SENTENCING OF INDIGENOUS OFFENDERS IN CANADA by Yuet Al

Section 718.2(e) was added to the *Criminal Code* to remedy the overrepresentation of Indigenous peoples in criminal custody.[1] Section 718.2(e) provides that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders".[2] In other words, this section suggests consideration of the systemic factors facing the accused and to enter a sentence based on section 718 principles of rehabilitation and a sense of responsibility whenever possible.[3]

In applying section 718.2(e), judges must also look at any Aboriginal heritage or "*Gladue*" factors applicable to the accused. There are two leading cases in interpreting section 718.2(e). *R v Gladue* outlines the factors to be considered, which includes family circumstances, support networks, impact of residential schools, unemployment, lack of educational opportunities, dislocation and fragmentation from Aboriginal communities, family involvement in crime, loss of cultural identity, substance abuse, poverty, racism, abuse, and witnessing violence.[4] *R v Ipeelee* reaffirms that a judge must apply *Gladue* factors when entering a sentence in any case involving Indigenous offenders.[5] It should be noted that the intended function of section 718.2(e) is the consideration of these factors, and not remedying overrepresentation through artificially reducing the Indigenous prison population.[6]

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[1] *R v Ipeelee*, 2012 SCC 13 at para 58 [*Ipeelee*].
[2] *Criminal Code*, RSC 1985, c C-46, s 718.2(e).
[3] Halsbury's Laws of Canada (online), *Aboriginal People*, "Sentencing Principles" at HAB-212.
[4] Wikibooks contributors, "Canadian Criminal Sentencing/Purpose and Principles of Sentencing" (20 March 2018), online: *Wikibooks* < https://en.wikibooks.org/w/index.php?title=Canadian_Criminal_Sentencing/Purpose_and_Principles_of_Sentencing&oldid=3391138> [https://perma.cc/C3K3-U6DN]; *R v Gladue*, 1999 1 SCR 688 at para 94 [*Gladue*].
[5] *Supra* note 1 at para 87.
[6] *Ibid* at para 126.

Section 718.2(e) has many implications on criminal justice and the overarching goal of reconciliation in Canada. The consideration of *Gladue* factors facilitates a larger discussion of colonialism in Canada, and how it has impacted the Indigenous population. The resulting factors have lead to significant ostracization of Indigenous peoples from society, hence the importance of acknowledging them before further ostracization via the legal system. Acknowledging section 718.2(e) factors also serves as a method of reducing the moral blameworthiness of Indigenous people convicted of crimes in a society that does not allow them to participate equally. Because Indigenous people have been prevented from an equal share of society's goods, it follows that they should be less morally blameworthy because of this arbitrary disadvantage.

Section 718.2(e) guides courts to consider the principles of rehabilitation and responsibility when entering a sentence. This may cause the courts difficulty when reconciling a non-custodial sentence with other important sentencing principles such as denunciation, deterrence, and separation from society. This is especially true in cases of intimate partner violence, an offence which is explicitly mentioned as an aggravating factor in sentencing per section 718.2(a)(ii).[7] As an aggravating factor, intimate partner violence requires courts to focus more on the aforementioned principles of denunciation and deterrence.[8] Cases in which an Indigenous person is convicted of intimate partner violence pose an interesting dilemma for the courts, in that the approaches suggested by section 718.2.(e) and section 718.2(a)(ii) are inherently conflictual. Thus, there is no "golden rule" or single principle for courts to follow when sentencing in these unique situations.

Cases of intimate partner violence which involve Indigenous offenders often follow a jurisprudence that is somewhat inconsistent. In *R v Etuangat*, the offender assaulted his spouse while she carried their baby on her back. The offender had issues with alcohol addiction and was willing to

[7] *Criminal Code*, *supra* note 2, s 718.2(a)(ii).
[8] Isabel Grant "The Role of Section 718(2)(a)(ii) In Sentencing for Male Intimate Partner Violence Against Women" (2018) 96:1 Can Bar Rev at 175.

seek treatment. The court in *Etuangat* went the way of section 718.2(e) and upheld a suspended sentence for the offender.[9] In contrast to this, the appellate court in *R v Morris* sentenced the offender to 12 months incarceration. The offender in *Morris* had forcibly confined and assaulted his common-law partner. He was also convicted of uttering threats and pointing a firearm. While the trial judge entered a non-custodial sentence, the appellate court overturned this ruling because the accused was not directly affected by any *Gladue* factors, as well as the need for deterrence and denunciation of such a serious crime.[10] These cases, as well as many others demonstrate that when section 718.2.(e) and section 718.2(a)(ii) principles come into conflict, courts will often have to use their discretion in electing one over the other. These choices require careful deliberation and consideration of various circumstances, including the seriousness of the crime and the impact of *Gladue* factors on the offender.

The aforementioned concept of moral blameworthiness can be applied to *R v Etuangat* and *R v Morris*, as a method of better explaining the discrepancy between the two verdicts. In *Etuangat*, the offender's substance abuse issues signified that he was subject to a systemic disadvantage. Because of this, we can infer that although his offense was morally wrong, some leeway should be afforded based on this disadvantage's negative effects. Conversely, the offender in *Morris* did not have any apparent connection to these negative impacts, and accordingly maintained moral blameworthiness for his crime.

Through section 718.2(e), courts have begun to recognize that the criminalization of Indigenous peoples is largely tied to colonialism. Although our colonial history still looms over us, section 718.2(e) is a small step in the right direction on a path towards reconciliation. In this day and age, lawyers and law students are educated on Canada's colonial history and how it has shaped our

[9] *Ibid* at 179.
[10] *Ibid* at 179-180.

justice system. If courts recognize that the criminalization of Indigenous people is largely connected to the still-prominent effects of colonialism, there is the potential for a large-scale remedy to these effects through rehabilitative means. Unfortunately, there is not always harmony in how section 718.2(e)'s emphasis on rehabilitation interacts with other prominent sentencing principles such as denunciation and deterrence. In cases where an Indigenous offender has committed a crime with aggravating factors, it becomes necessary to examine each case on its unique circumstances. Examining the significance of *Gladue* factors to the offender, as well as the severity of the crime is necessary to determine an appropriate sentence in cases where section 718.2.(e) and section 718.2(a)(ii) come into conflict. In conclusion, section 718.2(e) is a useful and pragmatic addition to the *Criminal Code*'s sentencing guidelines that can help alleviate overrepresentation of Indigenous people in custody.