by the accused, his family members, three probation officers including a social worker who supervised the probation officer, as well as reports describing the general social conditions in the relevant communities.³⁷ Based on these admittedly less-than-ideal sources, she determined that systemic and historic factors of social exclusion had contributed to the commission of the offence,³⁸ and that the relevant communities had perception and expectation that judicial procedures would incorporate their traditional approaches and allow for community participation.³⁹

In *R. v. Diamond*, Quebec Court Judge Bonin quoted at length from *Gladue*, but noted that the court did not have the benefit of any independent group recommending a sentence or setting out measures that might restore peace in the community. Although some community members were working on developing a justice committee, they were not ready to involve themselves in giving any recommendation to the court, and simply stated that they were prepared to support the accused following any decision the court might render.⁴⁰

In *R. v. Pépabano*, in which the accused pleaded guilty to impaired driving causing the death of three persons, Judge Bonin once again quoted at length from *R. v. Gladue* about the importance of considering the specific circumstances of the accused as an Aboriginal offender.⁴¹ However, his examination of those circumstances was limited. He accepted that the

35. *Ibid.*, at para. 126.

36. *Ibid.*, at para. 127.

37. *Ibid.*, at para. 38 and 56-85.

38. *Ibid.*, at para. 55.

39. *Ibid.*, at para. 85.

40. *Supra*, footnote 6, at para. 22.

41. *Ibid.*, at para. 19.

accused had lived in a “dysfunctional milieu, in relation with the numerous traumas experienced by First Nations Communities”, but did not elaborate on the role of those experiences in bringing the offender before the court. In considering the appropriateness of restorative approaches in the specific relation to the affected community, Judge Bonin expressed some frustration at operating with limited information about the community’s needs and resources.⁴²

Building bridges between the judiciary system and the First Nations and Inuit communities becomes more and more essential in order to help judges render more appropriate sentences to the members of these communities. The Court specifically suggested to this community to look into the possibility of creating a Justice Committee; but for reasons of its own, the community did not consider possible or a priority this opportunity to have an input in the judicial process. The Court has mentioned that it will respect the community’s decision but has also indicated how much such an input could benefit the community. *Unfortunately, the Court did not have the benefit of a recommendation by a neutral and independent group that reflects the community’s interest and understanding about this sentence to be rendered.* Clearly a contribution from the community would have helped a lot in restoring peace in the community.

Judge Bonin noted that Irene Pépabano had written letters to the victims’ family members, had participated in healing circles, and had become more interested in her native culture.⁴³ Nonetheless, he ultimately relied on the seriousness of the offence, as well as evidence that the community was deeply affected by offences related to drug and alcohol abuse, in order to justify heavier reliance on denunciation.⁴⁴ He left the restorative and community aspects of the sentence to be determined by the parole board following completion of a fit sentence.⁴⁵

The obvious concern is that it may be easier for sentencing judges to obtain information about the negative impact of crime generally (or a given crime) in a community than on the role of restorative or community-based elements in community conceptions of justice. This kind of incomplete picture may

42. *Ibid.*, at para. 21 (emphasis added).

43. *Ibid.*, at paras. 22-23.

44. *Ibid.*, at para. 45.

45. *Ibid.*, at para. 50.

result in an overemphasis on denunciation and deterrence at the expense of restorative principles. Moreover, to the extent that Aboriginal communities may face serious systemic challenges with particular kinds of criminalized behaviour (such as substance abuse in *Pépabano*), judges may see a greater need for denunciation and deterrence when sentencing community members who may become involved in those same criminalized behaviours.⁴⁶ The perverse result is that living in and committing a crime in such a community will result in harsher sentences for some Aboriginal offenders, even as those community circumstances played a role in bringing the offender before the court in the first place.⁴⁷ In *R. v. Amitook*, Judge Westmoreland-Traoré cautioned that “attention should be placed more on sanctioning the aggravation caused by the actions of the accused, as opposed to the underlying social conditions over which they have no control”.⁴⁸ But of course, where underlying social conditions render an offender’s community more vulnerable, the aggravation caused by his actions will be greater.

Leaving aside the complex question of how to deal with a vulnerable offender’s impact on his or her own vulnerable community, it is clear that the relative difficulty of obtaining views on communities’ conceptions of restorative principles and community-based sanctions presents an obstacle to the faithful application of *Gladue*. Judges appear to have had difficulty seeking and obtaining from witnesses information about the priority that a given community places on restorative approaches, as *Gladue* requires.⁴⁹ But in fact, *Gladue* requires judges to consider different Aboriginal conceptions of justice and to explore alternatives to incarceration for all Aboriginal offenders regardless of the evidence placed before them (and

46. See e.g., *R. v. Petiquay*, *supra*, footnote 6, at para. 99; *R. v. Blacksmith*, *supra*, footnote 6, at para. 75.

47. The “paradox” was noted both in *Petiquay*, *ibid.*, and in *R. v. Amitook*, *supra*, footnote 6, at para. 100 in which Judge Westmoreland-Traoré expressed the need to ensure that offenders in northern communities are not “more severely punished or doubly punished, that is, punished because of the longstanding poverty in their communities and punished for the crimes they commit”.

48. *Ibid.*, at para. 100.

49. *Ibid.*, at paras. 83-84.

indeed regardless of whether there is any program of alternative sanctions in the offender's community).⁵⁰ In practice, however, a lack of information may lead judges to downplay the importance or ignore the suitability of restorative, community-based approaches. This is of particular concern where judges tend to assume, wrongly,⁵¹ that there is a preference in Aboriginal communities for custodial or non-restorative sentences for more serious or violent offences.

(4) Community-Based Alternatives to Incarceration Found Inappropriate

The same concern is reflected when courts take the absence (or perceived absence) of appropriate community programs as a reason to limit the integration of restorative approaches to sentencing. Thus, the judge who sentenced Claudia Jean-Pierre in relation to a number of assaults causing bodily harm concluded that there were no appropriate resources in the community that could serve as an alternative to imprisonment that could reduce the risk of re-offence by controlling the accused's behaviour.⁵² Likewise in the dangerous offender application in *R. v. Flemming*, Judge Bonin held that the *Gladue* principles applied, but determined that "in the specific case of William Flemming . . . there is absolutely no evidence that any other services could be offered to the accused in the community that would allow concluding that there would be a reasonable possibility of eventual control of the risk for the community".⁵³

For similar reasons related to the dangers of reoffending, the court in *R. v. Nappaaluk* determined that the offender was not a suitable candidate for restorative alternatives to incarceration. Mr. Nappaaluk pleaded guilty to a number of charges including sexual assault, breaking and entering and breaching probation. He had a long history of convictions for each of these offences.⁵⁴ The court noted submissions from defence counsel that the accused, as an Inuk, would benefit from the halfway house and justice committee in his community,

50. *Ibid.*, at para. 92.

51. See section 2(1), *supra*.

52. *Supra*, footnote 6.

53. *Ibid.*, at para. 28.

54. *R. v. Nappaaluk*, 2004 CanLII 11218 at para. 7 (Que. Ct.).

Kangirsuk. The court also noted some personal circumstances of the accused: that he was expected as a child to become a hunter and the family supporter, but that later he lost sight in one eye, became “useless to his father” and began drinking and sniffing gas.⁵⁵ After considering the offender’s refusal to undergo therapy, his recidivism, and the fear that he inspired in the community⁵⁶ the court stated: “The Court is very well aware of the aboriginal origin of the accused and that particular attention must be taken for that reason when envisaging to impose a sentence of imprisonment on that person. But the accused cannot constantly seek refuge behind that particularity to avoid the penal consequences of his acts.”⁵⁷ The length of the penitentiary sentence was apparently unaffected by the offender’s status as an Aboriginal person.⁵⁸

(5) Offender Considered Unwilling to Engage Restorative Approaches

In *R. v. Conway*, the problem was not the lack of community resources to protect against dangers of reoffence, but the view that the offenders had no desire for reconciliation. The case concerned the takeover of a police station in the Kanesatake reservation of some 67 First Nations police officers in reaction to a Band Council decision to replace the existing police chief and install a new team of police officers from Kanesatake and other First Nations communities. Thirteen residents of Kanesatake were convicted of charges including rioting and forcible confinement. Then Quebec Superior Court Judge Duval-Hesler considered evidence about two initiatives undertaken by some of the defendants as an attempt at reconciliation, but concluded that neither sufficiently demonstrated that the offenders had the will or capacity to engage in that the kind of serious contemplation of the harm they did to others. Without this prerequisite, she concluded,

55. *Ibid.*, at para. 6.

56. *Ibid.*, at para. 22.

57. *Ibid.*, at para. 22.

58. *Ibid.*, at para. 25. Some community-based elements were introduced into the sentence by ordering Mr. Nappaaluk’s supervision in his community by the halfway house and the justice committee following his release from prison: see para. 30.

restorative approaches would be impossible.⁵⁹ She also declined to consider the role of the offenders' experiences as Aboriginal people in bringing them before the court. In the circumstance, therefore, the offenders' Aboriginal heritage appears to have had no impact on sentencing. It is perhaps unsurprising, given the politicized nature of the events and the deep cleavages within Kanesatake over the question of policing, that the court was reluctant to mediate and sanction particular restorative approaches or to consider exactly how the offenders' experiences as Aboriginal persons brought them into violent political conflict with their own community.

(6) Offender's Aboriginal Heritage Noted but Considered Irrelevant

In *R. v. Jean-Pierre*, a woman was convicted of a number of assaults, some involving weapons, and of violating of her parole conditions. The court discussed difficulties in the offender's personal life, detailed in the pre-sentencing report, including her parents' and her own struggles with alcohol consumption and violence in the home. Nonetheless, and without further explanation, Judge Guy Ringuet concluded:⁶⁰

Aucune circonstance systémique ou historique particulière n'est susceptible d'avoir contribué à la présence de la délinquante autochtone devant le Tribunal. Une distinction doit être faite entre l'histoire sociale de la délinquante au sein de sa famille et les facteurs systémiques ou historiques distinctifs qui peuvent être considérés comme des circonstances atténuantes parce qu'ils peuvent avoir contribué à la conduite de la délinquante autochtone. Ça ne veut pas dire que le Tribunal ne considère pas l'histoire sociale malheureuse de l'accusée. L'histoire sociale de l'accusée est considérée.

Similarly, in *R. v. Bastien*, the Quebec Court found s. 718.2(e) had no impact on sentence in part because the offender grew up in circumstances removed from Aboriginal communities, such that there was no demonstration that his Aboriginal heritage had any impact on the circumstances bringing him in contact with the criminal justice system.⁶¹

59. *R. v. Conway*, *supra*, footnote 6, at paras. 17-19.

60. *R. v. Jean-Pierre*, *supra*, footnote 6.

61. *R. v. Bastien*, *supra*, footnote 6, at para. 55.

(7) Failure to Mention or Consider *Gladue* or s. 718.2(e) of the *Criminal Code*

A number of sentencing decisions pertaining to Aboriginal offenders make little or no mention of *Gladue* or s. 718.2(e) of the *Criminal Code*.

In *R. v. B. (A.C.)*, a Quebec Court (Youth Division) judge sentenced a young man who pleaded guilty to involuntary homicide, marijuana trafficking and shoplifting as well as failing to comply with a condition of release. The court made no mention of *Gladue* or s. 718.2(e); indeed, the only mention made of the offender's Aboriginal status treated it as, apparently, a neutral or potentially aggravating factor in sentencing. Thus, the court granted that distance from his family, his milieu and his community could have had a negative impact on the offender, but noted that he failed to take refuge in his community when he was expelled from school. The court also noted that he acted as a bad influence on his Aboriginal peers by providing them with drugs.⁶² In *R. v. S. (A.)*, the offender was convicted in relation to several sexual assaults against young girls.⁶³ The decision noted that the offender was Aboriginal but this fact was not considered as part of the sentencing analysis. In *R. v. Auclair*,⁶⁴ a Native Special Constable pleaded guilty to assault causing bodily harm against his former girlfriend. The court granted him a discharge, but in doing so, said nothing about the fact that the offender was Aboriginal. In *R. v. Daye*,⁶⁵ the offender was convicted of arson in the context of the conflict over policing described previously in *Conway*;⁶⁶ the judge's sentencing decision made no mention of the offender's Aboriginal status. In *R. v. V. (R.)*,⁶⁷ a man pleaded guilty in relation to sexual acts against three young girls between 1975 and 1991. Although s. 718.2(e) was cited, the offender's Aboriginal status did not seem to factor into the sentencing determination.⁶⁸

62. *B. (A.C.)*, *supra*, footnote 7, at para. 35.

63. *Supra*, footnote 7.

64. *Supra*, footnote 7.

65. *Supra*, footnote 7.

66. *Supra*, footnote 6.

67. *Supra*, footnote 7.

68. *Ibid.*, at para. 39.

It is difficult to know, in these latter cases, precisely why s. 718.2(e) and *Gladue* do not appear to have been considered much or at all. The offender may have waived examination of factors related to his or her Aboriginal status, as contemplated in *Gladue*,⁶⁹ though the court's language in some of these cases would render this unlikely.

3. Positive Impacts of *Gladue* in Quebec

Despite the many limiting factors in the account above, it would be wrong to say *Gladue* has not affected sentencing in Quebec. However, it can sometimes be difficult to tell precisely the impact that *Gladue* had on sentences. Section 718.2(e) does not impose a statutory duty on judges to provide reasons.⁷⁰ The statutory duty to provide reasons in s. 726.2 of the Code seems not always to be followed, at least with respect to the application of s. 718.2(e). And indeed, even when reasons are provided, they may not make clear precisely the effect that the consideration of the *Gladue* factors had on sentence. For example, in *R. v. Petawabano*, in which a woman pleaded guilty to manslaughter after stabbing a man who had rejected her romantically, the court carefully considered the circumstances in the community of Mistassini and made note of the social problems in First Nations communities related to social exclusion.⁷¹ However, it is unclear precisely how those factors led the court to impose its sentence of four years and seven months. In addition, the terms of the sentence itself did not specifically integrate community-based or restorative elements.⁷² In other cases, reviewed below, judges clearly impose a shorter term of incarceration or specifically incorporate restorative elements into the court's sentence.

(1) Aboriginal Status Considered and Results in a Shorter Term of Incarceration

In some Quebec cases, judges inquire to varying degrees into the offender's Aboriginal background and the situation in their

69. *Supra*, footnote 1, at para. 83.

70. *Gladue*, *ibid.*, footnote 5, at para. 85.

71. *Petawabano*, *supra*, footnote 6, at paras. 35-47.

72. *Ibid.*, at paras. 51-54.

communities but nonetheless do not meaningfully engage with restorative or community-based approaches. Instead, they simply reduce the length of custodial sentences.

For example, in *Happyjack 1*, two sisters of Aboriginal origin were among a number of people convicted of defrauding a financial institution; in relation to both, the Quebec Court seemed simply to treat *Gladue* as permitting the imposition of a less severe sentence.⁷³ In *R. v. Angutigirk*,⁷⁴ decided shortly after the Supreme Court of Canada's decision in *Gladue*, the offender, an Inuk, was convicted of sexual assault against two young girls. Judge Bonin reduced the sentences from the otherwise appropriate 15 months to 12 months less a day in light of the Aboriginal status of the offender. On the second count and for the same reasons, the sentence was reduced from 18 to 12 months less a day. In *R. v. Sivuarapik*, Judge Bonin accepted the joint submission of the Crown and defence following a plea of guilty to manslaughter for stabbing a romantic rival. He said he would have considered a "more serious sentence" in light of the aggravating factors, but accepted the joint submission in light given the special situation of the offender as a young person and an Aboriginal person.⁷⁵

Providing shorter sentences to Aboriginal offenders is of course consistent with *Gladue*, which explicitly envisioned that a consideration of systemic and background factors might result in a shorter custodial sentence for a given Aboriginal offender. It thus made sense when, in *R. v. Amitook*, Judge Westmoreland-Traoré not only took notice of contributory systemic factors in determining the length of the term of imprisonment for trafficking marijuana and money-laundering, but also considered those factors in her decision to enhance credit for provisional detention.⁷⁶ She noted that as an Inuk, Amitook suffered disproportionately in provisional detention, because facilities were "not adapted to the requirements of Inuit offenders who are accustomed to an outdoor way of life", because he was far from his family, and

73. *Happyjack 1*, *supra*, footnote 6, at paras. 65 and 70; see also *Happyjack 2*, *supra*, footnote 6, at para. 62.

74. *Supra*, footnote 6.

75. *Supra*, footnote 6, at paras. 10-11.

76. *Supra*, footnote 6, at paras. 109 and 112.

because there were no programs and few other Inuit around him.⁷⁷ She added that he was overheard to have said to his attorney, without paying attention to the court, "Man, I am going to die in there."⁷⁸

Moreover, shorter sentences, whether or not they include probation or conditional sentences, are one way the justice system can make room for more community-based healing. The difficulty is that *Gladue* promised more than shorter terms of imprisonment: it promised the recognition and incorporation of restorative elements into sentencing judges' decisions. A simple sentencing discount may in some important respects recognize that custodial sentences may be poorly suited to the circumstances of Aboriginal offenders, but if this is all courts do, it falls short of *Gladue*'s promise to create a meaningful bridge between Aboriginal and non-Aboriginal conceptions of justice.

(2) Aboriginal Status Considered and Sentences Provide for Meaningful Integration of Community-Based and Restorative Justice

Sometimes, courts go beyond limiting the length of incarceration so that the sentences themselves engage courts and Aboriginal communities in collaborative restorative or community-based justice. The extent to which restorative and community-based elements figure in sentences varies.

In *Amitook*, Judge Westmoreland-Traoré strongly recommended that the offender serve his prison time in a facility adapted to the culture of Inuit people, such as the detention centre in St. Jerome (which testimony at trial revealed has such a program) or the detention centre in Iqaluit.⁷⁹ In *R. v. Annahatak*, a manslaughter case, Judge Lamoine declined a justice committee's recommendation that the offender would benefit more from a treatment centre than from any time in jail.⁸⁰ Based on the seriousness of the offence,⁸¹ she imposed a term of eight years' imprisonment, apparently identical to the

77. *Ibid.*, at para. 112.

78. *Ibid.*

79. *Ibid.*, at para. 128.

80. *Supra*, footnote 6, at paras. 25-27.

81. *Ibid.*, at paras. 29-30.

term she would have imposed on a non-Aboriginal offender. Nonetheless, she recommended that the report of the Justice Committee of Aupaluk be sent to penitentiary authorities.⁸² It is difficult to know precisely the use that penitentiary authorities would make of the justice committee's report, but such practices have the potential of encouraging restorative approaches within the context of detention.

Conditional sentences may also include restorative or community-based elements. The Quebec Court of Appeal approved the designation of justice committees to supervise conditional sentences in *R. v. Ammituk*.⁸³ In *R. v. Amitook*, the offender was required to meet with the justice committee and follow its recommendations concerning drug abuse and community service during probation.⁸⁴ In *R. v. Novalinga*, Judge Bonin had concerns that if the offender did not remain sober, the safety of the community would be at risk. Since there were no existing treatment programs in the community, the court decided, in light of *Gladue*, to incorporate in the conditional sentence a plan drawn up by the justice committee to have Mr. Novalinga participate in a "healing session" and to report every evening to the justice committee to ensure his sobriety.⁸⁵

Probation orders have likewise included requirements that are restorative or community-based. In *R. v. V. (R.)*, Superior Court Judge Levesque imposed a sentence of three years' detention for a sexual assault, followed by a probation period of three years, which would include drug therapy at Waseskun, an aboriginal healing centre near Montreal.⁸⁶ *R. v. Bastien* also included a strong recommendation that the offender submit to treatment at Waseskun upon his release from incarceration.⁸⁷ However, absent any reduction in the term of imprisonment on the basis of Aboriginal status, as discussed above,⁸⁸ it is difficult

82. *Ibid.*, at para. 44.

83. *R. v. Ammituk*, 2003 CanLII 10491 at para. 8 (Que. C.A.).

84. *Supra*, footnote 6, at paras. 112 and 121.

85. *Supra*, footnote 6, at paras. 2-5.

86. *Supra*, footnote 6, at paras. 29 and 30.

87. *Supra*, footnote 6, at para. 77.

88. See section 3(1).

to consider this an important step away from punitive and toward restorative models of justice.

Judges may also be understood to engage with restorative and community-based justice in their sentencing decisions when they encourage closer relationships between courts and communities in their reasons. For example, in *Amitook*, Judge Westmoreland-Traoré questioned in her disposition why the Attorney General chose to bring proceedings in Montreal, when this distance from the offender's community created "serious logistical obstacles" to convening a justice committee or a sentencing circle or to accessing other recommendations from community resources.⁸⁹ The objectives of sentencing would be better served, she stated, through proceedings in the community of the offender where there might be better access to recommendations from community resources.⁹⁰

4. Conclusion

A common theme these cases is the difficulty faced by judges in obtaining the information they need in order to fully take account of the circumstances of Aboriginal offenders and communities and to fashion appropriate sentences. When courts place a burden on counsel to adduce the relevant evidence, defer uncritically to joint submissions, consider a person's Aboriginal heritage to have had no impact on their commission of the offence, or take little notice of their positive duties under *Gladue*, they may be expressing difficulty in shifting toward what amounts to a more inquisitory judicial role.

Healy and Vancise⁹¹ have thus criticized the judicial notice requirement, saying effectively that circumstances in Aboriginal communities and Aboriginal conceptions of restorative justice are too complex, varied and open to dispute to be the subject of judicial notice. They suggest instead that the judicial notice requirement ought to be abandoned and that counsel should be required to adduce, under relaxed evidentiary standards, relevant information

89. *Ibid.*, at para. 111.

90. *Ibid.*, at paras. 125-27.

91. *Supra*, footnote 31.

about circumstances in Aboriginal communities related to restorative justice. *Gladue* certainly contemplated that defence counsel would play a central role in presenting evidence of circumstances in Aboriginal communities and of the impact of background and systemic factors on an offender. Indeed, defence counsel may need to be better equipped to seek out relevant information and to ensure that evidence related to their client's circumstances as an Aboriginal offender are adduced fully and in a timely fashion.⁹²

Healy and Vancise's critique reflects a concern that *Gladue*'s judicial notice requirement stretches the judicial role in an adversarial system beyond its proper capacities. However, the Supreme Court's decision recognized that adherence to strict conceptions of the adversarial system might not ensure that an offender's Aboriginal status would be adequately considered. Whether courts have the constitutional capacity to modify their roles in this way is a question for another time. But if indeed *Gladue* endorsed a modification to the strict adversarial system, then the question of judicial capacities within that system must be addressed afresh in relation to the new context. Factors that might affect judicial capacity to take proper notice of circumstances in Aboriginal communities include the extent to which that information is made publicly available, which will be affected by government and community responses to challenges of Aboriginal criminal justice. The ability of the prosecution to dispute facts taken through judicial notice is likewise relevant to reliability.

The cases in which *Gladue* and s. 718.2(e) receive only passing or no mention underscore the need for both public and judicial education about *Gladue* and its implications. This education can take a number of forms. The Quebec Court of Appeal ought to clarify or revise its decision in *R. v. McLean*, placing the burden on defence counsel to adduce evidence in relation to circumstances in Aboriginal communities. In addition, judicial training could ensure that judges are better aware of their own obligations under *Gladue* and could affect judges' own willingness and capacity to seek out the information they require to meet those obligations. The Supreme Court in *Gladue*

92. See *R. v. McLean*, *supra*, footnote 7, and *R. v. Jean-Pierre*, *supra*, footnote 6.

recognized that the concepts and principles of restorative justice would need to be developed over time, and through judges' interactions with the contexts of Aboriginal offenders.⁹³ Judicial willingness to engage with communities might itself help mobilize communities and governments to create and raise awareness about sentencing circles, justice committees and other community resources to address the concern that community-based alternatives to incarceration are insufficient.

Thus, it seems from the foregoing that judges cannot go it alone. Governments and communities may need to spend time and energy to raise awareness of the fact that judges are required to seek information about Aboriginal community-based justice, and to ensure that the exercise is viewed as a productive one. Only then will investments in justice committees and sentencing circles, for example, be likely. In the absence of appropriate support, *Gladue* might well turn out to have been an empty promise.

93. *Gladue*, *supra*, footnote 1, at para. 71.