SENTENCING ABORIGINAL OFFENDERS:
SECTION 718.2(e) OF THE CRIMINAL CODE OF CANADA AND
ABORIGINAL OVER-REPRESENTATION IN CANADIAN
PRISONS

by

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Sentencing Aboriginal Offenders: Section 718.2(e) of the Criminal Code of Canada and Aboriginal Over-representation in Canadian Prisons

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ABSTRACT

Although enacted in 1996 with the intent of ameliorating the social problem of Aboriginal over representation in Canadian prisons, section 718.2(e) of the Criminal Code has been largely ineffective in achieving its goal. To the surprise of many, Aboriginal over-incarceration levels have actually increased since the provision's enactment over six years ago. This thesis explores how section 718.2(e) has been applied in sentencing cases that have involved Aboriginal offenders, since the enactment of the provision in 1996 to the present, in an effort to identify possible reasons as to why Aboriginal over-incarceration levels have failed to decrease. One hundred and seventy-seven Canadian criminal cases involving Aboriginal offenders and section 718.2(e) are examined. In addition, materials gathered in interviews with seven Provincial Court judges are discussed. The main finding of this study is that, although sentencing judges are applying section 718.2(e) to justify mitigated sentences in most cases, the majority of the sentences handed out were nevertheless carceral. The data also show that non-carceral terms could not be justified in the majority of those cases, as the offenders had committed serious offences and had long and/or serious prior records. The author argues that the primary reason why the provision fails its mandate is because it does not address the root causes of Aboriginal over-incarceration. The author concludes that, since Aboriginal over-incarceration is a symptom of a larger problem that stems from social, political, and economic issues, efforts should be directed at the social, economic and political realms to address the roots of the problem. By addressing the disadvantage that causes criminality in the first place, the carceral levels associated with that criminality should decrease, and the problem of Aboriginal over-incarceration should be solved.
Dedication

To My Family
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CHAPTER ONE

Introduction

In 1996, the Canadian Parliament introduced major changes into the Criminal Code of Canada. One of these changes was the codification, for the first time in Canada's history, of the purpose and principles of sentencing. Among the subordinate principles of sentencing is section 718.2(e), which states 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 has generated considerable debate in the six years since its enactment.

Section 718.2(e) was enacted with the specific intent of ameliorating the over-representation of Aboriginal offenders in correctional institutions. This Criminal Code provision was but one outcome of the numerous sentencing commissions and inquiries on the problematic issue of Aboriginal over-incarceration. The word 'over-incarceration' denotes a situation in which members of a group (in this case, Aboriginal peoples) are over-represented in prison populations, compared to the proportion of the total population that they comprise outside of prison. Generally, Aboriginal peoples comprise only 2% of the total Canadian adult population, but make up approximately 17% of the Canadian prison population. Although the incarceration rates of this group differ across Canada, Aboriginals remain overincarcerated to varying degrees in every Canadian province.

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1 It has been acknowledged that the terms 'over-incarceration' and 'over-representation' are "...loaded and ambiguous," since they may also imply that the incarceration of many Aboriginal offenders is unjustified (Stenning & Roberts, 2002:80). However, for the sake of simplicity, the terms 'over-incarceration' and 'over-representation' will be used throughout this thesis to refer to the statistically disproportionate representation of Aboriginal peoples in prison populations, as compared to the total Aboriginal population in Canada.
2 The term 'Aboriginal' will be used throughout this thesis to include status and non-status Native Indians, Inuit, and Metis peoples.
Although this 'remedial' provision has been in place for over six years, Aboriginal over-incarceration rates have not decreased. There are a number of explanations that have been offered for the failure of the legislation to impact incarceration rates, including the issues surrounding the provision, problems with the law’s legislative history, problems with the provision and its surrounding sections, the manner in which judges have interpreted the provision, and the differential application of the provision by the Courts. To date, there has been no empirical enquiry into the role of these factors with respect to the application and apparent ineffectiveness of section 718.2(e).

This thesis explores the possible reasons why section 718.2(e) has not been effective in reducing the levels of Aboriginal over-representation in Canadian prisons. Specifically, this thesis sets out to explain how section 718.2(e) has been applied by sentencing judges in cases that have involved Aboriginal offenders, since the enactment of the provision in 1996 to the present. This research endeavour is important, as it is the first study to explore the variables that play roles in influencing the decision-making of sentencing judges in cases that involve Aboriginal offenders and the application of section 718.2(e).

In Chapter Two, published literature is examined with respect to the circumstances of Aboriginal offenders and the various root causes of Aboriginal over-incarceration. The various explanations that have been offered to explain Aboriginal over-incarceration are considered, including historical, cultural, structural, and contemporary explanations. As will be illustrated, no single theory can directly explain the phenomenon of Aboriginal over-incarceration. The explanations of Aboriginal criminality are also examined.
In Chapter Three, the legislative history of section 718.2(e) is presented, along with an overview of the 1996 sentencing initiatives. The purpose and principles of sentencing, and especially section 718.2(e), also receive careful analysis. Finally, the author reviews the case law that has interpreted the provision, and reveals the research that shows that Aboriginal over-incarceration rates have actually increased since section 718.2(e)'s enactment in 1996.

In Chapter Four, the research methods used to (1) analyze select criminal case judgments, and to (2) gather interview data from a sample of Provincial Court judges, are described. The author also reviews the data collection instrument used to gather data from the examined criminal case judgments, and the data collection instrument used to guide the in person individual interviews with seven sentencing judges.

In Chapter Five, the findings of the analysis of case judgments are presented. First, information such as the jurisdiction in which the cases were heard, and the type of plea most often made by the offenders at sentencing are outlined. Information relating to the demographics of the offenders, and the circumstances of the offenders and offences, are then examined. Information with respect to the sentences meted out, and the reasons for judgment, are also examined. Finally, various cross tabulations of the data are presented.

In Chapter Six, data gathered in interviews with a sample of Provincial Court judges are presented to inform the data collected from the analysis of case judgments. Although many of the judges' responses are presented in aggregate form, and are therefore representative of the majority of judges who held similar opinions, responses that were not shared by two or more judges are examined where appropriate.
In Chapter Seven, the findings of this study are discussed. The implications of those findings for the criminal justice system generally, and sentencing practises in particular, are also explored. Policy and program recommendations that may be effective in addressing the root causes of Aboriginal over-representation in Canadian prisons are also presented. Finally, areas for future research are identified, and final remarks are offered.
CHAPTER TWO
Aboriginal Over-Representation in Canadian Prisons

This chapter examines the phenomenon of Aboriginal over-incarceration. A review of the literature is presented to delineate the numerous explanations that have arisen with respect to Aboriginal over-incarceration. As will be illustrated, no single theory can directly explain the phenomenon of Aboriginal over-incarceration. Despite this fact, Chapter Three reveals that two of the explanatory models in particular were emphasized by Parliament in its effort to ameliorate Aboriginal over-incarceration through legislation.

The Problem: Aboriginal Conflict with Law and Over-incarceration

Although Aboriginal adults make up approximately 2% of the total Canadian population, they comprised approximately 17% of those inmates admitted into Provincial or Territorial custody, and Federal custody, during the 1998 to 1999 time period in Canada (Canadian Centre for Justice Statistics, 2001:10). Despite the variation in the numbers of Aboriginal offenders serving carceral terms throughout the provinces in Canada, Aboriginals remain overincarcerated to varying degrees in every Canadian province, and comprise the largest ethnic minority group in prisons across Canada (Lane, Daniels, Blyan, & Royer, 1978:308; La Prairie, 2002:186; Roberts & Doob, 1997:470). Aboriginal over-incarceration rates are alarmingly high in the Prairie Provinces and the territories, and while the rate in the Maritime Provinces is lower, it is nevertheless significant (Canadian Centre for Justice Statistics, 1999; see Table 1 in Appendix F for a breakdown of Aboriginal over-incarceration rates by province).
Research has shown that some Canadian cities contribute more to the over-representation of Aboriginal offenders in prison than others (La Prairie, 2002:182). The high-contributor cities have been identified as Thunder Bay, Winnipeg, Saskatoon and Regina; the medium-contributor cities as Edmonton and Vancouver; and the low-contributor cities as Halifax, Montreal and Toronto (La Prairie, 2002:196). Interestingly, the over-representation of Aboriginal offenders in prison is virtually non-existent in Prince Edward Island and Quebec (La Prairie, 2002:186).

A closer examination of the Aboriginal population characteristics in these 'high' and 'low' contributor cities suggests why this may be so: "(t)he Prairie cities and Thunderbay have the largest, the youngest, the least educated, the poorest, and the most mobile Aboriginal populations. By contrast, [the] Eastern cities have the best-educated and the most well off Aboriginal populations" (La Prairie, 2002:191). It is arguable that it is no coincidence that the Eastern Provinces have virtually no over-representation problem, while the Prairie Provinces have become infamous for high levels of Aboriginal over-representation in their prisons, as characteristics such as youth, the lack of education, and poverty, can be quite criminogenic.

Research has also shown that, compared to non-Aboriginal offenders, Aboriginal offenders are more often incarcerated for crimes against the person (Canadian Centre for Justice Statistics, 2001:11). In this light, it could be the very nature of the offences that Aboriginal offenders are being convicted of that is warranting imprisonment, as they are most often convicted of violent offences that usually require carceral terms (Chartrand, 2001:456). An in-depth examination of the causes of Aboriginal over-incarceration will assist in our understanding of the problem and the efforts taken to address it.
Explanations of Aboriginal Over-Representation in Canadian Prisons

Many scholars have offered explanations for the phenomenon of Aboriginal over-representation in Canadian prisons, with the objective of developing effective solutions to the problem. Although these explanations are very interrelated, they can generally be classified into the (1) historical, (2) cultural, (3) structural and (4) contemporary circumstances that Aboriginal peoples have faced since colonization (Gladue, 1999:413, 417; La Prairie, 1997:49).

Historical Explanations

Historical explanations of Aboriginal over-incarceration are premised on colonialism and its consequences. Many observers point to the historic colonization of Canada's Aboriginal peoples as being a major contributing factor to the problem of Aboriginal over-representation in Canadian prisons, and the overuse of imprisonment as a sanction in general (La Prairie, 1999b:139; Quigley, 1996:279; Quigley, 1999:131; Roberts & von Hirsch, 1999:58; Rudin & Roach, 2002:16).

The displacement and assimilation of Aboriginal peoples, through mechanisms such as relocations, residential schools and the prohibition of cultural practises, had a devastating effect on Aboriginal peoples (Royal Commission on Aboriginal Peoples, 1996:38). Among other things, the process of colonization, coupled with a legacy of cultural dislocation, led to decreased informal social control mechanisms and interdependency among members of Aboriginal communities (La Prairie, 1997:43, 47). Although many bands have managed to preserve their cultural practises, and revitalize their cultures and communities, the effects of colonialism are still experienced today (Bailey, 2000).
Cultural Conflict Explanations

The culture-clash explanation of Aboriginal over-incarceration holds that it is the conflict between Euro-Canadian society's traditional adherence to the retributive justice model, and the restorative justice approach of Aboriginal peoples, that has contributed to high levels of Aboriginal over-representation (Gladue, 1999:414; Roberts & von Hirsch, 1999:58; Rudin & Roach, 2002:16). This explanation is also used to explain the overuse of imprisonment as a sanction in general in Canada (La Prairie, 1999b:139; Quigley, 1996:279; Quigley, 1999:131).

Another culturally-based explanation of Aboriginal over-incarceration explains the over-representation of Aboriginal offenders as being the result of cultural misunderstandings (Royal Commission on Aboriginal Peoples, 1996 as cited in Bonta, La Prairie & Wallace-Capretta, 1997:128). Such misunderstandings could revolve around differences in justice approaches, but could also include other cultural differences. The fact that these cultural differences may contribute to communication problems and misunderstandings, even between different Aboriginal cultures themselves, may be aggravated by the "...stereotypes and erroneous assumptions held by both Aboriginal and non-Aboriginal people about each other's cultures" (Royal Commission on Aboriginal Peoples, 1996:615). For instance, in some Aboriginal cultures, eye contact does not occur as often as it may occur in other cultures (Bailey, 2000). Furthermore, in some Aboriginal cultures, silence is considered to be a demonstration of respect (Sinclair, 1989:5). Canadian criminal justice system officials may have misinterpreted such mannerisms (i.e., as indications of guilt). In this light, such misunderstandings could have played a role in contributing to Aboriginal over-incarceration.
Culture-clash explanations, however, do not explain why Aboriginals, who may not know much about their culture, find themselves in prison, or why members of other cultural groups do not find themselves in trouble with the law in such large proportions (Rudin & Roach, 2002:17). Moreover, ethnicity and culture have primarily comprised the 'politically acceptable conceptual framework' within which Aboriginal criminality and over-incarceration have been discussed (La Prairie, 1999c:250). This approach has created a dichotomy between Aboriginals and non-Aboriginals, and ultimately fails to recognize any similarities between the two groups, as it highlights only their differences (La Prairie, 1999c:250). Accordingly, this has (1) allowed problems such as Aboriginal over-incarceration to be attributed by many solely to the factors of ethnicity or culture; (2) invited more research to be conducted under these assumptions; and (3) encouraged the criminal justice system to discriminate between the groups through differential treatment (La Prairie, 1999c:250). This situation is unfortunate since other factors, such as socioeconomic and criminogenic factors, may have more influence on the variables that have caused the over-incarceration of Aboriginal offenders (La Prairie, 1992:1; La Prairie, 1999c:253).

*Structural Explanations*

These historical and cultural circumstances have negatively impacted Aboriginal peoples, and have contributed to loneliness, despair, anger, frustration, community fragmentation, and poor social and economic conditions. This situation has translated into limited social and academic skills, high unemployment rates, poverty, dependency (e.g. welfare), poor health and few legitimate opportunities. As a result, some Aboriginals have abused substances to cope, which in turn has resulted in children being
born with Fetal Alcohol Syndrome (FAS). Some Aboriginals have also in family violence and other criminal acts due to these circumstances.

Other criminogenic variables such as age, education, employment, and poverty may contribute to the contemporary explanations of Aboriginal over-incarceration. Some researchers have identified high birthrates and low life expectancies among Aboriginal peoples as having aggravated the problems that a century of cultural and community breakdown have caused (La Prairie, 1997:47). Compared to the total Canadian population, the Aboriginal population in Canada is significantly younger. In 1996, the average age of Aboriginals was 26 years, compared to 35 years for the total non-Aboriginal population of Canadians (Canadian Centre for Justice Statistics, 2001:4). This difference is significant and has implications. A large population of young people who have a limited variety of activities available with which to occupy their time, may, among other things, drink alcohol, or engage in criminality, to satisfy their boredom (Marenin, 1991b:25-27, as cited in La Prairie, 1992:22; La Prairie, 1997:47). Furthermore, it is well known that criminality is a behavioural phenomenon that occurs most often among adolescents and younger adults, and dissipates with age (Hartngagel, 1996:96-97). Thus, age may be a contributory factor of the problem of Aboriginal over-incarceration.

The over-representation of Aboriginal offenders in Canadian correctional institutions may have also been caused, in part, by a lack of education amongst this population. According to the 1996 census, 54% of the Aboriginal population in Canada have not earned a high school diploma (Canadian Centre for Justice Statistics, 2001:5). In contrast, only 34% of the total non-Aboriginal Canadian population did not complete
high school (Canadian Centre for Justice Statistics, 2001:5). The difference in the level of educational attainment between Aboriginals and non-Aboriginals is significant, and may contribute to the high levels of unemployment and the related problem of poverty amongst many Aboriginal people.

Furthermore, the unemployment rate is higher between Aboriginal people than it is for non-Aboriginal people (Canadian Centre for Justice Statistics, 2001:5). Approximately 24% of Aboriginal people suffer from unemployment, compared to only 10% of the non-Aboriginal population (Canadian Centre for Justice Statistics, 2001:5). Of the Aboriginals who live in Northern communities, only about 20% are employed (Elias, 1996:15). To exacerbate the problem of unemployment in the North is the shortage of employment, as employment opportunities in many remote Northern communities are often only part-time or seasonal (Elias, 1996:15).

In light of the employment rates of Aboriginals, it is not surprising that the Aboriginal population has a lower average income than the non-Aboriginal population (Canadian Centre for Justice Statistics, 2001:6). In fact, of all the ethnic groups in Canada, Aboriginal peoples experience the highest rates of poverty and social pathologies (Richards, 2001:1). Poverty has several negative implications. First, the twin problems of unemployment and poverty have contributed to high levels of welfare dependency (Richards, 2001:33). Several observers have argued that welfare promotes the problem of unemployment, as it creates a state of dependency amongst recipients that is difficult to break. Growing socioeconomic divisions on reserves have been especially successful in creating divisions between the 'haves' and the 'have-nots,' thereby further alienating the disadvantaged (La Prairie, 1999c, p. 255; Wright, Caspi, Moffitt, Miech & Silva,
This 'Culture of Poverty,' from which so many Aboriginals suffer, creates feelings of hopelessness that are passed to each successive generation (Richards, 2001:33; Sanson-Fisher, 1978:72).

Second, research has revealed that persistent poverty negatively affects childhood development, including Intelligence Quotient (IQ) scores, academic performance, and socio-emotional functioning (McLoyd, 1998:185). Even when the variable of maternal education is controlled for, family composition, ethnicity, and family income remain significant predictors of IQ scores and academic achievement in children (McLoyd, 1998:190, 192).

Third, financial hardship and social deprivation are factors that are very conducive to criminality (Anand, 2000:416; Jackson, 1988:218; Wittmeyer, 1999; Wright, Caspi, Moffitt, Miech & Silva, 1999b:175). When the deprivation, dependency, and negative developmental effects are considered together, the criminogenic nature of poverty, and the possibility that these factors may have contributed to the problem of Aboriginal over-incarceration become clear.

**Legal Conflict Explanations**

According to other explanations, the criminal justice system has played a role in contributing to Aboriginal over-incarceration. Roberts & Doob (1997:519) point out that some research suggests that bias, discrimination and racism may have manifested into the criminal justice system, particularly at the stages of policing, sentencing and parole. Several observers have also argued that such factors may have played roles in contributing to the over-representation of both Aboriginals and Blacks in Canadian prisons (Gladue, 1999:411; Roberts & Doob, 1997:470). Some scholars have also argued
that incarceration levels are ultimately determined by the decision-making that takes
place at the policing and sentencing stages of the system (Bryant, 1999:1; La Prairie,
1990:431). However, incarceration levels could also be determined by the types of
offences that Aboriginal offenders commit.

Other explanations hold that the sentencing system’s lack of clear direction to
judges, due to its guiding but apparently conflicting models of justice, and the
discretionary power it delegates to sentencing judges, exacerbates the problem. Many
scholars have argued that differential policing practises and discriminatory sentencing
practises, as exemplified through an over-reliance on carceral sanctions and the high
standards that have been set to determine eligibility for bail and non-carceral sanctions,
may contribute to Aboriginal over-incarceration (Anand, 2000:416; La Prairie, 1990:429,
430; La Prairie, 1999b:139; Quigley, 1996:279; Quigley, 1999:131; Roberts & Doob,
1997:519). It is because of such factors that it is not surprising that variation exists in
imprisonment levels for different offenders (Doob, 1999:357).

For these reasons, despite the absence of empirical support, systemic
discrimination has been considered to be one of the main causes of Aboriginal over-
incarceration (Anand, 2000:416; La Prairie, 1990:430; La Prairie, 1999c:252 253). This
assumption has provided the foundation for the government’s efforts at remedying
Aboriginal over-incarceration rates and contributed to an almost exclusive focus on the
criminal justice system (La Prairie, 1999c:252). As is illustrated in this chapter however,
decision-making within the criminal justice system is but one of many factors that may
account for the high levels of Aboriginal over-representation in Canadian prisons (La
Criminological Explanations

As illustrated in the above discussion, it is difficult to identify one explanation that can be used to explain the phenomenon of Aboriginal over-incarceration directly. Interestingly, since research has not yet been conducted in a systematic, comparative manner to examine these factors, the definite causes of Aboriginal over-incarceration are not known for sure (La Prairie, 1999c:252). The reason why such research has not been conducted is unknown. Furthermore, some observers have argued that explanations of Aboriginal over-incarceration, such as colonization and culture-conflict theories, do not stand up well in light of the reality that the over-representation levels of Aboriginal offenders vary across Canada (La Prairie, 2002:186; Tyler, 1999:209). Such arguments suggest that criminological theories may offer more powerful explanations of the problem of Aboriginal over-incarceration than previously recognized (La Prairie, 1992:23; La Prairie, 2002:186).

Numerous criminological theories can be used to explain criminality as it relates to the circumstances of Aboriginal offenders. The theories are of merit because they explain how numbers of Aboriginal offenders have found themselves in prison: Aboriginals may simply commit more crime than non-Aboriginals (Anand, 2000:416; La Prairie, 1990:430; Roberts & Doob, 1997:519; Wortley, 1999:261). High recidivism rates amongst this population undoubtedly contribute to the problem (Hann & Harman, 1993 as cited in Bonta et al., 1997:128). However, it should be noted that a high amount of crime amongst this population does not necessarily result in higher carceral levels. Instead, Aboriginal over-incarceration rates are probably more a function of the types of crimes being committed – crimes that cannot justify non-carceral terms.
Nevertheless, an examination of various criminological theories may provide more insight as to why some Aboriginals have come in conflict with the law and have become disproportionately represented in prisons across Canada. The biological perspective of criminality, for example, offers possible explanations as to why some Aboriginals have engaged in criminality. Biological explanations posit that biological defects and chemicals, which act in combination with other factors, may sufficiently affect the brain and thereby induce criminality (Denno, 1985:719; Einstadter & Henry, 1995a:87). Substance abuse and malnutrition may negatively affect fetuses and result in biological defects (Einstadter & Henry, 1995a:96-97; Faith, 1993:198).

Social-psychological perspectives of criminality focus on the social-psychological interactions that develop through the course of interactions with others (Einstadter & Henry, 1995c:175; Wright, Caspi, Moffitt & Silva, 1999a:480). Ineffective parenting that results in low-self control in children, labeling that contributes to being stigmatized, and inadequate socialization experiences that result in poor bonds to society are factors that may contribute to criminality (Einstadter & Henry, 1995c:178; Einstadter & Henry, 1995d:202). Social problems such as disadvantaged and dysfunctional environments may make these antecedents to criminality more likely to occur.

Finally, macro-level theories of criminality focus on the effects of society on individuals (Einstadter & Henry, 1995c:175; Wright et al., 1999a:480). Some Aboriginals who live in poverty may engage in criminality due to the strain they experience between their desired goals and legitimate means of obtaining those goals (Agnew, 1995:113, 114; Braithwaite, 1991:40, 42; Brannigan, 1997:413; Einstadter & Henry, 1995b:146; Faith, 1993:198-199; Sanson-Fisher, 1978:77; Wright, Caspi, Moffitt,
Miech & Silva, 1999b:176, 178). Conflict theories in criminology may also offer possible reasons as to why Aboriginal over-incarceration has come about. Such theories explain that society plays a major role in creating offenders, as it defines what acts are criminal, and imposes definitions on the powerless to gain control and maintain power (Cohen, 1985:93; Einstadter & Henry, 1995e:227, 228, 233). These explanations may be applied to the problem of Aboriginal over-incarceration, as historical processes have rendered many Aboriginals powerless (La Prairie, 1997:45).

The historical, cultural, structural and contemporary circumstances that Aboriginal peoples have faced have worked synergistically to contribute to the development of social pathologies such as substance abuse, child abuse, elder abuse, suicide, homicide, violence, familial dysfunction and violence, and high levels of criminality, and have made Aboriginal over-incarceration seem inevitable (Campbell, 1999b:80; Elias, 1996:13; Gladue, 1999:413; Hamilton & Sinclair, 1991:90, 91; La Prairie, 1997:50; La Prairie, 1999a:179, 183; La Prairie, 1999c:250; Sanson-Fisher, 1978:72-74; Sinclair, 1989:9; Wittmeier, 1999; Wong, 1999:381). These circumstances work in combination to make delinquency more visible and therefore more detectable, and when taken together, partly explain why Aboriginals are charged, convicted and incarcerated more frequently than non-Aboriginals (Sanson-Fisher, 1978:76; Sinclair, 1989:10).

Since the problem of Aboriginal over-incarceration is multi-dimensional, a multi-disciplinary approach must be used to achieve a comprehensive explanation of the phenomenon (Denno, 1985:711, 712; La Prairie, 1990:430-431; La Prairie, 1997:40, 49). Since effective remedies to the problem of Aboriginal over-incarceration may be
developed once the underlying causes of the problem have been identified, the above explanations of Aboriginal over-incarceration should function to inform the development of remedial measures to the problem of Aboriginal over-incarceration.

Summary

In this chapter, statistics detailing the extent of the problem of Aboriginal over-incarceration across Canada were reviewed. Additionally, various explanations of Aboriginal over-incarceration were examined. This endeavour illustrated the multifaceted nature of the phenomenon of Aboriginal over-incarceration. The next chapter examines the legislative history and application of the provision of the Criminal Code that was enacted with the intent of achieving social change, through the amelioration of the problem of Aboriginal over-incarceration in Canada. Unfortunately, the provision seems only to have been informed by two of the above-noted explanations of Aboriginal over-incarceration.
CHAPTER THREE
Section 718.2(e) of the Criminal Code

This chapter examines section 718.2(e) of the Criminal Code – the provision that was enacted with the specific intent of ameliorating the social problem of Aboriginal over-incarceration. Through a critical examination of the provision's legislative history, this chapter reveals that, of the numerous explanations of Aboriginal over-incarceration that have been offered in the literature, Parliament seems only to have been informed of the historical and legal conflict explanations when it legislated section 718.2(e). The provisions surrounding section 718.2(e), section 718.2(e) itself, and the case law that has interpreted the provision are also critically examined. Finally, the most recent Aboriginal over-incarceration rates available are compared to the 1996 Aboriginal over-incarceration rates to reveal that, despite the implementation of the provision, and subsequent case law, Aboriginal over-incarceration rates have increased. This chapter thus 'sets the stage' for the next three chapters, which consider the research question guiding this study: how has section 718.2(e) been applied in sentencing cases involving Aboriginal offenders, since the provision's enactment in 1996 to the present?

The Legislative History of Section 718.2(e)

The sentencing reforms of the Criminal Code that culminated in the enactment of section 718.2(e) have a lengthy legacy. Throughout each decade since 1914, one or more sentencing commissions or inquiries have examined the use of imprisonment (McDonald, 1997:429). Furthermore, a large number of reports were published on sentencing between 1965 and the early 1990s. Some of these inquiries and reports are canvassed
below to trace the eventual development of section 718.2(e), and to demonstrate the volume of sentencing reform recommendations over the years.

The Ouimet Report (1965) was one of the first studies to make recommendations to reform sentencing legislation. Systemic discrimination against Aboriginal peoples soon drew widespread attention and, in 1967, the first of over 30 justice inquiries, that would take place over the next two decades on that issue, was conducted (Hansard, 1995a:11). Numerous reports on sentencing were conducted throughout the 1970s and 1980s, including the Hugessen Report (1973), and the Goldenberg Report (1974). The Law Reform Commission of Canada published a report on dispositions and sentencing (1976). These reports arguably acted as catalysts behind the Government's review of the sentencing provisions Criminal Code in 1979.

The Law Reform Commission of Canada and the Canadian Sentencing Commission have been making law reform recommendations since 1983 (Hansard, 1995e:13921). In 1984, the Government of Canada took heed of these reforms and stated that imprisonment should be avoided wherever possible. However, this may not have been the case in practise, as some judges have even gone so far as to say that there is a 'custodial presumption' (McDonald, 1997:435). In 1984, a white paper on sentencing policy and proposals was published. The Canadian Sentencing Commission was established and the Liberals introduced Bill C-19. Although Bill C-19 focused on sentencing reform, it did not include a special provision for Aboriginal offenders (Stenning & Roberts, 2001). Bill C-19 died on the Order Paper when an election was called. In 1987, the reform recommendations of the Canadian Sentencing Commission were released, and in 1988, the Daubney Committee recommended sentencing reforms.
Both parties identified the need to explicitly state the purpose and principles of sentencing (Roberts & von Hirsch, 1999:49).

It was not until the late 1980s that serious consideration was given to the idea of attempting to remedy, through legislation, the over-representation of Aboriginal offenders in correctional institutions (Stenning & Roberts, 2001). In 1987, the Royal Commission on Sentencing published the Archambault Report. In 1988, the report "Locking Up Natives in Canada" by Jackson was published by the Canadian Bar Association. In 1991, the Manitoba Public Inquiry published a report entitled "The Justice System and Aboriginal People." This report had a major impact on the development and content of section 718.2(e). In this report, it was argued that cultural factors should be routinely examined, and non-carceral sanctions used, wherever possible (Stenning & Roberts, 2001). Although the reports leading up to section 718.2(e) did not all recommend the same reforms, many highlighted the same issues, such as Canada's frequent use of carceral sanctions (Hansard, 1995f:1870), and the concept of restraint in the use of carceral sanctions (McDonald, 1997:429, 430).

The Conservative Party, which was the government of the day, introduced Bill C-90 in June of 1992 (Hansard, 1995e:13930). Bill C-90 did have a provision similar to that which was to become section 718.2(e). However, it was only brought forward to second reading in May of 1993 (Hansard, 1993:19121). Many members of Parliament were critical of the length of time it took for Bill C-90 to be read and move through the legislative process (see Hansard, 1993:19120-3). In fact, some members of Parliament argued that Bill C-90 was receiving attention after 11 months from first reading simply because the government was trying to 'showcase' it for the upcoming election in hope of
winning votes (*Hansard*, 1993:19122). This could very well have been the case, as 'short-term political need' and the desire of governments to win votes may operate to influence political activity and law making (Ekstedt & Griffiths, 1988:108).

There were many issues surrounding the Bill. For example, one of the members commented:

I wonder how serious the government is. I noticed that the person introducing this debate at second reading today, which of course is a critical stage, was not the minister responsible. As a matter of fact, it was not even the Parliamentary Secretary responsible. The first speaker for the government was the Parliamentary Secretary for International Trade who read a nicely prepared statement written by somebody somewhere. It did not give the impression to anyone that the government was terribly serious about it (*Hansard*, 1993:19125).

Situations like this have implications. Perhaps the fact that other Ministers were raising the issue, and speaking on behalf of other people, negatively impacted the provision once it was finally legislated. Such circumstances could mean that Parliament did not develop a correct understanding of the section, or its understanding was compromised. There were also problems created by some members of Parliament who invoked time- allocation restrictions on the discussion of the Bill so that it would be "...passed with as little debate as possible" (*Hansard*, 1995e:13955). Bill C-90 died on the Order Paper in 1993 because approximately one year passed between the first and second readings, after which time an election was called (Stenning & Roberts, 2001).

The sentencing reform efforts since 1982 culminated in the creation of Bill C-41, which was introduced in 1994 (Roberts, 1998:424). Bill C-41 was a response to the various sentencing commissions of the 1980s and significantly changed Canada's criminal justice policy (Roberts & Grimes, 2000). For the first time in Canada's history, the purpose, principles and objectives of sentencing were formally identified and codified.
(La Prairie, 1999b:142; Roberts, 1999b:227; see Appendix A). The Bill also introduced provisions to the *Criminal Code of Canada* that were designed to reduce the use of carceral sanctions with the intent of attenuating incarceration levels. One of the provisions was section 742.1, which provides for the use of conditional sentences (Roberts, 1999b:229; Seniuk, 1997:265). Although the conditional sentence is technically a sentence of imprisonment, it is also a non-carceral alternative that was designed to reduce the use of carceral sanctions and Aboriginal over-incarceration levels (*Moleku*, 2002: para.8; Pelletier, 2001:485; *Proulx*, 2000: para. 91; Roberts, 1998:426, 428, 430; Roberts, 1999b:227; Roberts, 2000:8; Roberts & Grimes, 2000). This sentencing option permits judges, once they have determined that imprisonment is the only appropriate sanction in the circumstances, to order the term to be served in the community, pursuant to certain mandatory and optional conditions (Roberts, 1998:428; see Appendix B).

Another component of Bill C-41 was section 718.2(e). The provision reflected the sentencing principles introduced by Bill C-41. Section 718.2(e) states 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." The provision was developed and legislated into the *Criminal Code* to address the problem of Aboriginal over-incarceration and the overuse of carceral sanctions (Daubney & Parry, 1999:35; *Gladue*, 1999:405, 409, 412; *Wells*, 2000, para. 37). Section 718.2(e) was intended to perform the remedial function of ameliorating Aboriginal over-incarceration rates by encouraging a restorative approach to sentencing,
through the use of non-carceral alternatives such as conditional sentences (Gladue, 1999:385, 387, 399, 400, 405; La Prairie, 1999b:143; Wells, 2000, para. 4).

As proposed in Bill C-41, section 718.2(e) was a significantly 'watered-down' version of the provision that appeared in Bill C-90, which had outlined conditions that had to be met before carceral sanctions could be meted out (Roberts, 1997b:194; Roberts, 1998:427). This 'watering-down' of the provision can be explained by the fact that many factors influence the final form that proposed legislation takes when it is finally enacted into law (Roberts, 1998:420).

Advocacy groups, budgetary constraints, and public opinion are among the general factors that have affected the evolution of Canadian sentencing policy (Roberts, 1998:421). For instance, Aboriginal advocacy groups, such as Aboriginal women's interest groups, largely influenced the legislation of section 718.2(e) (Roberts, 1998:423, 427). The Inuit Women's Association of Canada shared their opinions about section 718.2(e) with the Standing Committee on Justice and Legal Affairs when the Bill C-41 was being debated, and argued that culture should not be used to mitigate sentences (Hansard, 1995b:30). A major concern was that community-based sanctions threaten the safety of their communities, particularly when communities lack the resources to support community-based sanctions (Hansard, 1995b:22). Women's groups argued that section 718.2(e) inappropriately favours offenders at the victims' expense (Hansard, 1995b:22).

Public opinion has also shaped the way in which sentencing policy has evolved. Politicians are under pressure to maintain the legitimacy of the State. The public is a group that generally assumes a retributive philosophy with respect to criminal sanctions. When the public views sentencing as too lenient, politicians try to rectify the situation
(Roberts, 1998:422-423). It is no surprise that, in trying to satisfy the public, efforts at implementing restorative justice principles weaken as they are compromised in the name of retributive justice.

Moreover, research on the public's perception of section 718.2(e) revealed that the public is more supportive of the provision when the provision is presented in the context of the financial and/or other hardships within which Aboriginal offenders have found themselves (Dioso & Doob, 2001:408-409). Generally, without knowledge about the background of the provision, the public perceives the provision as being too lenient. It is perhaps because of these influences that the wording of section 718.2(e) was not as forceful in encouraging the use of non-carceral sanctions as it could have been.

Policy formation is also impacted, albeit rarely, by research, and in the case of section 718.2(e), the lack thereof. The paucity of Aboriginal criminal justice research, together with an unsystematic approach to the integration of existing research with practise, has created a situation in which legislation has been negatively influenced (La Prairie, 1999c:249). Stenning and Roberts (2001) point out, for example, that the research finding that Aboriginal offenders receive shorter sentences than non-Aboriginal offenders was never brought to the attention of Parliament or the Supreme Court of Canada when the provision was being considered. This was an important omission, as it suggests that judges are not the source of Aboriginal over-incarceration (Stenning & Roberts, 2001). Parliament was not presented with such important research, and was therefore incapable of making informed decisions about the proposed provision.

Furthermore, Parliament also seems to have been guided by only the historical and legal conflict explanations of Aboriginal over-incarceration. This is illustrated
through the wording of the provision, which states 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." Parliament, in its development and legislation of the provision, viewed Aboriginal offenders as a homogenous population, because of the historical circumstances they experienced as a group. Such a perspective may direct attention away from the factors that operate to bring offenders before the courts as *individuals*. Moreover, Parliament also viewed Aboriginal over-incarceration as resulting from criminal justice processes, which is why it chose to address Aboriginal over-incarceration through the criminal justice system. More problematic was Parliament's underlying assumption that the problem of Aboriginal over-incarceration, which stems from multi-faceted social, economic and other various factors, could be effectively remedied through *sentencing*.

Regardless, very little time was spent debating section 718.2(e) during Parliament's debates of Bill C-41 (see for examples *Hansard*, 1994a; *Hansard*, 1994b; *Hansard*, 1994c; *Hansard*, 1995c; *Hansard*, 1995d; *Hansard*, 1995e). The great majority of the debates on Bill C-41 focused on section 718.2(a)(i) - the 'hate crimes' section. Members of Parliament argued over whether offences motivated by hate against members of the homosexual orientation should warrant harsher sentencing. The subsequent lack of attention that section 718.2(e) received had major ramifications for the Courts, as they had little guidance from Parliament in implementing section 718.2(e) and integrating it into the process of judicial decision-making (Stenning & Roberts, 2001). Observers have commented that the provision was essentially spoiled by clumsiness in the legislative process (Cairns, 2002:55). Section 718.2(e) was enacted into law on September 3, 1996.
Overview of Sections 718-718.2(e) of the Criminal Code

Perhaps more directly determining the proper interpretation and application of section 718.2(e)'s mandate is an understanding of the rules and principles that govern its practical application, as found in section 718 of the Criminal Code (Gladue, 1999:397). The statement of the purpose and principles of sentencing is comprised of four parts: (1) section 718 (the fundamental purpose of sentencing); (2) sections 718(a)-(f) (the ten objectives of sentencing); (3) section 718.1 (the fundamental principle of sentencing); and (4) sections 718.2(a)-(e) (the subordinate sentencing principles) (see Appendix A). A critical examination of these four parts of the purpose and principles of sentencing will be conducted to present an in-depth understanding of the shortcomings of section 718.2(e).

The Fundamental Purpose of Sentencing

Section 718 states that, "[t]he 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..." For the purpose of analysis, the fundamental purpose of sentencing, and the sentencing objectives to which it refers, will be considered separately.

Roberts and von Hirsch (1998:48, 54) have argued that, because Canada does not have legislated sentencing guidelines, as in the United States, sentencing decisions are largely guided by the statement of the purpose and principles of sentencing. To address these issues, it has been stated that the statutory statement of the purpose and principles in sentencing, as delineated in section 718, must be unambiguous and forceful (Roberts, 1995:16; Roberts, 1998:428; Roberts & von Hirsch, 1999:58, 59). Unfortunately, the purpose and principles have been identified by some as being neither unambiguous nor
forceful (Roberts & von Hirsch, 1999:48). Furthermore, the probability that section 718.2(e) will meet its mandate of ameliorating Aboriginal over-incarceration is diminished because the fundamental purpose of sentencing may be confusing due to the apparently conflicting sentencing objectives in Canadian law (Roberts & von Hirsch, 1999:60).

Moreover, it is difficult to see how "respect for the law and the maintenance of a just, peaceful and safe society" can be achieved when section 718.2(e) encourages the use of lesser penalties. This is especially so in light of the fact that the media has dubbed section 718.2(e) as a 'get-out-of-jail-free card.' The case of R.(M.S.) (2002) illustrates this well. In that case, an Aboriginal offender who was sentenced to a Federal term of imprisonment of three years for an aggravated assault committed against his estranged wife, had his sentence reduced to a conditional sentence at appeal. Whether or not the offender would have been given such a reduced sentence if he were non-Aboriginal is highly questionable. As will be discussed below, section 718.2(e) is a subsection of section 718. Therefore, it is subordinate to the fundamental purpose and principles of sentencing.

The Objectives of Sentencing

The six subsections of section 718 delineate ten objectives of sentencing, or aims of punishment: denunciation, individual and general deterrence, incapacitation, reparation to the individual, restitution to the community, promotion of responsibility in offenders, acknowledgement of harm to victims and communities, and the rehabilitation of offenders (Quigley, 1999:133; Roberts & Cole, 1999:6-11; Roberts & von Hirsch, 1999:53; see Appendix A). Interestingly, although retribution is a limiting principle,
retribution is not listed as one of the objectives to be considered when sentencing individuals. Retribution's absence from the list of objectives has been taken by some to indicate Parliament's intent to move toward a restorative justice model (McDonald, 1997:434). Although the objectives of deterrence, denunciation and separation are classified as being 'retributive,' none are equivalent to retribution as a sentencing objective. Retribution is a separate principle in that its main idea objective is punishment for punishment's sake (Griffiths & Verdun-Jones, 1994:414).

The wording that precedes this list of objectives (the fundamental purpose of sentencing), and namely its use of the phrase "one or more of the following objectives," is vague and encourages a 'cafeteria' approach to sentencing. Section 718 has been identified by some as a menu from which sentencing judges may pick and choose sentencing objectives that are deemed appropriate for any particular offender and offence. This emphasis on personalized sentencing encourages and legitimizes the exercise of discretion at sentencing (Wells, 2000, para. 40).

On the one hand, subsections (a) through (c) of section 718 encompass retributive justice objectives, namely those of denunciation, deterrence, and separation. On the other hand, subsections (d) through (f) of the same section list the aims of sentencing to include the restorative objectives of rehabilitation, reparation, and responsibility. Parliament incorporated the principles of restorative justice in its formal declaration of the purpose of sentencing. However, simply adding on the principles of restorative justice to the model that has dominated our justice system for much longer may be problematic. Retributive and restorative justice are conflicting theories of justice in that they advance competing interests (Glaude, 1999:402; Quigley, 1996:279). Several
observers have argued that the presence of these conflicting sentencing principles in the same provision is problematic, due to their irreconcilability (Kwochka, 1996:162; Young, 1997:347). This tension is also present in section 718.2, as subsection (b) instructs that offenders should be treated similarly for similar offences, while subsection (c) directs that certain offenders should be treated differently (Kwochka, 1996:162; Quigley, 1999:134). The fundamental purpose of sentencing may thus be confusing because of its competing goals of retribution and restoration. As Roberts and von Hirsch (1999:52-53) argue, this in turn provides little guidance for judges at sentencing.

The Supreme Court of Canada explained that Parliament’s decision to combine the conflicting principles of retributive and restorative justice in section 718 must be understood to mean that the parameters of sentencing analysis must be extended to all offenders, not just Aboriginal offenders (Gladue, 1999:403). Young (1997:375) has pointed out that although it is possible for the sentencing judge to reconcile the principles of punishment and rehabilitation, the fact that this is possible neither removes the confusion and tension that the combination of the two models of justice may create, nor the sentencing disparity that may result. When considered in this light, conflicting sentencing objectives may be a contributing factor to increasing Aboriginal incarceration rates, since section 718.2(e) must be read in accordance with section 718.

The Fundamental Principle of Sentencing

The fundamental principle of sentencing is delineated in section 718.1 of the Criminal Code, and states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The principles listed under section 718.2 are subordinate to the fundamental sentencing principle of proportionality
(McDonald, 1997:469). It is because of this that the fundamental sentencing principle influences the way that section 718.2(e) should be interpreted and applied by the Courts (Anand, 2000:415). Specifically, section 718.2(e) must be applied in a way so as not to violate this fundamental principle of proportionality (Stenning & Roberts, 2001). This may be difficult given the fact that section 718.2(e) encourages the meting out of less severe punishments.

Section 718.2(e) Analyzed

Section 718.2(e) states 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." For the purpose of critical analysis, the section may be broken down into four parts: (1) "all available sanctions other than imprisonment"; (2) "that are reasonable in the circumstances"; (3) "should be considered for all offenders"; and (4) "with particular attention to the circumstances of Aboriginal offenders."

It is important to note that section 718.2(e) is not a defence – it does not excuse offences committed by Aboriginal offenders (Rucin, 1999:A13). At best, the provision can be used to justify the substitution of a non-carceral sentence for a carceral sentence, in circumstances that sentencing judges deem appropriate. In those cases where non-carceral sentences would be inappropriate in the circumstances, the provision allows sentencing judges to consider the mitigation of the carceral term that they will mete out. In any event, if convicted, the offender will most often be subject to some form of sanction.
Part I of Section 718.2(e): "all available sanctions other than imprisonment..."

The non-carceral alternatives to which section 718.2(e) refers include community-based sanctions such as post-sentencing diversion, alternative measures, community service, probation, intensive supervision probation, fines, electronic monitoring, absolute discharges, conditional discharges, suspended sentences, and conditional sentences (Griffiths & Cunningham, 2000; Pelletier, 2001:486; Sprott & Doob, 1998:318). However, many Aboriginal communities lack the resources and service to support such alternatives (Hansard, 1995b:12).

Moreover, judges have noted that the wording of this particular part of the provision is unclear and could be misconstrued (Moleku, 2002: para. 6-9). The Court in Proulx (2000: para. 95) pointed out that there is inconsistency between the English and French interpretations of the provision with respect to the phrase "sanctions other than imprisonment." As mentioned above, a conditional sentence is a sentence of imprisonment and also an alternative to incarceration (Moleku, 2002: para. 8; Pelletier, 2001:485; Proulx, 2000: para. 91). Therefore, a conditional sentence does not fall into the category of "sanctions other than imprisonment" because it is a term of imprisonment (Proulx, 2000: para. 91). As Judge Beaudry of the Federal Court of Canada explained:

The Court in Proulx (2000) pointed out that the interpretation of this provision as it appears in English could therefore have the absurd result of precluding courts from considering conditional sentences as alternatives to incarceration, particularly in the cases of Aboriginal offenders. Such results would go against efforts to reduce the number of incarcerated persons, which was Parliament's intention in providing for conditional sentences (Moleku, 2002: para.7).

The Courts have, therefore, advised that the term 'imprisonment' should be interpreted as 'incarceration,' so as to ensure that sentencing judges are aware that they are allowed to
consider non-carceral alternatives such as conditional sentences (Moleku, 2002: para.9; Proulx, 2000: para.95). However, the second part of section 718.2(e) qualifies the use of non-carceral alternatives by stating that such non-carceral alternatives must be reasonable in the circumstances.

**Part II of Section 718.2(e): "...that are reasonable in the circumstances..."**

Because the term 'circumstances' is used twice in section 718.2(e), the disposition meted out must therefore be based on the factual circumstances of the case (Goodstoney, 2000, para. 45). The Supreme Court of Canada interpreted the term 'circumstances' as it appears in part two of section 718.2(e) to include factors such as: the seriousness of the offence; the offender's previous record; the impact the offence had on the victim and community; the particular circumstances of the offender; any aggravating or mitigating factors; the sentencing principles of denunciation, deterrence, proportionality; and case law (Wells, 2000, para. 20). Within this interpretation, the judge must be aware of the facts surrounding the offender and the offence so as to be able to craft an appropriate disposition. Unfortunately, this approach often does not work in the favour of Aboriginal offenders, for the circumstances of their cases often reveal that they do not qualify for such non-carceral alternatives.

For example, post-sentencing diversion is a non-carceral alternative that is generally used with first-time and/or low-risk offenders (Griffiths & Cunningham, 2000:95). Many Aboriginal offenders have long prior records and/or commit serious offences against the person, and thus do not qualify for this type of alternative. Furthermore, probation is used when the offences that have been committed do not carry minimum penalties (Griffiths & Cunningham, 2000:96). Even if the offender qualifies
for intensive supervision probation, such an alternative may not be in their interest, as such intensive supervision may expose offender violations and thereby further contribute to the over-incarceration of this population (Griffiths & Cunningham, 2000:128). Electronic monitoring may not be a viable option either, as it is only used in cases wherein the offender resides at a stable residence that also has a phone, and where the offences committed were neither serious nor violent (Griffiths & Cunningham, 2000:116).

Moreover, the conditional sentence is a non-carceral alternative that has received a vast amount of scrutiny from sentencing scholars. Of the non-carceral alternatives, this sanction has the most prerequisites that must be satisfied before such a sentence is imposed. The prerequisites are: (1) the offence must not have a minimum penalty, (2) the judge would sentence the offender to less than two years, (3) the offender does not pose a risk to the community, and (4) the imposition of a conditional sentence would be consistent with the purpose and principles of sentencing (Proulx, 2000:451). As noted, many Aboriginal offenders do not satisfy the first two conditions. The third condition may also prevent Aboriginal offenders from receiving a conditional sentence. Many Aboriginal offenders have breached Court orders in the past, or have long prior records, and are deemed to be a threat to community safety (Roach & Rudin, 2000:368).

Another issue surrounding the conditional sentence is the relative leniency of the sanction, as compared to the jail sentence it was designed to replace (Roberts, 1997a:1). The lack of equivalence undermines the fundamental principle of proportionality and the sentencing objective of denunciation (Roberts, 1997a:3; Roberts, 1997b:187, 189, 191; Roberts, 1999a:82). For these reasons, scholars who study sentencing have suggested
that conditional sentences be made more punitive through the imposition of more lengthy and demanding conditions and by making the consequences of breach more certain and severe (Roberts, 1997a:4; Roberts, 1997b:200-201, 202; Roberts, 1999a:91-92). However, as sentences are made more difficult to complete due to the imposition of numerous conditions, the likelihood of breaches increase (Roach & Rudin, 2000:371). Viewed in this light, conditional sentences may not reduce the over-incarceration levels of Aboriginal offenders; rather, such sentences may actually contribute to high levels of confinement (Roach & Rudin, 2000:372; Roberts & Stenning, 2002:88).

Another issue surrounding section 718.2(e)'s phrase "...that are reasonable in the circumstances..." concerns the community. Several critical variables determine the success of community-based sentencing alternatives in reducing Aboriginal over-incarceration, including community access to resources, the 'health' of the community, and community understanding and involvement (La Prairie, 1998:73, 75; La Prairie, 1999b:148, 149; Levine, 2000a; Rudin, 1999a:315). When the community intervenes and devotes resources to support community-based alternatives, such sanctions may be meted out to offenders who have committed even serious crimes (Roach & Rudin, 2000:368). For this to occur, the community must have the resources and the social infrastructure in place to help offenders rehabilitate themselves, and to simultaneously ensure that the community is protected (J. (C.), 1997, para. 42).

Although the efforts made to reduce the use of carceral sanctions are commendable, non-carceral sanctions usually threaten community safety and postpone 'inevitable' incarceration (Watts, 1989:4). This is because most communities lack both the human and financial resources needed to support such initiatives (Hansard,
1995b:12). Without such resources, community-based sanctions are not carried out properly because there may be no one available to supervise Court orders, for example (Hansard, 1995b:22). Furthermore, many Aboriginals disapprove of allowing violent offenders to serve their sentences in the community, since such sentences clearly compromise community safety in the name of rehabilitation when the community lacks the resources. However, the lack of resources in some communities may mean that some offenders do not receive community-based alternatives (Koshan, 1998:40; Watts, 1989:3).

Although new sentencing alternatives are being developed, it is difficult, if not impossible, for all Aboriginal offenders to have access to these alternatives, as many live on reserves that are geographically isolated from the centers wherein such alternatives can be implemented (La Prairie, 1990:437; Pelletier, 2001:481; Watts, 1989:3). In this way, community safety is threatened, especially in remote Northern communities (Hansard, 1995b:11). Moreover, because sentencing options become especially limited in such communities, judges must often choose between meting out a carceral sentence or discharging the offender completely (Roberts & Doob, 1997:495).

Part III of Section 718.2(e): "...should be considered for all offenders..."

As Roberts argues (1997b:194), the language used in section 718.2(e) does not restrain judges from imposing carceral sanctions. The phrase "...should be considered..." in section 718.2(e) simply suggests that judges think about non-carceral sanctions whenever possible (Roberts, 1998:427). Judges are not required to use non-carceral sanctions, nor are judges held accountable for not using a non-carceral alternative. It only directs judges to give consideration to such alternatives. The provision's wording is
weak, and therefore unlikely to compel judges to avoid meting out carceral sanctions that might function to reduce the numbers of Aboriginal offenders in correctional institutions (Roberts, 1997b:194; Roberts, 1998:427; Roberts & von Hirsch, 1999:58). Furthermore, it is difficult to determine whether or not judges are in fact considering the provision.

Part IV of Section 718.2(e): "...with particular attention to the circumstances of Aboriginal offenders."

The Supreme Court of Canada directed the judiciary to pay particular attention to the circumstances of Aboriginal offenders, since those circumstances are unique and may have largely contributed to their criminality (Gladue, 1999:385, 401, 414). The circumstances of Aboriginal offenders to which section 718.2(e) refers include the social factors that are specific to Aboriginal offenders, alternate approaches and sanctions that are specific to Aboriginal culture, the availability of such sanctions, and the amount of community support Aboriginal offenders have (Wells, 2000, para. 21). Although many Aboriginal offenders have faced similar social circumstances, judges cannot simply take judicial notice of those circumstances (Vancise & Healy, 2002:101, 102). Since section 718.2(e) uses the term 'circumstances' twice, the disposition must be fact-based, which means that the submission of facts about each offender at sentencing is essential (Goodstoney, 2000, para. 45).

The fact that Parliament singled out and named Aboriginals in section 718.2(e), and in so doing, set Aboriginal offenders apart from non-Aboriginal offenders, has raised concern among many Aboriginals. Many Aboriginals dislike the term 'minority,' as the term is often applied to immigrants, which they are not (Levine, 2000b:54). Furthermore, the generic use of the term 'Aboriginal' is inappropriate, as the term and the circumstances to which section 718.2(e) refers cannot properly be said to apply to all
Canadian First Nations peoples (Hansard, 1995b:28; Stenning & Roberts, 2001). Many differences exist among First Nations peoples, among them being culture, language and customs (Koshan, 1998:41). Through the use of the single term 'Aboriginal,' section 718.2(e) assumes that all Aboriginal people are the same. In this sense, Parliament's provision is somewhat discriminatory, as it simply assumes that all Aboriginal offenders have faced disadvantaged circumstances, and that those circumstances have generally been the same for all Aboriginal offenders across Canada (Levine, 2000a). Discussions about Aboriginal over-incarceration and related issues sometimes allow many to forget that at least 95% of all Aboriginal peoples who live in Canada lead crime-and-substance-abuse-free lives (Sinclair, 1989:10).

For Parliament to have singled out one specific ethnic group as it did in section 718.2(e) suggests that over-incarceration is a problem that affects only Aboriginals. However, other ethnic groups, such as Blacks, are also over-represented in some Canadian prisons, and face many of the same social problems as the majority of Aboriginal offenders (Roberts, 1998:427; Roberts & Doob, 1997:470; Roberts & von Hirsch, 1999:58; Stenning & Roberts, 2001). In fact, despite the large amounts of Black over-incarceration in Ontario prisons, Black offenders have received little attention from researchers (Roberts & Doob, 1997:518). Furthermore, Aboriginal over-representation rates vary among the provinces (La Prairie, 2002:186; Roberts & Doob, 1997:470). Stenning and Roberts (2001) have argued that it is, therefore, unfair to give Aboriginal offenders special attention by applying different sentencing standards to them, and not to other offenders who share similar backgrounds. In this sense, the sentencing principle of parity may be violated (Roberts & Stenning, 2002:85).
One interpretation is that more politics than principles were at work for Parliament to have singled out Aboriginals (Roberts, 1998:427). For these reasons, it has been argued that section 718.2(e) should not have identified Aboriginals specifically, and instead should have been worded in a way so as to apply to all individuals in similarly disadvantaged circumstances, since the provision has created unrealistic expectations with respect to the amelioration of Aboriginal over-incarceration rates (Roberts & von Hirsch, 1999:58; Stenning & Roberts, 2001).

Some Aboriginals do not approve of the 'culturally sensitive' sentencing of Aboriginal offenders, especially those convicted of violent crimes, and even view section 718.2(e) as lenient and racist (Hansard, 1995b:19-21; Koshan, 1998:40). The Inuit Women's Association of Canada, for example, has argued that Aboriginal offenders should be treated and sentenced like any other offender – that is, 'stiffly' and 'properly' (Hansard, 1995b:30). They argue that since Aboriginal women and children compose the majority of victims of Aboriginal offenders, any laws made about Aboriginal offenders should take their interests into account (Hansard, 1995b:4). It appears that this argument was not considered by Parliament during the development of section 718.2(e).

Although the provision clearly applies to all offenders, including repeat offenders, Parliament's singling out of Aboriginal offenders in the provision suggests that Aboriginal offenders must necessarily be accorded special consideration (Roberts & Stenning, 2002:90). As mentioned above, however, such 'special treatment' may violate the codified sentencing principles of parity and fairness (Roberts & Stenning, 2002:85, 90). More importantly, it may also violate the fundamental sentencing principle of proportionality (Roberts, 2002:1). As discussed above, the principles listed under section
718.2 are subordinate to the fundamental sentencing principle of proportionality as it is set out in section 718.1 (McDonald, 1997:469). Due care must therefore be taken when using restorative justice approaches, as the principle of proportionality may be violated when such approaches are utilized in response to criminal behaviour (Roberts, 2002:1).

**Case Law Overview**

Although section 718.2(e) has received judicial consideration in numerous Court decisions since its legislation in 1996, *Gladue* and *Wells* are the only two cases to-date within which the Supreme Court of Canada has interpreted and applied the provision. These cases served as 'wake-up calls' to judges and lawyers alike, as many did not give the provision the attention it was meant to have prior to these precedent-setting cases (Turpel-Lafond, 1999:37). A brief overview of the facts of these cases will provide a contextual background that may be used to better understand the decisions of those cases.

**R. v. Gladue: Factual Information**

During the early evening hours of September 16, 1995, Jamie Tanis Gladue, an Aboriginal woman, was celebrating her 19th birthday with some friends and family in the townhouse in which she and her common-law husband lived. Gladue had suspected that her common-law husband had been cheating on her by engaging in sexual relations with her sister, so she confronted him. In response, her common-law husband told her that "...she was fat and ugly and not as good as the rest" (*Gladue*, 1999: para. 5). At this point, Gladue's common-law husband left the residence to seek refuge in Gladue's sister's residence. While Gladue's common-law husband banged on Gladue's sister's door, Gladue ran toward him and stabbed him in the heart, causing him to collapse in a pool of
his own blood. Gladue did not fully appreciate the consequences of her actions, as she had a blood-alcohol content that was over double the maximum legal limit for driving at the time of the stabbing. At trial, she was convicted of manslaughter. At sentencing, Gladue neither raised her Aboriginal status, nor pointed to section 718.2(e). The judge sentenced her to three years' imprisonment. On appeal, Gladue tried to adduce new evidence with respect to her efforts to maintain connections with her Aboriginal background. Although the Court of Appeal agreed that the trial judge erred in concluding that section 718.2(e) did not apply to Gladue since she was living off of a reserve, the Court nevertheless upheld the sentence that the trial judge meted out (Gladue, 1999).

**R. v. Wells: Factual Information**

During the early morning hours of May 14, 1994, James Warren Wells, an Aboriginal male, joined a house party that was taking place in the home of his victim, who was an 18 year old Aboriginal female. The evidence adduced at trial established that the victim was sexually assaulted in her bedroom while she was either asleep or unconscious due to alcohol consumption. The medical examination revealed the existence of vaginal abrasions. Wells was convicted of sexual assault. The sentencing judge classified Wells' actions as constituting a 'major' or 'near major' sexual assault, and accordingly identified the sentencing objectives of deterrence and denunciation as the primary considerations at sentencing. Considering the fact that Wells did not plan the crime, nor use 'gratuitous violence,' but that he had a prior record and lacked remorse, the judge imposed a sentence of 20 months' incarceration – a sentence that both the Court of Appeal and the Supreme Court of Canada upheld (Wells, 2000).
Gladue and Wells were both appealed to the Supreme Court of Canada on several grounds. One ground of the appeals was that the trial judges failed to give appropriate consideration to the offenders' circumstances as Aboriginal offenders (Gladue, 1999:396; Wells, 2000). Ultimately, the carceral terms meted out by the sentencing judges in both cases were upheld by the Supreme Court of Canada. In Gladue, the Supreme Court of Canada upheld the previous Courts' judgments with respect to the sentence handed out for various reasons, including the facts that (1) the sentence of three years' imprisonment was deemed reasonable, and that (2) Gladue had already been paroled (Gladue, 1999). In Wells, the Supreme Court of Canada upheld the previous Courts' judgments because the sentencing judge was not deemed to have made any errors with respect to the seriousness of the offence, or the consideration and emphasis of appropriate factors (Wells, 2000).

Gladue and Wells: Case Law

Before the Gladue decision, the wording of section 718.2(e) may have led some sentencing judges to believe that they had discretion in deciding whether or not to consider the offender's unique circumstances as an Aboriginal offender. The Gladue decision, however, has made it clear that sentencing judges have no discretion in deciding whether or not to consider those circumstances, and that the consideration of those circumstances must take place (Gladue, 1999:419). As the Supreme Court of Canada explained, the provision requires the aid of the judiciary, who are instructed to sentence Aboriginals differently by tailoring each sentence to reflect the offender's circumstances as best as possible, to allow section 718.2(e) to fulfill its remedial purpose (Gladue, 1999:400, 409). For this reason, it is incumbent upon sentencing judges to attempt to acquire and consider the information regarding the circumstances surrounding the
offender (as an individual and as an Aboriginal), the offence(s), victim(s), the community, and information on the various non-carceral alternatives that are available (Gladue, 1999:418, 419; Ouigley, 1999:139; Turpel-Lafond, 1999:38). Thus, section 718.2(e) also places a burden on prosecutors, defence counsel, probation officers and the community to provide judges with such information (Chalifoux, 1994:775, 776, 781; Roach & Rudin, 2000:375, 378; Turpel-Lafond, 1999:37, 38).

Legal scholars have interpreted the Gladue decision to mean that judges must, whenever possible, canvass reasonable non-carceral alternatives (Daubney & Parry, 1999:35), before incarceration is imposed (Campbell, 1999b:82). In fact, the sentencing judge is under an obligation to attempt to find an alternative to imprisonment (Gladue, 1999:422, 424). The extent to which section 718.2(e) facilitates the use of non-carceral sentences where possible by judges, however, depends in part on the community’s capacity to accommodate and support such measures. However, the absence of support networks and community-based programs in communities does not prevent the sentencing judge from imposing a sanction that considers restorative principles and is sensitive to the needs of the parties involved (Gladue, 1999:422, 424). In cases where imprisonment is the only appropriate sentence in a particular case, section 718.2(e) implicitly suggests that sentencing judges consider a reduced term of imprisonment (Campbell, 1999a:239; Gladue, 1999:417). Section 718.2(e) does not automatically mitigate sentences by virtue of the offender’s Aboriginality, but instead simply instructs that alternative sanctions should be canvassed (Campbell, 1999b:80; Gladue, 1999:420).

Section 718.2(e) does more than simply codify common law. In light of Gladue and Wells, section 718.2(e) is remedial, in that it alters the method of analysis that judges
must use in developing appropriate sentences for individual offenders (Auger, 2000:11; Gladue, 1999:400, 417). It is also unique for its formal recognition of the principle of restraint in sentencing (Daubney 2002:38). The provision requires sentences to reflect the circumstances of Aboriginal offenders, because those circumstances are unique (Gladue, 1999:400).

The method of analysis that judges must use in determining a fit sentence for Aboriginal offenders is two-fold: (1) the consideration of the Aboriginal offender's circumstances that may have been conducive to the commission of the offence, and (2) the consideration of alternatives to imprisonment; if no alternatives exist, the length of the carceral term must then be considered (Gladue, 1999:417-418, 423).

Although section 718.2(e) requires that judges sentence Aboriginal offenders in a different way so as to ensure that the sentence meted out is appropriate, the Court in Wells (2000, para. 44) pointed out that the different method of sentencing "...does not mandate, necessarily, a different result" [Emphasis in original], even with respect to the mitigation of carceral terms (Gladue, 1999:421).

The Court in Gladue limited section 718.2(e)'s applicability by relying on lower Courts' interpretations, and holding that Aboriginal and non-Aboriginal offenders be sentenced similarly when the offences are violent and/or serious (Gladue, 1999:400, 417). The Court ruled that section 718.2(e) should only apply to non-violent and minor offenders (Lash, 2000). The Court in Wells caught its mistake in Gladue by explaining that the above statement was not meant to be a rule, and will vary from case to case (Wells, 2000, para. 50). However, it is clear that the Court refuses to give the provision the remedial force it was intended to have by Parliament since the Court did not consider
the facts that many Aboriginal offenders: (1) commit violent and/or serious crimes, and (2) have long criminal records (Chartrand, 2001:456). These are part of the circumstances of Aboriginal offenders to which the provision refers (Chartrand, 2001:456). Furthermore, some observers have argued that failing to apply *Gladue* to serious offences would violate the proportionality principle (Roach & Rudin, 2000:366), since proportionality looks at both the gravity of the offence and the degree of offender responsibility (Roach & Rudin, 2000:366).

In summary, *Gladue* and *Wells* provide ambiguous, and thus potentially problematic guidance with respect to what judges should do in the cases of Aboriginal offenders who have committed serious offences (Anand, 2000:412; Roach & Rudin, 2000:365). On the one hand, the legislation states that alternatives to imprisonment should be used whenever possible. On the other hand, the case law limits the situations in which the provision will apply to only non-violent and non-serious cases. This reduces the number of cases in which section 718.2(e) can be applied. The law, therefore, significantly limits the provision's ability to achieve the remedial force it was intended to have (Pelletier, 2001:479, 481). Moreover, *Gladue* and *Wells* may be cited in support of carceral sentences (Anand, 2000:418). Such 'guidance' may make the goal of reducing Aboriginal over-incarceration less attainable (Anand, 2000:413).

The *Gladue* and *Wells* decisions also leave unanswered the question of to what extent, in quantitative terms, section 718.2(e) should serve to mitigate sentences in the instances where the offences are so serious that the only appropriate sentences are

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3 It is important to note that (1) Parliament did not specify that the provision should only apply to non-serious offences (Pelletier, 2001:481), and that (2) the *Criminal Code* does not distinguish any particular offence as 'serious' or 'non-serious' (Pelletier, 2001:479).
carceral. Since these cases are precedent-setting, in that they were the first to consider, interpret and apply section 718.2(e), it would have been worthwhile for the Court to have taken the case law in this area a step further. The Court should have speculated and/or hypothesized about the extent to which carceral sentences would be reduced in certain circumstances.

However, the mitigation of carceral terms through the invocation of section 718.2(e) may cause more harm than good, as it means that offenders will spend less time in jail and, therefore, have less of a chance to receive the treatment they need while in prison because of the long waiting lists — a situation that just sets offenders up to recidivate in the long term. This makes for long carceral histories that clearly would not work in their favour at future court appearances (La Prairie, 1990:437).

The Impact of Section 718.2(e)

Despite the many Aboriginal justice programs and policies that have been targeted at the criminal justice system and implemented over the past 25 years, Aboriginal over-incarceration rates have not decreased (Makin, 1998 as cited in La Prairie, 1999c:252; La Prairie, 1999c:258). The legislation of the new sentencing initiatives that have made the use of restorative justice initiatives, conditional sentences and more lenient sentencing possible, have failed to alleviate the problem of Aboriginal over-incarceration to the extent anticipated (La Prairie, 1999b:148; Quigley, 1999:134, 159).

Conditional sentences, in particular, were being relied upon by many to decrease incarceration rates drastically, since they were designed with the specific intent of lowering prison rates by allowing offenders to serve their sentences in the community
instead of prison. However, although over forty-two thousand conditional sentences had
been handed out in Canada as of 1999, Provincial incarceration rates have generally not
decreased (Pelletier, 2001:487). It is important to note that "(w)hen calculating
incarceration rates, the Canadian Centre for Justice Statistics does not count conditional
sentences as carceral sentences because these sentences are not served in prison but in the
community" (M. Charmant, Information Officer, Canadian Centre for Justice Statistics,
Statistics Canada, personal communication, September 25, 2002). This can only mean
that conditional sentences have been of absolutely no assistance in remedying the
problem of Aboriginal over-incarceration.

Recent data suggest that Aboriginal over-incarceration levels are actually
increasing (Rudin & Roach, 2002:4). The incarceration rate of Aboriginal offenders has
increased slightly over the 1997 to 1998 time period at the Provincial and Territorial level
(Canadian Centre for Justice Statistics, 2001:10; see Appendix F, Table 1), and the rate
has increased at the Federal level (La Prairie, 2002:187). Such a situation suggests that
the roots of this social problem have not been adequately addressed.

Summary

This chapter critically examined the legislative history of section 718.2(e), the
sentencing provisions that were enacted in addition to section 718.2(e), section 718.2(e)
itself, and the case law that has interpreted the provision. Data revealing the increase in
Aboriginal over-incarceration rates since the provision's enactment in 1996 were also
presented. Why section 718.2(e) has been ineffective in ameliorating Aboriginal over-
incarceration as it was intended remains unanswered. To shed some light on this
question, this thesis examines how section 718.2(e) has been applied in sentencing cases
involving Aboriginal offenders, since the provision's enactment in 1996 to the present. The next chapter describes the method employed to gather data in an effort to address this research question.
CHAPTER FOUR
Method

This thesis has critically examined the problem of Aboriginal over-incarceration and the provision of the Criminal Code that was legislated over six years ago with the intent of ameliorating it. Data indicating an increase in Aboriginal over-incarceration levels since 1996 was also examined. No research has yet been conducted to investigate the possible reasons as to why Aboriginal over-incarceration rates have failed to decrease. This study, therefore, sets out to examine how section 718.2(e) has been applied in sentencing cases that have involved Aboriginals offenders, since the enactment of the provision in 1996 to the present. The methods used to gather data for this study are examined in this chapter.

Research Question and Objective

Why have the levels of Aboriginal over-representation in Canadian prisons increased, despite the enactment of section 718.2(e)? To begin to answer this question, it would be worthwhile to study the factors that affect the decision-making of judges, since judges are the individuals responsible for applying the sentencing provision to Aboriginal offenders. The main research question guiding the present study then is how has section 718.2(e) been applied in sentencing cases involving Aboriginal offenders, since the enactment of the provision in 1996 to the present?

This study approaches the aforementioned research question in two ways. First, through a content analysis of 177 published case judgments, data is gathered on

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4 The term 'published' will be used to refer to judgments that were written and published in a periodical such as Canadian Criminal cases, or made available through a database, such as Quicklaw.
approximately 40 key variables that may play a role in influencing sentencing decisions. The descriptive statistics of these various variables are revealed, and highlight the key elements of some of the cases that have involved section 718.2(e) and Aboriginal offenders at sentencing. Bivariate analyses are also conducted on the variables examined, in an effort to determine which variables seem to be most associated with particular types of sentences.

The second way in which this study attempts to answer the research question is through interviews with a small, non-representative sample of Provincial Court judges. Through these interviews, this study attempts to more comprehensively answer the main research question, by asking the judges, among other things, to identify the various variables that they take into consideration when determining the types of sentences they mete out in cases that involve section 718.2(e) and Aboriginal offenders.

The main objective of this study is to conduct exploratory research. Through the analysis of both published case judgments, and interviews with sentencing judges, an attempt is made to identify the variables that seem to be related to the types of decisions that judges make with respect to their application of section 718.2(e) to Aboriginal offenders. If research is able to identify the variables that have restrained judges from giving the provision the full force and effect that was intended by Parliament, more effective ways of ameliorating the over-incarceration problem may emerge.

To date, no research analyses have been conducted on the Canadian criminal cases involving Aboriginal offenders in which section 718.2(e) has been invoked. As well, there are no data on exactly what the judiciary has been taking into account when sentencing Aboriginal offenders in light of section 718.2(e), and what factors have been
affecting the types of sanctions that Aboriginal offenders receive. Thus, this study examines numerous factors, as specified by judges, to explore how the provision has been applied in cases that have involved section 718.2(e) and Aboriginal offenders.

**Published Canadian Criminal Case Judgments**

The *Canadian Statute Citations* and 'Quicklaw' were consulted in an effort to identify and gather the Canadian criminal cases that have considered section 718.2(e) with respect to the sentencing of Aboriginal offenders. The *Canadian Statute Citations* is a reference book that lists Canadian cases that have considered particular provisions, by the provision number. In the *Canadian Statute Citations*, the statute heading 'section 718.2(e)' was examined and over 200 published case judgments were found in which section 718 has been considered. Since section 718.2(e) is available to Aboriginal and non-Aboriginal offenders, this list included many cases that involved non-Aboriginal offenders. The present study uses only those cases that involved both an Aboriginal offender, and section 718.2(e), at sentencing.

Since the *Canadian Statute Citations* is not current and not all case judgments are retrievable in hard copy form from a library, the computer program 'Quicklaw' was also used in the case judgment search. The "Criminal Law Case Law, Global" (CRCL) database in Quicklaw was used to search for cases using the string of terms: "(Aboriginal or Native or Indian) and "718.2(e)" and (sentence or sentencing)." This search yielded 416 matches. The cases had to be read through to find those that were suitable for analysis. The selection process yielded a total of 177 case judgments for analysis.
**Sampling**

In comparison to the total number of judgments that have been rendered since 1996, a relatively small number of judgments have considered the applicability of section 718.2(e) to Aboriginal offenders. Furthermore, the vast majority of criminal case judgments go unreported, as judges are not required to provide written judgments in all of their cases. Due to the additional fact that not all cases can be found (because of the limited number of case judgment databases available for student use), the case-finding strategy discussed above rendered a manageable number of cases to examine.

Therefore, sampling did not occur from all of the cases that met the research criteria. Instead, each and every available case that met the research criteria was examined. The results are therefore not only representative of the population, but also factual, since they were obtained by examining every relevant case available.

**Data Collection Instrument**

The data-collection instrument developed for the purpose of the case judgments' analysis contains 40 variables (see Appendix C). Information was gathered on a variety of items, including the year the judgment was rendered, the province in which the case was heard, the last level of Court in which the case was heard, the purpose of the Court hearing, and which party appealed the sentence (in the event the case was appealed). Information was also gathered on the number of charges that the offender had accrued, the type of offence(s) the offender committed, and whether the offender initially pled guilty or not guilty.

Data were also gathered on the demographics of the offenders and the victims to determine if such variables seemed associated with the decisions meted out. It should be
noted that, in the cases that involved two or more offenders, information was recorded for only one of the offenders for the sake of simplicity in coding. Also, for the purpose of this thesis, the type of background within which the offender was raised had to be differentiated. For this reason, 'healthy background' was operationally defined as background circumstances such as a stable home and upbringing, a loving and caring family, and access to opportunities. Conversely, 'tragic background' was defined as background circumstances such as dysfunctional family life, poverty, physical and/or sexual abuse, substance abuse, and the lack of opportunity.

Data were also gathered on which party – Crown counsel or defence counsel – raised the applicability of section 718.2(e), and whether defence counsel properly informed the court of the offenders' circumstances. Information was also gathered on whether a pre-sentence report was submitted to the court, and what the recommendations of the report were with respect to the type of sentence that should be meted out. The sentencing principles cited in the judgments as justifying the dispositions, and the various reasons the judges used to justify why they did not apply section 718.2(e) in particular cases were also recorded.

Initially, consideration was given to using the *Sentencing Digests* to determine the range of sentences certain offences usually yield, so as to quantify whether the sentences meted out in the cases examined were actually being mitigated by section 718.2(e). The decision was made not to use the *Sentencing Digests* after considering several cases that quoted *R. v. M. (C.A.*) to explain that

Sentencing is an inherently individualized process and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction (1996:375).
For the purpose of this thesis then, data on this variable were coded based on either (1) the judge explicitly saying that he or she has mitigated the sentence of the Aboriginal offender based on the application of section 718.2(e), or (2) a comparison of (a) the recommendations made by the Crown and defence with respect to their suggestions as to what they believe would be an appropriate sentence, to (b) what was actually meted out by the judge.

During the collection of the case data, it was noted that the vast majority of the case judgments did not provide enough information in their judgments to answer all of the questions listed on the data collection instrument. An attempt was made to attenuate this problem by examining earlier Court decisions where possible, to find more information that may not have appeared in the appellate judgments. The most common missing data points related to the demographics of the offender and the victim, such as the offenders' education levels, whether the offenders lived in urban or rural areas, whether the offenders were employed, and the age and ethnicity of the victims.

The Sample of Canadian Sentencing Judges

The other data source for this study were interviews conducted with a small sample (n = 7) of Provincial/Territorial Court judges. The judges were also selected for study according to a set of criteria. First, the participants must have been Canadian judges with the power to impose sentences, and second, the judges must have had to consider the applicability of section 718.2(e) with respect to an Aboriginal offender at least once in their experience. The sample is not assumed to be representative.

Since this research was conducted on human participants, associated ethical issues were given consideration, and ethical approval of the research was obtained from the
Research Ethics Board of Simon Fraser University (see Appendix D). Informed consent was obtained from all participants. This was done to ensure that the participants (1) became aware of any factors that may influence their decision on whether or not to participate in this study, and also that they (2) understood that although they were under no obligation to participate, or answer all the questions they may be asked (Palys, 1997:94), their participation was nonetheless important to the goals of the research (Palys, 1997:96). Measures were also taken to ensure the anonymity of the participants' responses, including the fact that the names of the participants were not recorded in the field notes. Moreover, all identifying information is withheld so as to protect the anonymity of the judges who most kindly agreed to participate in this study.

**Sampling**

In many countries, sentencing judges are resistant to research being conducted upon them (Ashworth, 1995:263). This statement holds true in Canada. Because judges are a difficult population to access for research purposes, the snowball sampling technique was employed to build a research sample. With the help of one judge who is amenable to research, the author was able to contact other like-minded judges. After each interview, each participant was asked if he or she knew of any other judges who may be interested in participating. After contacting those new judges, and holding interviews with those who were interested and available, the research sample was built. However, due to a general reluctance amongst many judges to speak about sentencing issues, the sample in this study consists of only seven judges.
Data Collection Instrument

To guide the interviews, the author developed an interview schedule consisting of 60 questions (see Appendix E). Information was gathered on the background experiences of the judges, including their educational backgrounds, career experiences, and their decision-making practices in general, so as to provide context for their responses with respect to the questions that would address their opinions and application of section 718.2(e).

The judges were asked about their personal sentencing philosophies and about the problematic aspects of section 718 as discussed in Chapter Three. The judges were also asked specific questions with respect to their sentencing of Aboriginal offenders, so as to determine how experienced they were in this regard, and also to further contextualize their responses.

Questions were posed regarding the various issues that surround the application of section 718.2(e) at sentencing. Specifically, the judges were asked questions about the factors that they consider in deciding whether or not to invoke the provision when sentencing an Aboriginal offender, the factors that would prompt their use of the provision to justify a mitigated carceral sentence, and the impact of the related case law on their exercise of discretion at sentencing.

The judges were also asked questions regarding the legislative history of section 718.2(e), their views of section 718.2(e) itself, and its mandate. They were also solicited for their thoughts as to whether or not the provision has been meeting its mandate since its enactment in 1996, and the possible reasons why Aboriginal over-incarceration rates have not decreased.
Given that judges are experienced criminal justice system officials, with years of experience in dealing with offenders and applying the law, the author decided that it would be most interesting to ask them how the problem of Aboriginal over-incarceration could be better addressed. In legislating section 718.2(e), no one from Parliament consulted judges – the individuals who continually see Aboriginal offenders before them, who continually learn about the factors and circumstances surrounding the criminal offences, and who know which community-based sanctions are available in their community. The author therefore seized the opportunity to discover their thoughts on what must be done to address the problem of Aboriginal over-incarceration effectively.

Summary

This chapter examined the methods used to gather data from 177 published case judgments, and seven sentencing judges, in an effort to explain how section 718.2(e) has been applied in sentencing cases involving Aboriginal offenders, since the enactment of the provision in 1996 to the present. Chapter Five reveals the findings of the analysis of case judgments, and Chapter Six reveals the findings of the data gathered in the interviews with the seven sentencing judges.
CHAPTER FIVE
The Findings of the Analysis of Case Judgments

This chapter presents the findings of the analysis of 177 published case judgments in an effort to determine how section 718.2(e) has been applied in sentencing cases involving Aboriginal offenders since the enactment of the provision in 1996 to the present (see Appendix H for a list of the cases). To answer this research question, a number of variables that may potentially influence the decision-making of sentencing judges are examined. Specifically, descriptive statistics in the form of frequency distributions and cross tabulations are used to discover any trends in cases involving section 718.2(e) and Aboriginal offenders at sentencing. One feature was the absence in some case judgments of all of the information of interest to this study. In such cases where information was missing, the data could not be coded, and lower population sizes therefore resulted. Non-parametric tests of significance and measures of correlation are also utilized in an effort to analyze the data in more depth. Owing to the small number of published case judgments analyzed in this study, the findings should be regarded as preliminary.

Descriptive Statistics

Frequency Distributions

The Years

Although section 718.2(e) came into effect in 1996, the overwhelming majority (81%) of the published case judgments examined in this study were heard between the years 1999 and 2002 (see Appendix F, Table 1). This finding is likely explained by the
fact that the Supreme Court of Canada's judgment in *Gladue* in 1999 drew widespread
attention to section 718.2(e) among many lawyers and judges (Turpel-Lafond, 1999:37).

**The Regions**

The majority of the case judgments examined in this study were delivered in the
province of British Columbia (25%), followed by Alberta, Ontario, Saskatchewan,
Manitoba, and the Yukon Territory (see Appendix F, Table 1). New Brunswick and the
Northwest Territories each accounted for 4% of the cases examined. The remaining
cases were heard in Newfoundland, Nova Scotia, Quebec and Nunavut. No relevant case
judgments from Prince Edward Island were found. The distribution of cases is slightly
similar to the national Aboriginal over-incarceration levels. Although the highest
Aboriginal over-incarceration levels are in the Prairie Provinces, the lowest carceral rates
of Aboriginal offenders are found in the Maritime Provinces (La Prairie, 2002:186, 196).
This carceral trend amongst the Maritime Provinces is reflected in the case judgment
data, as shown above.

**The Levels of Court**

With respect to the levels of court in which the cases were heard, approximately
29% of the cases were heard in Provincial or Territorial Courts, while 33% were heard at
the Supreme Court level, and 36% were heard at the Court of Appeal level (see Appendix
F, Table 2). The only two cases involving the application of section 718.2(e) to
Aboriginal offenders that have been considered by the Supreme Court of Canada are
*Gladue* (1999) are *Wells* (2000). Interestingly, approximately 44% of the cases examined
were appealed to a higher court, and the majority of these cases (69%, *n* = 73) were
appealed by the offenders (see Appendix F, Table 2).
The Types of Offences

The majority of the cases (59%) involved convictions on only one charge (see Appendix F, Table 2). Significantly, the majority of the cases examined (approximately 64%) concerned serious and/or violent offences. The offences that the Aboriginal offenders were most often convicted of included sexual-assault-related offences, assault-related offences, property offences, manslaughter, and impaired driving offences (see Appendix F, Table 2). Cases involving second-degree murder, drug offences, and 'other' offences that could not be classified into one category, comprised the least number of cases in this study.

The Offenders

In 15 of the 177 case judgments, no information was provided on how the offender pled. Of the cases in which this information was gleaned, 65% of the offenders pled guilty to the offence(s) with which they were charged \( n = 162 \) (see Appendix F, Table 2). Although information on the number of offenders involved per case could not be ascertained from one of the case judgments, the majority of the cases in this study (82%) involved only one offender, while 11% involved two offenders, 5% involved three offenders, and 2% involved four or more offenders (see Appendix F, Table 2).

The demographic variables of the Aboriginal offenders were also interesting to explore. The majority of offenders in the cases examined were male \( (84\%, \ n = 176) \), and between 18 to 24 years of age \( (34\%, \ n = 138) \) (see Appendix F, Table 3). Offenders in the 42 to 60 age range, and the 12 to 17 age range, each comprised the smallest proportions of the cases examined (see Appendix F, Table 3). These data are consistent
with the well known finding that criminality occurs most often amongst young adults, and dissipates with age (Hartnagel, 1996:96-97).

The majority of the offenders had a prior criminal record at the time of sentencing (83%, n = 166), had only achieved an education level between grades 7 to 12 (54%, n = 68), and were residing in a rural area at the time of sentencing (72%, n = 83) (see Appendix F, Table 3). Data gathered from the case judgments also indicate that the majority of offenders were employed at the time of sentencing (55%, n = 87) (see Appendix F, Table 3).

However, a high percentage of offenders had suffered 'tragic' circumstances in their life, including poverty, familial dysfunction, physical and/or sexual abuse, limited opportunities, and subsequent substance abuse (88%, n = 108) (see Appendix F, Table 3). The data indicate that most offenders (85%, n = 130) were abusers of drugs, alcohol, or some combination of both substances at the time of sentencing (see Appendix F, Table 3), and an even higher percentage of offenders were abusing some substance, such as drugs, alcohol or some combination of both at the time of the crime (90%, n = 124) (see Appendix F, Table 4).

Although approximately two-thirds of the cases examined did not report whether the Aboriginal offenders had the support of their family or community, the cases that did report this variable indicated that most offenders had the support of their family (79%, n = 61) and/or their community (75%, n = 55) (see Appendix F, Table 4). Such support could be expected to have a positive impact on the sentence handed out by the judge, and possibly encourage the judge to hand out a non-carceral sanction such as a conditional sentence.
Information was also collected with respect to whether or not the offenders, at the
time of sentencing, had expressed remorse over their crimes, and also whether or not the
offenders had made rehabilitative efforts since the commission of their crimes. Seventy-
four percent of the cases involved Aboriginal offenders who had expressed remorse
\( n = 91 \), compared to 26% of the cases that explicitly stated that the offenders were not
remorseful for the offences that they had committed (see Appendix F, Table 4). Slightly
more cases \( n = 102 \) revealed information about the Aboriginal offenders' rehabilitative
efforts since the time of the offence(s). Of these cases, 75% of offenders made
rehabilitative efforts since the commission of their crime(s), compared to 25% of
offenders who did not (see Appendix F, Table 4).

The Extent to which the Courts were Informed of the Offenders' Circumstances

There was considerable variation across the cases with respect to the amount of
information specified in the case judgments, about the background circumstances of the
offenders. Information regarding the background circumstances of individual Aboriginal
offenders, including their age, education level, and prior criminal record, could play a
role in the decision-making of judges as to whether or not section 718.2(e) should operate
to justify a non-carceral sanction, or mitigated carceral term.

The courts were informed of the background circumstances of the Aboriginal
offenders at sentencing approximately half of the time \( n = 123 \) (see Appendix F,
Table 5). In comparison, 60% of the cases that were appealed \( n = 75 \) did not indicate
whether the courts were informed of the background circumstances of the offenders. Of
the case judgments that indicated whether or not pre-sentence (or pre-disposition) reports
were made available to the judges at sentencing \( n = 90 \), only 22 made reference to the
reports' recommendations. Approximately 73% (n = 22) of these cases recommended that a non-carceral alternative be given at sentencing (see Appendix F, Table 5).

The Victims

Information was also collected with respect to the victims of the offences committed by the offenders, as such information could possibly have an impact on the types of sentences meted out by judges. The majority of cases (82%, n = 137) involved only one victim (see Appendix F, Table 6). Moreover, the majority of the victims were female (55%, n = 128). Approximately 69% of the victims were adults (19 years of age and over), and 31% were children (18 years of age and younger) (n = 86) (see Appendix F, Table 6). Only 49 of the cases examined indicated the ethnicity of the victims. In these cases it was determined that the vast majority of victims were Aboriginal (84%), as compared to non-Aboriginal (16%). The vast majority of victims sustained physical injuries from the offences committed against them (81%, n = 137) (see Appendix F, Table 6). The final piece of information collected from the cases with respect to the victims was about their relationship to the offender: approximately 69% (n = 124) of the victims knew their assailants (see Appendix F, Table 6).

The Application of Section 718.2(e) to Aboriginal Offenders

In nearly all of the cases, section 718.2(e) was at least mentioned as part of the reasons given to justify the sentencing judges' decisions (see Appendix F, Table 7). Furthermore, the provision operated 52% of the time to justify a lesser penalty (i.e. a non-carceral sanction, or a mitigated carceral term) (see Appendix F, Table 7).

However, approximately two thirds of the sentences given out at trial (n = 176) nevertheless involved carceral terms (see Appendix F, Table 7). Moreover, most of the
sentences given at trial were carceral terms of over two years' imprisonment (39%, \( n = 176 \)), followed by carceral terms of under two years' imprisonment, conditional sentences and other non-carceral alternatives (see Appendix F, Table 7). Of the cases that were appealed to some level, the majority of the cases (50%, \( n = 78 \)) were dismissed (see Appendix F, Table 7).

**The Reasons for Judgment**

Data were also collected with respect to the specific reasons that the judges provided in the case judgments as to why section 718.2(e) could not be used to justify either a non-carceral or mitigated carceral term in certain cases. This did not apply in 98 of the cases examined (55%) in which section 718.2(e) was invoked by the judge to justify a mitigated carceral or non-carceral sentence. In the 79 cases in which this did apply, the judges explained in their written case judgments that the provision was unable to mitigate the sentences because of the seriousness of the crimes (71%), the offenders' prior records (17%), or for various other reasons (40%) (see Appendix F, Table 8). It should be noted that, although the case judgments revealed that section 718.2(e) did not operate to justify a mitigated carceral or non-carceral term in four of these 79 cases, no reasons where provided by the sentencing judges as to why this occurred.

The case analysis also revealed the frequency with which the different sentencing objectives were mentioned by the sentencing judges. Deterrence was the most cited sentencing objective in the cases examined (56%), followed by denunciation, rehabilitation, separation, responsibility, retribution, reparation and acknowledgement of harm to the community (see Appendix F, Table 9). In addition, the fundamental sentencing principle of proportionality was cited in 20% of the case judgments (see
Appendix F, Table 9). It is interesting that retribution was cited, since it is not listed as one of the sentencing objectives in section 718, and furthermore is a sentencing objective that is clearly dissimilar to the other objectives.

**Cross Tabulations**

Cross tabulations are an effective way of comparing batches of categorical values. They provide the frequencies and percents of two variables, namely an independent variable (IV) and a dependent variable (DV), when those variables are considered together. Since most of the data gathered from the 177 case judgments are of the categorical (nominal) level of measurement, a more in-depth analysis of the data can be achieved through cross tabulations.

For the purpose of this thesis, the variables of most interest are: (1) whether section 718.2(e) was used to justify non-carceral or mitigated carceral sentences; (2) whether the sentences given at trial were carceral or non-carceral; and (3) whether the sentences given at trial were over two years' imprisonment, under two years' imprisonment, conditional sentences, or other non-carceral sanctions. These three variables were accordingly treated as dependent variables in the cross tabulations. For exploratory purposes, cross tabulations were created for all of the variables listed in the data collection instrument against the three main dependent variables identified above. However, many of the cross tabulations had low cell counts owing to the lack of information specified in the case judgments. Therefore, only selected cross tabulations will be discussed.
The Years

The first cross tabulation of interest considered the years in which the judgments were rendered (IV) in conjunction with whether or not section 718.2(e) justified lesser sentences (DV). The trend here is very interesting: between the years 1996 to 1998, section 718.2(c) operated to mitigate the majority of sentences (71%). However, between the years 1999 to 2002, the majority of the sentences meted out (52%) were not mitigated because of the provision (see Appendix G, Figure 2). Interestingly, most of the sentences handed out in both of those time periods were carceral, followed by non-carceral sentences, and sentences in which a combination of carceral and non-carceral sanctions were meted out (see Appendix G, Figure 3).

The Regions

The next cross tabulations considered the provinces in which the judgments were heard against the dependent variables identified above. Section 718.2(e) was used by judges to justify less severe sentences in the majority of cases that were considered in the Western and Prairie Provinces (British Columbia, Alberta, Saskatchewan, and Manitoba) (52%), and in the Northern Provinces (Nunavut, the Yukon Territory and the Northwest Territories) (72%), but not in the majority of cases that were considered in the Eastern and Maritime Provinces (44%) (see Appendix G, Figure 4).

The Types of Offences

Another cross tabulation was conducted using the types of offences of which the offenders were convicted of (IV) and the dependent variable of whether or not section 718.2(e) operated to justify non-carceral or mitigated carceral terms at sentencing. Although the provision did not justify lesser sentences in the majority of cases involving
second-degree murder, manslaughter, or sexual-assault-related convictions, the provision
did justify lesser sentences in approximately 64% of the cases involving assault-related
offences, 74% of the cases involving property offences, and 67% of the cases involving
drug related offences (see Appendix G, Figure 5).

The Offenders

The next cross tabulation of interest examined whether or not the offenders had
prior records at the time of sentencing (IV) and whether or not section 718.2(c) operated
to justify non-carceral or mitigated carceral terms at sentencing (DV). Interestingly, the
provision operated to justify lesser sentences in the majority of cases that involved
offenders with prior records (54%), but did not justify lesser sentences in the majority of
cases that involved offenders who did not have prior records (59%) (see Appendix G,
Figure 6). However, as shown in other cross tabulations of this independent variable: (1)
the majority of Aboriginal offenders with prior records received a carceral sentence at
sentencing (56%), compared to those offenders who did not have a prior record (36%)
(see Appendix G, Figure 7), and (2) the majority of offenders with a prior record received
a carceral sentence of over two years' imprisonment at sentencing (45%), compared to
those offenders who did not have a prior record (18%) (see Appendix G, Figure 8). So,
although most offenders with a prior record enjoyed the benefits of section 718.2(e) at
sentencing, those offenders nevertheless received carceral sanctions of over two years'
imprisonment.

Another independent variable of interest was whether or not the Aboriginal
offenders experienced 'healthy' or 'tragic' circumstances during childhood. In the
majority of cases involving Aboriginal offenders who had experienced 'tragic'
circumstances, section 718.2(e) operated to mitigate the sentences handed out (62%) (see Appendix G, Figure 9). As with the 'prior record' variable examined above, the 'background circumstances' variable revealed that, although the majority of offenders experiencing a 'tragic' background had section 718.2(e) operate to mitigate their sentences at trial, the majority of these offenders nevertheless received carceral terms at sentencing (53%) (see Appendix G, Figure 10). Moreover, of the types of sentences received, a carceral sentence of over two years' imprisonment was handed out most often (47%), compared to jail sentences of under two years' (18%), conditional sentences (25%), and other non-carceral sentences (11%) (see Appendix G, Figure 11).

The next independent variables that were examined considered whether the offenders had the support of their family or community at sentencing. It was found that:

- Section 718.2(e) was used as the basis for lesser sentences in the majority of cases that involved offenders who had the support of their family at sentencing (56%) (see Appendix G, Figure 12).

- The majority of offenders (51%) who had the support of their community at sentencing did not receive a lesser sentence because of the provision (see Appendix G, Figure 13).

- Although the majority of Aboriginal offenders who had the support of their family at sentencing received carceral sanctions (56%) (see Appendix G, Figure 14), the offenders who had the support of their community at sentencing received a carceral sanction (59%) even more often (see Appendix G, Figure 15).

- The offenders with the support of their family or community received conditional sentences more often (44% and 37%, respectively) than the offenders who did not
have the support of their family or community at sentencing (15% and 7%, respectively) (see Appendix G, Figures 16 and 17).

In summary, these results are surprising. Since community-based sentences require community supports, one would expect that since most of the offenders had the support of their community, that they would receive non-carceral sanctions more often. However, the data indicate otherwise.

The Extent to which the Courts were Informed of the Offenders' Circumstances

The independent variable of whether or not the Court was well-informed of the various background circumstances of the offender at sentencing also proved interesting, when considered in conjunction with the various dependant variables in the form of cross tabulations. Section 718.2(e) justified lesser sentences in the majority of cases in which sentencing judges were well-informed of the background circumstances of the Aboriginal offenders (62%), compared to cases in which the Court was not well-informed (50%) (see Appendix G, Figure 18). Despite the fact that section 718.2(e) justified lesser sentences in the majority of cases in which the Court was well-informed of the offender's background circumstances, the majority of sentences given at trial in these cases were carceral (47%) (see Appendix G, Figure 19), and also over two years' imprisonment (39%) (see Appendix G, Figure 20).

The Application of Section 718.2(e) to Aboriginal Offenders

It was also interesting to examine the cross tabulations of which party – defence counsel, Crown counsel or the judge – first raised the applicability of section 718.2(e) to the Aboriginal offender at sentencing. The majority of cases in which defence counsel
first raised the applicability of section 718.2(e) had the provision justify a lesser sentence (59%), compared to cases in which the provision's applicability was raised by Crown counsel (67%), and cases in which the provision's applicability was raised by the judge (37%) (see Appendix G, Figure 21). However, although the provision operated to justify lesser sentences in most cases, most of the sentences handed out were nevertheless carceral, regardless of which party first raised the applicability of the provision to the Aboriginal offender at sentencing (see Appendix G, Figure 22). Moreover, carceral terms of over two years' imprisonment represented the majority of sentences meted out (see Appendix G, Figure 23).

**Nonparametric Tests of Significance and Measures of Correlation**

Additional statistical analyses were performed on the data in an attempt to identify any correlations between the variables under study so as to provide insights into which of the variables mentioned in the published case judgments may have influenced the sentencing judges' decisions. The findings of such an analysis could then be compared to the directives of the *Gladue* and *Wells* decisions to determine how closely the decision-making of sentencing judges conforms to the directives of the Supreme Court of Canada in these two precedent-setting cases. Given the judgments of the High Court in *Gladue* and *Wells*, it would be expected that Aboriginal offenders who had experienced tragic background circumstances, but nevertheless had the support of their family and/or community, would likely receive a non-carceral or mitigated carceral term at sentencing.

However, as most of the variables in the data collection instrument were of the nominal or ordinal levels of measurement, only certain advanced statistical tests could be
performed. Specifically, to determine which variables share statistically significant relationships with one another, two-way chi-square tests of significance at the .05 alpha level were performed on the cross tabulations. Correlation coefficients were then used to determine the degree of association between the variables.

Unfortunately, none of these additional statistical analyses proved fruitful. The majority of cross tabulations yielded statistically insignificant chi-square values, which rendered correlational analyses futile. Furthermore, of the few cross tabulations that did render significant chi-square values, the correlation coefficient values were too weak to be of any importance. Low cell counts in the cross tabulations undoubtedly contributed to these problems. Although data were collected from 177 published case judgments, the size of this sample of case judgments was too small to permit advanced statistical analyses.

**Strengths and Weaknesses of the Case Judgment Analysis**

There are several strengths associated with this analysis of case judgments. First and foremost, this is the only study that has been conducted to date that explores the published case judgments that have considered section 718.2(e) with respect to Aboriginal offenders at sentencing. Furthermore, the data collection instrument was designed to be as exhaustive as possible with respect to the variables of interest. This research is very useful for the purpose of exploration, as it helps reveal general trends, and provides guidance to researchers who choose to explore this area more closely in the future.

The primary limitation of this research is the fact that the overwhelming majority of all criminal case judgments in Canada are *unwritten*. According to one of the judges
interviewed for the second part of this study, approximately 95% of all judgments are delivered orally in court, since judges are not required to provide written reasons for judgment. Of those few judgments that are written, even fewer are published. The clear implication of this is that this study is, therefore, not representative of all Canadian case judgments that have considered section 718.2(e) and Aboriginal offenders.

However, a great effort was made to locate as many of the published judgments as possible. At the time of the writing of this thesis, the population of case judgments in this study was as complete as it could be. As iterated above, this means that sampling did not occur from all the cases that met the research criteria. Instead, each and every available case that met the research criteria was examined. The findings are, therefore, not only representative of the population of published case judgments, but also factual, since the findings were obtained by examining every relevant case available.

However, the vast majority of the case judgments examined did not provide enough information to answer all of the questions set out in the case judgment data collection instrument. Furthermore, only information that was explicitly specified in the written judgments could be coded for the purpose of analysis. The attenuation of these problems was attempted through an examination of earlier Court decisions where possible, in search of information that may not have appeared in the appellate judgments. The most common missing data points related to the demographics of the offenders and victims, such as the offenders’ education levels, whether the offenders lived in urban or rural areas, whether the offenders were employed, and the victims’ ages and ethnicities. Information was also missing in some of the cases with respect to whether or not the offenders had the support of their families and/or communities, whether they had
expressed remorse, whether they had made rehabilitative efforts since their offences, and whether or not there were pre-sentence reports.

**Summary**

This chapter presented the findings of the analysis of 177 published case judgments in an effort to determine how section 718.2(e) has been applied in sentencing cases that have involved Aboriginal offenders since the enactment of the provision in 1996. The strengths and weaknesses of this research were also outlined. To inform and assist in the interpretation of the case analysis findings, the next chapter presents the findings of the data collected in interviews with seven Provincial/Territorial Court judges.
CHAPTER SIX
Judicial Perspectives on Sentencing Aboriginal Offenders

Empirical research was conducted on 177 published case judgments in an attempt to answer the research question of "how has section 718.2(e) been applied in sentencing cases that have involved Aboriginal offenders, since the enactment of the provision in 1996 to the present?" In an effort to inform and assist in the interpretation of the case analysis findings, seven Provincial court judges were interviewed. All of the interviewees are Provincial Court judges in Canada, except for one who is a Territorial Court judge. The comments and observations of the judges provide support for the findings of the analysis of case judgments and contribute to an understanding of how members of the judiciary view the circumstances of Aboriginal offenders, the factors that affect their decision making, and how sentences are meted out within the framework of section 718 of the Criminal Code.

In the interviews, information was collected on the judges' life experiences, including their post-secondary education, in addition to their law school, legal career and judicial career experiences. Information was also gathered with respect to the judges' decision-making practices in general, so as to provide context for their perspectives and application of section 718.2(e), and their thoughts on how the problem of Aboriginal over-incarceration might more effectively be addressed.

Background Information

All but two of the judges interviewed for this study were male, and all but one were born and raised in Canada (see Appendix F, Table 10). With one exception, all of the judges were non-Aboriginal. Most of the judges reported that they had contact with
Aboriginal people while growing up, and that during this early time in their lives, they generally viewed Aboriginal people as suffering from disadvantage (see Appendix F, Table 10).

**Post-Secondary Education**

Four of the judges interviewed had earned both an undergraduate degree and a Bachelor of Law (LL.B.) degree (see Appendix F, Table 11). Two of the judges had only one degree (an LL.B.), as they entered law school before completing the requirements of their undergraduate degrees. One judge had completed a Master's degree in addition to an undergraduate and Bachelor of Law degree (see Appendix F, Table 11). The majority of the judges (n = 6) completed their university education in Canada. When asked if they had always wanted to become a lawyer, all of the judges responded in the negative. Interestingly, most of the judges interviewed went to law school because they 'fell into it,' or, as one judge put it, "because there was nothing else to do."

**Law School Experiences**

Three of the judges stated that they attended law school during the 1960s, while the others indicated that they had attended law school either during the 1970s or 1980s (see Appendix F, Table 12). When asked if there were any courses that they took in law school that they would identify as having been especially helpful to them as decision-makers, most of the judges answered "not really," but identified courses on topics such as contracts, torts, criminal procedure, and constitutional law as being helpful. One judge said that it was not the courses *per se*, but how the law school experience in general taught everyone to think on their feet that may have been most helpful in their role as
decision-makers. When asked if any courses on Aboriginal-related issues were offered when they went through law school, five of the judges said "no." As one judge explained:

I went to law school during the years of the Vietnam War and free drugs – the focus was on other societal values. There was no research out yet on Aboriginals – society was not interested in [Aboriginal related issues] yet.

The values of society did change, and as the two judges who attended law school during the 1980s noted, courses on Aboriginal related issues were eventually introduced and made available to law students. Of these two judges, one learned about Aboriginal related issues through a course taken on constitutional law, while the other judge learned more about Aboriginal-related issues by taking courses on Aboriginal law.

**Legal Career Experiences**

Four of the judges reported that they were engaged in general criminal defence work after the completion of their law degrees, while the rest were involved in work as Crown counsel (see Appendix F, Table 13). It should be noted that, although all of the judges practiced criminal law, most also handled many other types of cases, such as personal injury claims and family law cases, during this time in their careers (see Appendix F, Table 13).

When asked about what it was that they most liked about their job as lawyers, most identified "the battles in court," in addition to "helping others," and "most everything." When asked about what it was that they most disliked about their job as lawyers, most identified "the business aspect of it," which was namely the quoting and collecting of fees from clients, followed by "losing cases," "too much work," and "too little pay" (see Appendix F, Table 13).
Although all of the interviewed judges said that they had handled the cases of Aboriginal offenders as lawyers, there was a split amongst the judges with respect to whether or not they noticed any differences in the difficulties experienced by their Aboriginal and non-Aboriginal clients. Five of the judges indicated that they did notice a difference between their Aboriginal and non-Aboriginal clients in this respect, and that their experiences with Aboriginal clients changed their impressions of Aboriginal offenders. In the words of one judge:

I noticed a higher degree of dysfunction amongst this population due to their upbringing. Many were suffering from FAS, poverty and disaffection – they were like lost souls. These experiences did change my impressions about Aboriginal offenders, as they solidified the impression I had that most Aboriginals were challenged by being Aboriginal. I learned how fundamentally honest and non-manipulative and lacking in deceit they are, and that they did suffer a lot of prejudice.

Another judge noted that there were many problems experienced by Aboriginal offenders that all seemed deeply intertwined. This particular judge identified general life dysfunction, violence, broken families (due to the inability of some to parent), the ramifications of the residential school experience, and multigenerational problems (for instance, seeing three generations of the same family in court) as being characteristic of many Aboriginal offenders. Another judge said that it appeared as though the problems of Aboriginal offenders always involved alcohol and violence. This perception was validated by the analysis of case judgments, as the majority of the cases examined involved offenders who were abusing substances at the time the offences were committed.

Another judge noted that it was often difficult to get Aboriginal female victims to discuss what happened and that they were also reluctant to attend court and testify. This
judge also noted that there were often no counselling or court assistance resources available. One other judge noted that Aboriginal offenders tend to generally be very passive in court and are not prepared to fight for their rights.

On the other hand, two of the judges stated that they noticed no differences between their Aboriginal and non-Aboriginal clients. One of the judges simply said, "the distinction that they were Aboriginal was not present." The other judge provided a more in-depth response:

We didn't think of [Aboriginal offenders] as different, but Gladue seemed to highlight them as Aboriginals. They were dealt with in an ignorant fashion before – they weren't highlighted as a concern. The Gladue decision was therefore good because it made people more aware of the problems, so that they could be better addressed. Gladue also allowed people to understand why they are like that. Now there's more depth to the problem. Now they see that it's not all their fault. Changes are being made and it's leading to greater pride. But [Gladue] was bad because it was emphasizing [racial distinctions]. So, this question has a "yes" and "no" answer to it, for different reasons. Good and bad came out of Gladue. There was a realization that we have to treat Aboriginals better, by not sending them to jail so fast, and by not using jail as the first alternative. Gladue said that "we shouldn't be sending them to jail because there are better ways of dealing with it," like circle sentencing, which looks to outside input and help from the community. Up until Gladue, we were like an ostrich, afraid to tackle the issue.

As aforementioned, the analysis of case judgments revealed that the majority of cases in which section 718.2(e) was specifically cited as affecting the sentence meted out were heard after the Gladue decision in 1999.

The judges were also asked about the views they held of the criminal justice system, judges, and judicial decision making prior to becoming lawyers, as practicing lawyers, and as judges. Five of the judges stated that, prior to entering the legal profession, they never thought about the criminal justice system. Those judges, who had given some thought to the criminal justice system, considered the system to be fair (see
Appendix F, Table 14). As lawyers, four of the judges viewed the criminal justice system as fair. Two of the judges thought of it as 'procedure-line justice' when they were lawyers, because, as one judge stated "everyone is just pushed through" (see Appendix F, Table 14).

Four of the judges stated that their view of the criminal justice system had not changed from when they were practicing lawyers. Of the judges whose views of the justice system had changed, two felt that the system is good, but less efficient than they previously thought it was. Finally, one judge stated that the criminal justice system is dysfunctional, since it sets out to do more than it is able to do (see Appendix F, Table 14). In this judge's words:

[The criminal justice system] has become increasingly dysfunctional because the expectations of what it can accomplish are unrealistic. [Judges] aren't social workers, or magicians, nor can they re-write history. I don't think that the system does what it says its doing.... We need resources. There are no resources. If the public knew the real state [in which the criminal justice system is in], they would be disappointed.

The judges were also queried about their perceptions of the judiciary and how, or if, their views had changed over time. Before becoming lawyers, four of the judges viewed members of the judiciary as being omnipotent and autocratic, while the remainder had not developed any views of judges at this point in their careers (see Appendix F, Table 15). As lawyers, three interviewees viewed judges as humans, with strengths and weaknesses like every other person, and three other interviewees explained that they held some judges in very high esteem. As a lawyer, one interviewee viewed some judges as being unapproachable (see Appendix F, Table 15). Once they became members of the judiciary themselves, the judges in the sample viewed judges more as individuals and less in terms of position. Many judges explained that their job is more lonely and difficult
than they ever thought it could be, and that, as judges they understand the hard work and agony that goes into decision-making. This led them to view judges even more highly than they did when they were lawyers (see Appendix F, Table 15). Interestingly, none of the judges had a long-standing desire to become a member of the judiciary.

Changes also occurred with respect to their perceptions of judicial decision-making. Before becoming lawyers, most of the interviewees had never thought about judicial decision-making (see Appendix F, Table 16). As lawyers, the majority of the judges interviewed explained that they viewed judicial decision-making as a function of various factors (see Appendix F, Table 16). As judges, the majority of interviewees explained that they view judicial decision-making as difficult, primarily because some decisions are very hard to make, and also because decision making is generally a solitary exercise (see Appendix F, Table 16).

**Judicial Career Information**

There was considerable variation among the judges with respect to the number of years of experience on the bench. Three of the judges had been appointed to the bench within the last five years, while three of the judges had been on the bench for five to ten years, and one of the judges interviewed was appointed to the bench more than ten years ago (see Appendix F, Table 17). The years of experience the judges have had on the bench may affect their application of section 718.2(e) at sentencing.

The judges explained that, although a wide variety of cases come before them on a daily basis, including family and small claims cases, the majority of the cases they hear are criminal cases. When asked to identify the most difficult thing about being a judge, the interviewees gave a variety of responses. Two of the judges stated that sentencing is
the most difficult part of the job, while two other judges indicated that deciding guilt and/or innocence is the most difficult part. One judge identified the job as most difficult in cases where sufficient information is lacking. The analysis of case judgments in this study found that important information relating to the background circumstances of the offenders was missing in a large number of cases. Whether this would have affected the judges' application of section 718.2(e) is, however, unknown. One judge said that sitting still for long periods is the most difficult aspect of being a judge. As a judge, one must concentrate and listen; frequently, one does not move and ends up being in a 'frozen' position for long periods because of this.

**The Judges' Sentencing Perspectives**

The judges were asked to delineate, in general terms, their personal sentencing philosophy. Three of the judges indicated that they impose the least severe penalty given the specific circumstances of the case, while two of the judges stated that they attempt to make sentencing an individualized process. Two other judges said that they emphasize the sentencing objective of rehabilitation where possible, especially with respect to first and second-time offenders (where the circumstances allow), and also attempt to involve everyone affected by the offence(s).

When asked to identify the general factors that are considered when making sentencing decisions, one judge pointed to section 718, which lists many of the factors that they are to consider, and another judge summed it up by saying "everything that's relevant to the offence, and whether or not [the offender] will re-offend." The majority of the judges provided more elaborate responses, and stated that they consider the type of offence and circumstances, the seriousness of the offence, whether or not there was a
motive, the effect of the offence on the victim and/or community, any mitigating and/or aggravating circumstances of the offence, the offender's circumstances, the offender's prior criminal record, what the offender may have going for them, rehabilitative opportunities for the offender, the law (i.e. minimum penalties) and sentencing ranges. These findings are consistent with the contents of the case judgments that were examined and discussed in Chapter Five, in that the vast majority of the judgments referred to each of these factors.

The judges were also asked how they balance the competing objectives of section 718 in their decision-making. Interestingly, two of the judges responded initially by stating "it's what makes sentencing so hard." The vast majority of the judges indicated that section 718 is only a guide to use at sentencing, and that the emphasis given to each of the objectives is determined on an individual basis. The majority of judges also noted that not all of the objectives listed in section 718 are applicable in each and every case. This finding is reflected in the cases analyzed for the thesis. The vast majority of the cases examined referred only to select sentencing objectives, in partial justification of the sentences meted out.

When the judges were asked about what they thought of the fact that section 718 employs such competing objectives, one judge responded:

The whole justice system has competing objectives. Section 718 allows for discretion; it provides a bunch of equally usable hooks that the judge may choose to hang their hat on.

As one of the judges explained: "[the objectives set out in section 718] are not competing objectives as much as they are simply objectives that need to be thought of." Another judge explained that the objectives listed in section 718 form a continuum, from
restorative justice to retributive justice, and that the principles to be emphasized in any particular case will fit somewhere along that continuum. For that reason, the objectives listed in section 718 are not as competing as they appear, and all of the objectives are therefore required. Two judges explained that a number of the objectives set out in section 718 have been a part of the common law for years, and that section 718 is simply a codification of that law.

The Judges' Perspectives on the Sentencing of Aboriginal Offenders

All of the judges indicated that they had sentenced Aboriginal offenders. Four of the seven judges considered themselves 'very experienced' with respect to the sentencing of Aboriginal offenders, while three of the judges did not consider themselves 'very experienced.'

When asked how they sentenced Aboriginal offenders before section 718.2(e) came into effect in 1996, only four judges answered this question from their own personal experience, as these judges were appointed to the bench before 1996. These judges explained that before section 718.2(e) was legislated in 1996, they were already sentencing Aboriginal offenders in a way that took their individual background circumstances into account at sentencing. In other words, they were sentencing Aboriginal offenders in a way that is no different than the way in which they sentence Aboriginal offenders now, that is, on an individual basis that attempts to impose the least severe type of sentence as possible.

One judge elaborated and explained that Aboriginal offenders are sentenced in the same way that all other offenders are sentenced: on a basis that takes their individual circumstances into account, as humans. This judge went on to say that
It is problematic to introduce race into the courtroom because where does one draw the line? The Aboriginal ancestry in any given person may be very little. Are we going to do as they did in South Africa, and create twenty or so different 'degrees' of a certain race? Of 'Aboriginality' in this case? How does one determine whether the offender before the court is Aboriginal? Right now, it's on the basis of self-identification.

The judges were asked if Aboriginal offenders present any different challenges for them as decision-makers at sentencing, as compared to non-Aboriginal offenders. Six of the judges answered this question in the affirmative. For the most part, these judges explained that the main challenge that Aboriginal offenders present is that it is generally harder to reconnect these offenders with the community and to access community support and resources. As one judge explained,

'Street Natives' have nothing. They've left the reserve to live on the street in a strange city. They don't seem to have any of the family support that other offenders seem to have. While other Natives have choices, these ones don't.

The response of one judge to this question, however, was in sharp contrast to the others. This judge answered the above question in the negative and said

Everyone presents different challenges. White offenders can be even worse than some Aboriginal offenders... Judges always look at the offender as an individual [at sentencing] [Emphasis in original].

When the judges were asked whether, as members of the judiciary, their views of Aboriginal offenders had changed from the perspectives they held as lawyers, five answered in the affirmative. In general, their understanding of the issues surrounding Aboriginal offenders has deepened. Two of the judges noted that they now see Aboriginal offenders as being even more disadvantaged than they previously thought, while another judge commented that other offenders, and not just Aboriginal offenders, need resources too. Two other judges stated that, although various social and cultural
problems have contributed to criminality amongst many Aboriginal offenders, the answer
to these problems, and the larger problem of Aboriginal over-incarceration, could not be
solved solely by the courts.

All of the interviewees answered in the affirmative when asked if they had ever
given thought to the possible reasons why Aboriginal offenders are overrepresented in
prison populations across Canada. All of the judges recognized Aboriginal over-
incarceration as a multi-faceted problem. They pointed to the various explanations of
Aboriginal over-incarceration discussed in Chapter Two, including historical factors,
residential schools, sexual abuse, substance abuse, familial dysfunction, the lack of
educational and social services, poverty, displacement, and other historical and
contemporary factors that have led to the marginalization of Aboriginal peoples. One
judge also identified the poor manner in which Naïve land claims have been handled as
another factor that may have contributed to the over-incarceration of Aboriginal
offenders in Canada.

Two of the judges explained that the State-imposed dependency of Aboriginal
peoples, and the abrogation of self-determination that has resulted, has created a situation
in which many Aboriginal offenders are unable to or fail to take responsibility for their
behaviour. This is perceived by these judges as a possible contributing factor to the over-
incarceration of Aboriginal peoples. Two judges also stated that the inappropriate
allocation of financial resources by the Federal government in an effort to solve the
problem of Aboriginal over-incarceration might also have hindered the implementation of
effective solutions to the problem.
Two judges pointed more to the problematic aspects of the criminal justice system itself, including a lack of skilled counsel to represent Aboriginal offenders and a lack of resources that support the non-carceral alternatives the provision encourages judges to consider. The nature of non-carceral sanctions was also identified as problematic. As one judge explained:

"Often, the offender will ask for jail, because they just have to do the time, and then they're free. The problem with non-carceral sanctions is that [the offenders] have to check in regularly with the authorities. If they go fishing, that isn't always possible. Jail is therefore the best accommodation [in those cases]. In some cases, [jail] provides shelter and an increase in their standard of living, or they want to go to jail to see their brothers."

And as another judge pointed out, many Aboriginal offenders commit offences that are so serious that incarceration is the only alternative in those cases.

The Judges' Perspectives on the Application of Section 718.2(e) at Sentencing

The judges were also asked to identify the factors that they consider in their decision as to whether or not to use section 718.2(e) to inform their sentencing decisions with respect to Aboriginal offenders. As expected, and consistent with the findings of the analysis of case judgments, the judges pointed to factors as highlighted in the Wells decision, such as offence seriousness, prior record, the impact of the offence on the victim and community, the circumstances of the offender, any aggravating and/or mitigating factors, the sentencing principle of proportionality and the various objectives of sentencing. Interestingly, in addition to these factors, most of the judges also stressed the fact that they consider whether or not there is community support for the Aboriginal
offender. This is an important consideration, especially in cases wherein the use of non-carceral alternatives may be appropriate.

When asked to identify the factors that would prompt section 718.2(e) to be used as a justification for a mitigated carceral sentence, versus a non-carceral sentence, four of the judges interviewed initially responded by stating that they attempt to avoid the imposition of a carceral sentence to offenders as often as possible. As to the specific factors that may contribute to a less severe sentence, including the use of a non-carceral alternative, the judges pointed to less serious offences, resources that may not have been accessed previously, whether or not the offender has ever had a 'break' before, and finally, community-based programs that are available through the Provincial correctional system.

The judges identified a wide range of non-carceral alternatives that they consider in appropriate cases, including conditional sentences, suspended sentences, terms of probation and community service, and treatment programs. With respect to the use of non-carceral alternatives, the comments of one judge are particularly insightful:

No Aboriginal offenders or bands have asked me to mete out a sentence from the Corrections and Conditional Release Act. Sections 81 to 84 [of this Act] provide for community supervised sentences and community administered sentences.

This may be due to a lack of community resources in some cases. Moreover, a couple of the judges mentioned that, in appropriate cases, they have handed out fines and/or discharges, but that such cases were rare.

When asked about how section 718.2(e) and the case law surrounding it have impacted their exercise of discretion in sentencing, three of the judges interviewed said that the provision has not limited their discretion. Two other judges elaborated on this
point and explained that the provision is simply a *guide* that they must consider. Two of the judges stated that the provision has actually afforded them more discretion, because up until the introduction of the provision, and especially the *Wells* decision, serious offences generally warranted automatic jail sentences.

When asked what they thought of the apparent contradiction that has evolved in the case law between the *Gladue* and *Wells* decisions with respect to the application of the provision to serious offences, five of the judges said that the case law is not problematic. The decisions have allowed them to continue to craft individualized sentences by taking the circumstances of each case and offender into account. As one judge explained, the case law simply clarifies that if the offender is dangerous, imprisonment will likely follow, but that the provision should still be considered even when the offences are serious.

**The Judges' Perspectives of the Legislative History of Section 718.2(e)**

The majority of the judges knew that section 718.2(e) came about as a result of the research conducted during the 1970s and 1980s that revealed that Aboriginal offenders were over-represented in Canadian prison populations. Each of the judges provided a different response when asked why they thought Parliament chose to direct the judiciary to alter their sentencing practices for Aboriginal offenders in an effort to address the problem of Aboriginal over-incarceration, rather than other criminal justice system personnel such as police officers, prosecutors or parole board members.

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5 The judges highlighted the *Wells* decision in their responses to this interview question because the Court in *Wells* ruled that the statement in *Gladue* that Aboriginal offenders should receive regular stiff sentencing like non-Aboriginals when the offences are violent and/or serious, was not meant to be a 'rule.'
One judge explained that it could be because the decisions of judges are public, whereas the decisions of other criminal justice system officials are not. Another explained that perhaps Parliament chose judges because the standards that judges set become guidelines for other criminal justice system officials to follow. Yet another judge explained that focusing on judges would be the most effective way of achieving their goals, since at the end of the day, it is sentencing practises that have the most impact on carceral levels. Interestingly, one judge pointed out that Parliament likely chose judges simply because sections 91 and 92 of the Constitution Act (1982), which operate to divide powers between the Federal and Provincial governments, prevented other criminal justice system officials from being chosen.

Section 718.2(e) was enacted in the absence of overarching policy, specifying the social values that the provision was intended to capture. When the judges were asked if they thought that the legislation of such social policy would improve the effectiveness of the provision in achieving its mandate, one judge answered affirmatively, but added that it would probably take a long time for such a policy to achieve its desired effect. Two judges disagreed however, and stated that such policy would only be of assistance to the public, and not the courts, as it would serve to draw the public's attention to the issues.

The Judges' Perspectives of Section 718.2(e)

Three of the judges viewed section 718.2(e) favourably, while the remaining four judges were either undecided or indifferent. As one judge stated "it's always worthwhile to use jail as a last resort [at sentencing]." The majority of judges agreed that the intent of section 718.2(e) is admirable and that the wording of the provision is not problematic.
One judge did allude to the fact that the provision could have been made even better if it had simply referred to disadvantaged offenders. Another judge stated:

[Canada] is the only country in the world that treats Aboriginals differently in criminal legislation – the only country that treats any specific ethnic group differently. The identification of any one group creates imbalance by definition.

The judges were also asked whether they thought that it is appropriate that this provision, and the case law surrounding the provision, asks them to consider non-carceral and mitigated sentences particularly in the cases of Aboriginal offenders. Some of the judges interviewed answered this question in the affirmative, while others expressed doubts about the legislation in this respect. For instance, one judge explained:

We would never say to an offender "I am sending you to jail because your population is under-represented in prison." It shouldn't be the other way around either.

The Judges' Perceptions of the Effect of Section 718.2(e) on Aboriginal Over-Incarceration Rates

When the judges were asked if they thought that the provision has been meeting its mandate of reducing Aboriginal over-incarceration levels in Canada, four of the judges said that they did not know. Two of the judges said "no," and one judge said "yes, with respect to mitigated sentences, but no with respect to whether they're getting non-carceral sentences."

The analysis of case judgments reported in Chapter Five showed that, despite the enactment of section 718.2(e) in 1996, Aboriginal over-incarceration rates have not decreased. When the judges were informed of this and their responses solicited, three of the judges stated that it is probably because the provision fails to deal with the root causes and issues underlying Aboriginal over-incarceration. One judge pointed to various
factors, including improper submissions by some legal counsel, the lack of resources in some communities that support non-carceral alternatives, and the fact that some Aboriginal offenders do not want community-based sentences. Another judge reasoned that it could be because more conditional sentences have been handed out. If conditional sentences are being classified as carceral sentences by agencies that compile statistical information, this would be a contributing factor to the increased levels of Aboriginal over-incarceration. However, as noted in Chapter Three, Statistics Canada does not count conditional sentences as carceral, which means that the number of conditional sentences that have been handed out has not contributed to the statistics on Aboriginal over-incarceration rates. Furthermore, no research has yet been conducted with respect to the impact of breached conditional sentences on carceral levels.

The case analysis research also revealed that, although most offenders are receiving mitigated sentences because of section 718.2(e), they are still receiving carceral sentences. When the judges were informed of this and asked for their ideas as to why this might be the case, one judge explained that many Aboriginal offenders have lengthy prior records that mitigate against the imposition of non-carceral sentences. When the judges were asked if they thought that the spirit behind section 718.2(c) could ever be realized, the majority said "yes," but added that more initiatives, in addition to section 718.2(e), will be required to address Aboriginal over-incarceration than just the provision alone. This finding is consistent with what the Supreme Court of Canada said in the Gladue decision. When the judges were asked about what they think is needed to allow section 718.2(e) to meet its mandate and better address Aboriginal over-incarceration, their responses were as multi-faceted as the problem itself.
Several of the judges stated that social change must take place before Aboriginal over-incarceration rates will decrease. More specifically, the public must be educated, so that they may become more culturally sensitive. Others said that the public’s expectations of what the criminal justice system can achieve must be brought into alignment with reality. Five of the judges suggested that the disadvantage experienced by many Aboriginal people should be addressed through education, healthcare, and proactive social programs. Crime prevention programs were also mentioned as a means to reduce Aboriginal over-incarceration levels. Two of the judges argued that the disadvantage and marginalization of many Aboriginal offenders could be reduced by "giving back the land and wealth that was taken from them."

It was also suggested that Aboriginal offenders be given greater access to community-based treatment programs. As one judge stated, "many [Aboriginal offenders] recover by getting back in touch with their culture and taking pride in it." The judges also suggested that changes should be made at the community level for Aboriginal over-representation rates to decrease. They spoke of the lack of resources and support that is characteristic of many communities and suggested that more resources should be allocated to communities to buttress community-based sentences. In addition to the need for more resources, the judges also spoke of the need for more community involvement and support for offenders from Aboriginal communities.

Several of the judges also pointed to aspects of the criminal justice system that could be improved to facilitate the amelioration of Aboriginal over-incarceration. One judge suggested that improved legal representation of Aboriginal offenders would help, and that First Nations justice should be encouraged. As this judge explained,
[Change] has to come from the community itself. First Nations people have to know their options – that they don’t have to buy into this justice system. We must empower them through education. Some don’t want that, and that’s fine. But they should be encouraged, and that encouragement can come from judges. Judges can hold court in the community of the aboriginal offender, and judges can also be open to circle sentencing. Judges can bridge some gaps.

In addition, several of the judges felt that Aboriginal peoples must take greater ownership of the problems associated with criminality. As in some areas of the country, Aboriginal peoples have financial and educational resources at their disposal, in addition to employment opportunities. Despite this, a portion of the Aboriginal population becomes involved in serious criminal activity.

**Strengths and Weaknesses of the Judicial Data Set**

The major strength of interviewing a sample of judges for the present study is that this represents the first instance in which members of the judiciary have been asked to comment on section 718.2(e) for the purpose of research. Although the sample was small and identified through the snowball sampling technique, the perspectives of the judges interviewed nevertheless provide key insights into the issues surrounding the application of this sentencing provision. The data also inform the analysis of case judgments, which is the core of this thesis. These preliminary findings also provide the basis for a more in-depth exploration of judicial attitudes and practices with respect to section 718.2(e).

There are, however, several limitations of the judicial data set. First, the sample size is small and non-representative. It should be noted that the researcher made extensive efforts over a period of five months to contact members of the judiciary. Despite these efforts, only a small number of judges returned calls soliciting their participation in the study, which raises the possibility that those judges who did respond
represent a biased sample. The fact that the contact period spanned the summer months, which is the traditional time for holidays, may have contributed to the limited number of responses.

Another contributing factor is the highly politicized nature of section 718.2(e) and the sentencing process itself. Judges who were contacted may have felt uncomfortable in being candid about their perspectives on the provision. In addition, judges apparently operate under strict guidelines that prevent them from publicly commenting on political issues. The questions posed by the researcher may have been interpreted as being political in nature. It was very apparent to the researcher that at least two of the judges were very cautious about how they responded to the interview questions. Future research on this topic will confront this challenge.

Summary

In this chapter, the findings from interviews with a small sample of Canadian judges were explored in an effort to inform the findings of the analysis of case judgments presented in Chapter Five. In addition to informing the analysis of case judgments, the interviews with the judges contributed valuable insights to the ongoing discussions about Aboriginal over-incarceration. In their responses, the judges discussed some of the factors that may have contributed to Aboriginal over-incarceration, and possible strategies for addressing this very complex issue. The implications of these findings are discussed in the next chapter.
CHAPTER SEVEN
Discussion

This study examined published case judgments and perspectives of the judiciary in an effort to answer the research question of how section 718.2(e) has been applied in sentencing cases that have involved Aboriginal offenders since the provision's enactment in 1996 to the present. To date, there had been no examination of the published Canadian criminal cases involving Aboriginal offenders and section 718.2(e) at sentencing, or of the perspectives of the judiciary on the issues relating to section 718.2(e). The present study is, therefore, exploratory in nature.

In this chapter, the findings of the analysis of published case judgments and of the interviews with sentencing judges are briefly summarized and discussed. Through the discussion of the research findings, the research question guiding this study is answered, and the contribution of this research to the knowledge of the problem is identified. Some of the legal implications, policy implications and practical implications of this research are also discussed in this chapter. Finally, some directions for future research are identified.

Discussion of the Research Findings

The Published Case Judgments

The analysis of the case judgments revealed that most cases were heard between the years 1999 and 2002 and at an appellate level. The analysis also revealed that most of the cases involved sexual assault and assault-related offences. The majority of offenders pled guilty, were between 18 and 24 years old, and had prior criminal records. In addition, the analysis of case judgments showed that the overwhelming majority of
Aboriginal offenders had suffered tragic circumstances in their lives, were substance abusers and were abusing some substance during the commission of their crimes. The majority of the Aboriginal offenders had the support of their family and/or community, had expressed remorse over their crimes and had even made rehabilitative efforts since the commission of their crimes. However, in the majority of cases, the sentencing judges did not have access to information about the offenders' backgrounds, and such information was even less likely to be available at the appellate level.

One of the more notable findings of the analysis of case judgments was that, although section 718.2(e) was referred to in 99% of the cases and was used by the sentencing judges to justify a lesser penalty in slightly more than half of those cases, the majority of the sentences handed out were nevertheless carceral terms of over two years' imprisonment.

Despite section 718.2(e)'s encouragement of a restorative justice approach, most of the sentences examined were justified by the retributive justice sentencing objectives of deterrence and denunciation. In the cases in which section 718.2(e) was not applied, the reasons most often cited for the provision's inapplicability were offence seriousness and long and/or serious prior records.

Furthermore, the majority of the cases that went to appeal were dismissed. As will be discussed more fully below, it is the length of the carceral term that most directly impacts carceral levels, rather than the numbers of offenders that are sent to jail (Landreville, 1995:39, 47). The fact that most of the cases were dismissed on appeal means that most of the offenders were required to serve the sentences meted out at
sentencing. The implication of these findings is that sentencing practises have not changed in a way that will operate to decrease Aboriginal over-incarceration levels.

This research suggests that the sentences received by Aboriginal offenders have not been a function of family and/or community supports – the majority of the offenders who had the support of their family and/or community still received a carceral term at sentencing. The research also suggests that the background circumstances of Aboriginal offenders do not play as integral a role as expected, since the majority of those offenders who suffered tragic circumstances nevertheless received carceral terms at sentencing.

Thus, the research conducted on the case judgments indicates that a retributive justice approach has continued to characterize sentencing practises primarily because the offences and prior records of Aboriginal offenders have been too serious to justify the imposition of non-carceral sanctions as section 718.2(e) encourages. This finding is important because it shows that, although the background circumstances of Aboriginal offenders are being taken into account, the offenders are generally being sentenced on a 'case by case' basis, and not on the basis of their Aboriginality alone.

*The Judges*

Seven Provincial/Territorial Court judges were interviewed to inform the findings from the analysis of case judgments. The majority of the judges indicated that they impose the least severe penalty possible in light of the circumstances of each case that comes before them. The judges reported that they consider a wide range of factors when sentencing Aboriginal offenders, including offence and offender-specific variables and the various subsections of section 718. The interviews with the sentencing judges also
revealed that they have been sentencing Aboriginal offenders on this individual basis since even before section 718.2(e) was legislated.

The judges also indicated that, although they attempt to avoid meting out jail sentences as often as possible, section 718.2(e) usually operates to justify mitigated carceral and non-carceral sanctions in cases that involve less serious offences. Moreover, one judge explained that since many Aboriginal offenders have lengthy and serious prior records, non-carceral sentences are not usually feasible.

This research suggests that the sentences Aboriginal offenders have been receiving are not a consequence of section 718.2(e) per se, but rather a function of the principle that sentencing should always take place on an individualized basis. This individualized approach is embodied in section 718.2(e). Consistent with the information provided in the case judgments analyzed, the judges interviewed said that they do consider section 718.2(e) when sentencing Aboriginal offenders. The judges indicated that they consider a wide range of case-specific factors when sentencing, and that they avoid handing out jail sentences whenever possible.

Judges are considering section 718.2(e) at sentencing. Significantly, their consideration of the provision requires them to sentence on the basis of the individual circumstances in each case – which is something that they say they have been doing for Aboriginal and non-Aboriginal offenders alike, even before the provision was legislated.

The Application of Section 718.2(e) by the Judiciary since 1996

The analysis of the case judgments, and the supplemental information gathered in interviews with the judges, answer the research question of how section 718.2(e) has been applied since the provision's enactment in 1996 to the present. In most cases,
section 718.2(e) has been used by sentencing judges to justify mitigated carceral terms. Moreover, in most cases, section 718.2(e) has not functioned to justify non-carceral terms, since generally, the offences have been serious and the offenders have had long and/or serious prior records.

The application of section 718.2(e) at sentencing can also be discussed in more specific terms, namely with respect to the various independent variables that were studied. As mentioned in Chapter Five, the provision's application has differed over the years since its enactment in 1996. Between the years 1996 to 1998, section 718.2(e) operated to mitigate the vast majority of sentences that involved carceral terms for Aboriginal offenders. However, from 1999 to the present, lesser sentences were not meted out in most cases. This change in the provision's application could be due to a variety of factors, including the *Gladue* decision of 1999. This change could also be a reflection of the fact that the provision may have fallen into disfavour amongst judges.

The provision's application can also be discussed in terms of the offences to which it has been applied. As one would expect, given the *Gladue* decision, the analysis of the case judgments revealed that section 718.2(e) has not been applied to justify the imposition of lesser sentences in cases involving serious offences such as second-degree murder, manslaughter or sexual assault related offences. However, the provision has been used by judges to justify lesser sentences in other cases such as assault-related offences, property offences, and drug-related offences. These findings are to be expected, given the ruling in *Gladue* (1999) that the provision would not operate to justify non-carceral terms in cases involving serious and/or violent offences.

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5 Recall that *Gladue* is a case that can be cited either for or against a non-carceral term (Anand, 2000:418).
Section 718.2(e) has also been applied differentially to offenders without prior records. Although the provision has often been applied to justify mitigated carceral terms in cases involving offenders who had prior criminal records, the provision has not been applied as often in cases involving offenders who did not have a prior record. Perhaps this is because judges have started considering prior records as being part of the unfortunate circumstances of some Aboriginal offenders.

Similarly, the provision has been used by sentencing judges to justify mitigated sentences for offenders who have suffered tragic circumstances in their lives. However, although the sentences were mitigated, the majority of the sentences handed out in these cases were nevertheless carceral terms of over two years' imprisonment. This is most likely due to the fact that the offences and prior records of the offenders were too serious to justify non-carceral terms.

Interestingly, although the majority of the offenders had the support of their family and/or community, this did not function to mitigate sentences under section 718.2(e). Again, this could be due to a number of factors, including the fact that the offences and prior records may have been too serious to warrant mitigated sentences, or the fact that some resources may lack the resources needed to support community-based alternatives.

Although certain variables seemed to warrant a differential application of section 718.2(e) in some cases, the provision operated most often to justify mitigated carceral sentences. Parliament had hoped that section 718.2(e) would result in the increased use of non-carceral sentences for Aboriginal offenders. However, the judges interviewed for this study indicated that they have been meting out the least severe penalties that the
circumstances of the cases could justify. Therefore, the provision has not been operating to affect Aboriginal over-incarceration rates as intended.

**Implications**

There is no question that section 718.2(e) is a well-intentioned provision. Research conducted throughout the 1970s and 1980s first drew society's attention to the problem of Aboriginal over-representation in Canadian prisons. Since then, numerous steps have been taken to attempt to decrease Aboriginal over-incarceration levels, as exemplified through the development of Native police forces, Native Courtworker programs, Native liaison programs, and a variety of correctional programs such as Native half-way houses, Native parole supervision facilities, sweat lodges and community-based healing lodges (Lane et al., 1978:308-309; Wilson, 2001:14). However, none of these initiatives have decreased Aboriginal over-incarceration levels.

In an attempt to achieve a reduction in the levels of Aboriginal offenders in confinement through legislation, Parliament enacted section 718.2(e). It assumed that a primary contributing factor to the high incarceration rates of Aboriginal offenders was the historical circumstances that Aboriginal peoples have faced. 'This assumption was reflected in the wording of the provision, with its reference to 'background circumstances.' Parliament also assumed that systemic discrimination within the criminal justice system, and especially as it has manifested through the sentencing practises of the judiciary, also played roles in contributing to Aboriginal over-incarceration. These assumptions are reflected in the fact that Parliament attempted to address this problem by focusing on sentencing practises. Despite the enactment of section 718.2(e) in 1996, Aboriginal over-incarceration rates have increased.
Aboriginal Over-Incarceration: The Symptom of a Much Larger Problem

Many Aboriginal offenders have been sentenced leniently since the enactment of section 718.2(e) in 1996. Although sentences have been mitigated, the majority of the terms meted out have been for over two years' jail, since most cases have involved serious offences and prior records, and since such circumstances cannot usually justify non-carceral terms. However, as Landreville's (1995:39, 47) research has shown, imprisonment rates are most influenced by the length of the carceral terms, rather than the number of offenders that are being sent to jail. Additionally, the length of time that an offender remains in custody is, in part, a function of the decision-making of parole boards. The meting out of non-carceral alternatives will not be an effective way of lowering prison populations, since such sanctions usually replace short prison sentences anyway (Landreville, 1995:39, 45). Therefore, if the goal is to reduce prison population levels, it would be more efficient to limit the number of long-term carceral sentences meted out, rather than to substitute non-carceral sentences for short terms of imprisonment (Sprott & Doob, 1998:306, 308, 317).

The judges interviewed for this study indicated that they impose the least severe penalties possible in the cases that come before them. If the offences being committed are so serious that carceral terms cannot be mitigated any further than they have been, then researchers must examine the root causes of the disproportionate involvement of Aboriginal offenders in serious crime to better address the problem of Aboriginal over-incarceration.

The primary reason why Aboriginal over-incarceration rates have been unaffected by the enactment of section 718.2(e) is because the provision does not address the root
causes of this complex social problem. As discussed in Chapter Two, Aboriginal over-incarceration has arisen out of a complex interplay between numerous factors that have contributed to the involvement of some Aboriginals in the criminal justice system. Viewed in this light, it is hardly surprising that section 718.2(e) has been ineffective in ameliorating Aboriginal over-incarceration, since the provision does nothing to address the root causes of Aboriginal criminality or the various processes by which Aboriginal offenders become involved in the criminal justice system. Although Aboriginal over-incarceration is a social problem, it is more accurately viewed as a symptom of a much larger social problem.

Aboriginal Over-Incarceration: A Problem for the Judiciary?

The criminal justice system is therefore, perhaps, not the mechanism through which to address an issue that stems from larger social, political, and economic problems. The criminal justice system was designed to address and resolve legal issues and has a limited capacity to solve complex social problems. Even if section 718.2(e) were applied by sentencing judges in a manner that better contributed to a reduction in Aboriginal over-incarceration, the root causes of Aboriginal criminality and conflict with the law would remain unaddressed.

The findings of this study suggest that there are distinct limits to using the criminal law to effect social change. The judges of the Supreme Court of Canada have stated that neither section 718.2(e) nor any 'sentencing innovation' could remedy the problem of Aboriginal over-representation in Canadian prisons (Gladue, 1999: para. 65). Rather, the Courts were designed to address legal problems, and because of that, they are ill equipped to address social problems.
Further, it is difficult to address the underlying causes of Aboriginal over-incarceration through sentencing. As Roberts and Stenning (2002:90) have noted: "If sentencing judges are to address the problem of over-incarceration despite the fact that it apparently has almost nothing to do with sentencing, what other social problems would we have judges address?"

Addressing the Problem of Aboriginal Over-Incarceration: Policy and Program Alternatives

The unique status of Aboriginal peoples in Canadian society is not in question. What is at issue is the approach that Parliament has taken in attempting to use the criminal law to redress a situation that has arisen through various historical, structural and contemporary factors. Different measures must be taken to address this social problem. Sincere efforts to address Aboriginal over-incarceration would have started by addressing the roots of the problem. Policy and program initiatives should be developed that address poverty, social injustice, and the other factors that have lead to the over-representation of Aboriginal offenders in Canadian prisons (Anand, 2000:418; Starling, 1988:138). The fight against Aboriginal over-incarceration must therefore be re-directed from the criminal justice system to the social and economic arenas.

Policy Intent

The findings of this study suggest that Aboriginal over-incarceration has come about largely because the offences that Aboriginal offenders have been committing have been too serious to merit non-carceral, and/or further mitigated carceral terms. Chapter Two discussed the various factors that may have led some Aboriginal offenders to engage in criminality. The examination of these various explanations suggested that the root
causes of many crimes may be boiled down to different aspects of disadvantage. Poor health (including Fetal Alcohol Syndrome, malnutrition, and drug abuse), minimal educational attainment, and limited social and employment skills are some examples of criminogenic factors that may be directly attributed to disadvantage. If the disadvantage is addressed, then the criminality that it associated with that disadvantage will most likely decrease. Efforts aimed at the reduction of criminality will in turn reduce the numbers of offenders incarcerated. Carceral levels on the whole will then necessarily decline, because many incarcerated offenders are individuals who have committed their crimes due to the effects of disadvantage. Thus, the policies aimed at reducing disadvantage may ultimately function to ameliorate Aboriginal over-incarceration.

The policy intent outlined above may be captured through different variations in the wording of given policies. Therefore, the utility and effectiveness of proposed policies should not be underestimated, since "...(m)any policies have to enter the world premature and incomplete, lacking fine detail and content" (Rock, 1995:15). These conditions facilitate the 'officialization' of policies by the government (Rock, 1995). Thus, this section sets out to express the need for such a policy, and its possible articulation.

**A Human Rights Policy**

The creation and implementation of a human rights policy may achieve the twin goals of addressing Aboriginal criminality and over-incarceration. Such a policy should be worded in a way that addresses the wider disadvantage that some people face, especially minority groups, for it is that disadvantage that contributes to crime and results in high carceral levels. The term 'wider disadvantage' is meant to be interpreted in a
broad sense: the disadvantage that some people suffer throughout the course of everyday life that stems from issues such as a lack of education, healthcare, and socioeconomic resources. The wording of such a policy may be formulated as follows:

In keeping with the goals of democratic governance as well as international covenants, all Canadian citizens and other permanent residents of Canada (including status and non-status Aboriginal peoples) have the right to a minimum standard of living, including adequate healthcare, education, housing, and financial assistance, *so as to achieve formal equality*.

The phrase '...so as to achieve formal equality' was included in the proposed policy statement in an effort to solidify its primary purpose of the removal of disadvantage. It is prudent to identify the purpose of the policy in the body of the actual policy statement, so as to prevent possible confusion that might arise during the interpretation and application of the policy by the judiciary.

The existence of the *Canadian Charter of Rights and Freedoms* largely determines how policies will be written, and for that reason, policies should be consistent with the aims set out in the *Charter* (Milne, 1999:6). The human rights policy delineated above is consistent with the aims set out in the *Charter*. Section 15 of the *Charter* sets out equality rights, namely with respect to 'equality before and under the law,' 'equal protection and benefit of law,' and also 'affirmative action programs.' The wording of section 15(2) of the *Charter* is of particular interest:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

This section seems not only consistent with, but also supportive of the human rights policy delineated above. In fact, it seems to actually capture the crux of the above-stated
human rights policy: a program that has at its object the amelioration of conditions that have been conducive to the disadvantage of individuals or groups, including those who are disadvantaged because of ethnicity and/or national origin. This Charter section comes very close to articulating such a policy, but unfortunately falls short of such an endeavour. The Charter's articulation of an idea that is so close to the gist of the human rights policy purported here is a clear indication that both the government and 'Zeitgeist' may be ready for the legislation of such a human rights policy. Although it is questionable whether the Charter has yet been interpreted as establishing a right to government services, the government's Constitutional obligation to ensure that the rights of Aboriginal peoples are satisfied nevertheless remains.

Potential Program Initiatives

An array of procedures and programs must be developed to accompany such a policy, so as to permit its full satisfaction. Procedures should be formulated to carry out the broad mandate of the social policy, which is namely to ensure that all people have a minimum standard of living, as demonstrated by their access to adequate healthcare, education, housing and financial resources, so as to prevent criminality. Such procedures require the ancillary support of social programs that are aimed at achieving each of the aforementioned aspects of a minimum standard of living. The government would ideally fund the social programs in an effort to reduce disadvantage amongst its people, including Aboriginals.

First, society must take preventative measures to ensure that the problems of poverty and substance abuse do not continue to negatively affect the fetuses of disadvantaged women. This may be achieved through the development and utilization of
education programs that focus on family planning, nutrition and the effects of substance abuse on growing fetuses. In addition to education programs, access to healthcare resources such as counseling, drug treatment programs and pre/post-natal medical care must also be made available, so as to combat the criminality that may arise in the absence of such services.

Educational resources should also be improved and made more accessible. Parenting education programs and preschool programs would facilitate socialization and strengthen attachments to family, school and society, thereby decreasing the probability that some individuals may engage in criminality, and increasing the probability of future academic and employment success (Denno, 1985:735). The research on poverty suggests that providing for the financial support for families in need would also facilitate cognitive development and academic performance in children (McLoyd, 1998:198). Through education, legitimate opportunities will increase, and the need to engage in criminality will decrease.

It is much easier and more effective to direct Aboriginal decarceration efforts at children, by ensuring that they are socialized properly and that they develop sufficient bonds to school, rather than try to break habitual offending patterns of adult offenders (Denno, 1985:736). However, such measures must be supplemented by social intervention strategies aimed at adults. Adults must serve as positive role models to the young for such strategies to work. For this to occur, individuals at risk should be educated with respect to the harmful effects of substance abuse, and physical and/or sexual abuse, so that such destructive patterns may stop and the young may lead healthy lives.
Resources should also be directed toward the improvement of communities. Among other things, communities must develop a greater capacity to support non-carceral alternatives. Judges may be more inclined to use non-carceral alternatives if the community more readily supports such alternatives. Furthermore, research shows that when offenders on conditional release have the support of their communities, their risk of recidivism lowers drastically (St. Amour, 2002:9).

Resources are also needed to improve the living conditions on reserves and provide young Aboriginals with legitimate activities to occupy their time. Some communities in Canada that seem disadvantaged, owing to their display of various levels of dysfunction, but they actually are not, since they have an abundance of financial, healthcare and social resources at their disposal. In such cases, and in all cases, change must not only come from policy and programs, but it must also come from within.

As Judge Lilles wrote in the *Schafer* (2000: para. 92) decision, the courts are not able to address the root causes of crime – only the community can do that. Aboriginal justice can be better achieved through community ownership of problems, community development and relationship building (Warhaft, Palys & Boyce, 1999:168). Moreover, communities can become safer and stronger if more members of the community become involved in the correctional process (St. Amour, 2002:9). Thus, strategies for addressing Aboriginal conflict with the law can be generated from within the community.

When a community decides to take ownership of its problems, fundamental changes can take place, even without the need for new laws or policies to be enacted (Warhaft et al., 1999:180). Notwithstanding this, the implementation of policies and
programs such as the ones recommended in this thesis may achieve the anticipated goal sooner than if disadvantaged people were not given assistance.

**Repeal Section 718.2(e)**

In addition to implementing the above accompanying programs, one already legislated procedure should be repealed entirely: section 718.2(e). The provision has been ineffective in achieving its mandate of ameliorating Aboriginal over-incarceration since its enactment in 1996. In fact, it may never achieve its mandate (M.A. Jackson, personal communication, February 11, 2002).

Section 718.2(e) is riddled with problems and internal inconsistencies, as illustrated by the extensive discussion in Chapter Three on the provision. The seemingly altruistic provision has done nothing for Aboriginal offenders. Over six years have passed since its enactment and Aboriginal over-incarceration levels have increased. Among other things, this study has demonstrated that most Aboriginal offenders have continued to receive mitigated carceral sentences since 1996.

The mitigation of carceral terms does not help address Aboriginal over-incarceration. Offenders serving shorter prison terms may not receive the treatment they may need while in prison due to long waiting lists for treatment programs in prison. Furthermore, section 718.2(e), and the case law surrounding it, may encourage the use of carceral sentences because the mitigation of sentences makes it easier for judges to hand out carceral terms in such heated political times. The provision may also minimize the sense of responsibility and self-determination some Aboriginal offenders may feel for their crime, since the provision justifies non-carceral terms on the basis of the
background circumstances that Aboriginal peoples have suffered as a group, and as individuals.

The wording of the provision requires judges to consider the personal circumstances of the offender so that an appropriate sentence can be crafted. However, the circumstances of disadvantaged offenders often reveal that they do not qualify for non-carceral alternatives, because of long prior records, the lack of community resources, the lack of community support, and/or various other reasons. Although the provision was intended to help disadvantaged offenders, its wording prevents its goal from being achieved.

Moreover, even if such non-carceral sanctions were available and could be used, the wording of section 718.2(e) is too weak to ensure that that would happen. The provision, in its use of the phrase "should be considered," simply suggests that judges think about non-carceral sanctions where possible (Roberts, 1998:427). Such wording does nothing to compel judges to avoid using carceral sanctions (Roberts, 1997:194), let alone reduce Aboriginal over-incarceration (Roberts, 1998:427).

The singling out of Aboriginal offenders in the provision is also problematic. Aboriginal offenders are not the only offenders who are overrepresented in prison populations, for Blacks suffer over-incarceration in some Canadian provinces and face many problems that are similar to the problems that the majority of Aboriginal offenders face (Roberts, 1998:427; Roberts & Doob, 1997:470). Furthermore, the generic use of the term 'Aboriginal' is questionable, as differences exist between First Nations with respect to cultures, languages and customs. Some Aboriginals even disapprove of the
'culturally sensitive' sentencing that the provision allows, and view the provision as lenient and racist (Hansard, 1995b:19-21; Koshan, 1998:40).

Compounding these problems is the fact that the provision attempts to individualize a systemic problem (M.A. Jackson, personal communication, February 11, 2002). The provision speaks in terms of the individual, by legislating that non-carceral sanctions be considered at sentencing, particularly in cases involving Aboriginal offender. The focus on the individual prevents the provision from ever effectively meeting its mandate, because it does nothing to address the social problems that continue to perpetuate Aboriginal over-incarceration (M.A. Jackson, personal communication, February 11, 2002).

Interestingly, in other jurisdictions where indigenous peoples are over-represented in the criminal justice system and correctional facilities, such as New Zealand and Australia, there are no provisions similar to section 718.2(e) (Roberts & Stenning, 2002:93). Furthermore, no sentencing scholars from other parts of the world have provided favourable reviews of the provision (Roberts & Stenning, 2002:93). It is also interesting to note that Parliament has decided not to legislate a similar provision into the new Youth Criminal Justice Act (Rudin & Roach, 2002:4).

Furthermore, the use of carceral terms as a last resort at sentencing is a sentencing practise that many judges say that they have been doing long before section 718.2(e) was even implemented. In fact, this very sentencing principle was legislated into the Criminal Code at the same time as section 718.2(e). Section 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate
in the circumstances." This provision interestingly captures the essence of section 718.2(e), without all of the political cacophony.

As exemplified throughout this thesis, section 718.2(e) is in effect a 'Band-Aid' for the social problem of Aboriginal over-incarceration, since it does nothing to address the criminality and disadvantage that contribute to Aboriginal over-incarceration. Given the aforementioned policy goals, and the problems with the provision, section 718.2(e) should be repealed.

**Future Research Directions**

Future research should be conducted in several areas. First, more proactive and systematic research is needed to explain the causes of Aboriginal over-incarceration so that the problem may be better understood and effectively addressed (La Prairie, 1999c:253, 255, 257). Specifically, since the varying levels of Aboriginal over-incarceration across Canada have been attributed to demographic differences, this factor should be explored (La Prairie, 1999c:253). Such research should also explore the background circumstances of offenders more thoroughly, in an effort to determine why they have engaged in criminality, so that efforts aimed at prevention and early intervention can be improved.

Additional research also needs to be conducted on the use of conditional sentences. Since conditional sentences were first made available as a sentencing option in 1996, there is a possibility that their *breaches* could be contributing to high levels of Aboriginal over-incarceration. However, no research is available on how many breached conditional sentences have resulted in carceral terms of imprisonment. If research shows
that a large number of carceral terms are being meted out in response to breached conditional sentences, steps may be taken to correct the problem.

Additional, in-depth research should also be conducted on how section 718.2(e) is being applied to Aboriginal offenders at sentencing. Such research should also examine plea bargaining with respect to Aboriginal offenders, since plea bargaining can have an effect on the charges laid, and the sentences that result. Research on the application of section 718.2(e) to Aboriginal offenders at sentencing would require a representative sample of sentencing judges to provide written reasons for judgment in cases involving section 718.2(e) and Aboriginal offenders at sentencing. Such research may be difficult to conduct, since judges have generally been very resistant to having research conducted on their sentencing practices. However, their cooperation is needed to allow a remedy to the problem of Aboriginal over-incarceration to emerge.

Final Remarks

Despite the years of research and inquiries that preceded the development of section 718.2(e) of the Criminal Code, the provision has been largely ineffective to date in ameliorating the problem of Aboriginal over-representation in Canadian prisons. Although over six years have passed since the enactment of section 718.2(e), and Aboriginal offenders have been receiving mitigated carceral and non-carceral sentences because of the provision, Aboriginal over-incarceration rates in correctional institutions across Canada have increased. The problem of Aboriginal over-incarceration is serious.

Although Aboriginal over-incarceration is often attributed, in part, to the sentencing practices of judges, the findings of this study indicate that judges are imposing
the least severe penalties possible, given the circumstances of the cases that come before them. Furthermore, non-carceral alternatives are being used whenever possible.

The primary contributing factor to Aboriginal over-incarceration is not the sentencing practices of the judiciary *per se*. Rather, the main contributing factor is more correctly identified as the criminality that results in the serious offences and long prior records, as these are the main factors that prevent judges from giving non-carceral sanctions in the majority of cases. Section 718.2(e) has been ineffective in addressing Aboriginal over-incarceration because it does not address the roots of the problem: namely the factors that result in the criminality of some Aboriginal offenders.

The findings of this study also suggest that there are limitations to using the criminal law to facilitate social change and address social problems. Members of the judiciary deal with legal issues, and have only a limited capacity to address the underlying problems that contribute to the criminality and criminal justice system involvement of some Aboriginals.

Since Aboriginal over-incarceration has arisen out of a complex interplay between a multitude of factors, including historical, cultural, structural and contemporary factors, the approach taken to address it then must be multi-faceted. Efforts to reduce Aboriginal over-incarceration should be re-directed from the criminal justice sphere to the social and economic spheres, in a systematic manner. Social intervention programs must be developed and resources must be allocated to prevent criminality, by mainly addressing the various forms of disadvantage that some offenders may suffer from, including financial, social and health related forms of disadvantage.
Through the creation and legislation of social policy that is designed to address disadvantage on a wide-scale, the problem of crime and the associated problem of over-incarceration will dissipate, since less Aboriginal peoples would be sent to jail. The underlying social values of such policy must be embraced if the problem of Aboriginal over-incarceration is to be ameliorated.
APPENDICES

Appendix A

The Purpose and Principles of Sentencing
(Criminal Code Sections 718-718.2)

718. Purpose - 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 acknowledgement of the harm done to victims and to the community.

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

718.2 Other sentencing principles - 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, color, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or
(ii) evidence that the offender, in committing the offence abused the offender's spouse or child,
(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization shall be deemed to be aggravating circumstances;
(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
Appendix B
Conditional Sentence of Imprisonment
(Criminal Code Sections 742.1-742.3)

742.1 Imposing of conditional sentence - Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the Court
(a) imposes a sentence of imprisonment of less than two years, and
(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.
the Court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3

* * * * *

742.3 (1) Compulsory conditions of conditional sentence order - The Court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:
(a) keep the peace and be of good behaviour;
(b) appear before the Court when required to do so by the Court;
(c) report to a supervisor
   (i) within two working days, or such longer period as the Court directs, after the making of a conditional sentence order, and
   (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;
(d) remain within the jurisdiction of the Court unless written permission to go outside that jurisdiction is obtained from the Court or the supervisor; and
(e) notify the Court or the supervisor in advance of any change of name or address, and promptly notify the Court or the supervisor of any change of employment or occupation.

(2) Optional conditions of conditional sentence order - The Court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:
(a) abstain from
   (i) the consumption of alcohol or other intoxicating substances, or
   (ii) the consumption of drugs except in accordance with a medical prescription;
(b) abstain from owning, possessing or carrying a weapon;
(c) provide for the support or care of dependants;
(d) perform up to 240 hours of community service over a period not exceeding eighteen months;
(e) attend a treatment program approved by the province; and
(f) comply with such other reasonable conditions as the Court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.
## Appendix C

### Case Judgment Data Collection Instrument

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<td>Was the offender remorseful?</td>
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<td>Rehabilitative efforts made by the offender since the offence?</td>
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<td>Did Defence Counsel properly/adequately inform the Court of the offender's circumstances/background:</td>
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<td>At the sentencing hearing?</td>
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<td>Was there a PSR/PDR?</td>
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<td>Non-Carceral Alternative</td>
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<td>Was section 718.2(e) used to justify a non-carceral or mitigated carceral sentence?</td>
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<td>Sentence Given at Trial: Carceral or Non-Carceral</td>
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<td>Sentence Given at Trial (indicate type):</td>
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<td>Conditional Sentence</td>
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<td>Carceral Term Added</td>
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<td>Non-Carceral Term Added</td>
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<td>Made Non-Carceral</td>
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<td>Reduced Non-Carceral</td>
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<td>What sentencing principles were cited to justify the sentence given?</td>
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<td>Reparation</td>
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<td>*Retribution</td>
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<td>If s. 718.3(c) was not used/applied, what was the reason given?</td>
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Appendix D
Ethical Approval of Research

SIMON FRASER UNIVERSITY

OFFICE OF RESEARCH ETHICS

BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6
Telephone: 604-291-4370
FAX: 604-291-4860

May 3, 2002

Ms. Tamie Fenning
Graduate Student
School of Criminology
Simon Fraser University

Dear Ms. Fenning:

Re: Sentencing Aboriginal Offenders; Section 718-2(e) of
The Criminal Code and Aboriginal Over Incarceration

I am pleased to inform you that the above referenced Request for Ethical Approval of Research has been approved on behalf of the Research Ethics Board. This approval is in effect for twenty-four months from the above date. Any changes in the procedures affecting interaction with human subjects should be reported to the Research Ethics Board. Significant changes will require the submission of a revised Request for Ethical Approval of Research. This approval is in effect only while you are a registered SFU student.

Best wishes for success in this research.

Sincerely,

Dr. Hal Weinberg, Director
Office of Research Ethics

C: C. Griffiths, Supervisor
/bjr
Appendix E
Interview Schedule

Background Information
1.) Gender
2.) Where were you born?
3.) Where were you raised?
4.) When you were growing up, did you ever have contact with Aboriginal people?
   - If so, what were your impressions of Aboriginals when you were young?

University Experiences
5.) What university degrees do you hold?
6.) At which universities did you complete them?
7.) When did you decide to go to law school?
8.) Why did you decide to go to law school?
9.) Have you always wanted to become a lawyer?

Law School
10.) During what years did you attend law school?
11.) Were there any courses that you took in law school that you would say have been especially helpful to you today as a decision-maker?
12.) When you were in law school, did you take any courses on Aboriginal-related issues?
   - Were any courses offered on Aboriginal-related issues?
   - How would you say that (that course/those courses) changed your impressions about Aboriginals?

Legal Career
13.) After law school, where did you do your articling?
14.) Can you briefly describe what you did after you earned your law degree?
   - (Defence/Crown; big/small firm, etc.)
15.) What kinds of cases did you handle during this time?
16.) When you were a lawyer, what was it that you liked or didn't like about your job?
17.) When you were a lawyer, did you ever handle the cases of Aboriginal offenders?
   - If so, did you notice any differences between your Aboriginal and non-Aboriginal clients, in terms of the problems they may have had?
   - Did these experiences change your impressions about Aboriginal people?

18.) Before you became a lawyer, how did you view the criminal justice system?
   - As a lawyer, how did you view the criminal justice system?
19.) Before you became a lawyer, how did you view judges?
   - As a lawyer, how did you view judges?
20.) Before you became a lawyer, how did you view judicial decision-making?
   - As a lawyer, how did you view judicial decision-making?
21.) Before you became a judge, did you ever give some thought to the possible reasons why Aboriginals are overrepresented in prison populations?
Judicial Career
22.) Have you always wanted to become a judge?
23.) When were you appointed to the bench? (years of experience as a judge)
24.) At what level of court do you sit? (Provincial/Supreme/Appellate)
25.) What kinds of cases normally come before you?
26.) Now that you are a judge, how has your view of judges changed?
27.) Has your view of judicial decision-making changed?
28.) Has your view of the criminal justice system changed?
29.) What is the most difficult thing about being a judge?

Sentencing
30.) What would you say your personal sentencing philosophy is, generally?
31.) What factors do you consider when making sentencing decisions about offenders, generally?
32.) Section 718 lists 10 objectives of sentencing. How do you balance these competing objectives in your decision making?
33.) What do you think of the fact that section 718 has such competing objectives? (restorative justice vs. retributive justice)

Sentencing Aboriginal Offenders
34.) Have you sentenced Aboriginal offenders in the past?
35.) How experienced would you rate yourself with respect to the sentencing of Aboriginal offenders?
36.) Before section 718.2(e) came into effect in 1996, how did you sentence Aboriginal offenders?
   - Did you sentence Aboriginal offenders differently than non-Aboriginal offenders?
37.) Do Aboriginal offenders present any different challenges for you as a decision-maker (at sentencing), compared to non-Aboriginal offenders?
38.) Has your view of Aboriginal offenders changed since you've become a judge?
   - In what way has your view changed?
39.) Have you formed any hypotheses that explain why Aboriginals are overincarcerated?

Issues Surrounding the Application of section 718.2(e) at Sentencing
40.) What factors do you consider in your decision on whether or not to invoke section 718.2(e) when sentencing an Aboriginal offender?
41.) What factors would prompt you to use section 718.2(e) as a justification for a mitigated carceral sentence, versus a non-carceral sentence?
42.) What factors would prompt you to ignore section 718.2(e) all together?
43.) What non-carceral alternatives do you consider when you consider the alternatives?
44.) How has the provision, and the case law surrounding the provision, impacted your exercise of discretion at sentencing?
The Legislative History of section 718.2(e)

45.) To the best of your knowledge, how did the provision arise?
46.) Why do you think Parliament focused on addressing the problem of Aboriginal over-incarceration by suggesting that judges sentence differently? (Why didn't they pass a law ordering the police, prosecutors or parole board members to deal with Aboriginal offenders differently)?
47.) Do you think that it's appropriate that this provision, and the case law surrounding the provision, asks you to consider non-carceral and mitigated sentences in the cases of Aboriginal offenders?
48.) The provision was enacted in the absence of overarching policy specifying the social values that the provision was intended to capture. Do you think that the legislation of such social policy would improve the effectiveness of the provision in achieving its mandate?

Case Law Surrounding section 718.2(e)

49.) The Court in Gladue (1999) ruled that Aboriginal offenders should receive regular stiff sentencing like non-Aboriginals when the offences are violent and/or serious. The Court in Wells (2000) ruled that that statement was not meant to be a rule. What do you think about this guidance?

Section 718.2(e)

50.) What is your view of section 718.2(e) generally?
51.) What do you think of the mandate of section 718.2(e)?
52.) What do you think of the wording of section 718.2(e)? (is it problematic?)
   - Do you think that the provision should be re-worded? or repealed entirely?

The Effect of section 718.2(e) on Aboriginal Over-incarceration Rates

53.) Do you think that the provision is meeting its mandate of reducing Aboriginal over-incarceration?
54.) My research has shown the implementation of section 718.2(e) in 1996 has not decreased Aboriginal over-incarceration rates. Why do you think this is so?
55.) My research has shown that although most offenders are receiving mitigated sentences because of section 718.2(e), the offenders are still receiving carceral sentences. What do you think about that?
56.) Do you think that the spirit behind section 718.2(e) could ever be realized?
57.) What do you think is needed to allow section 718.2(e) meet its mandate?
58.) In your opinion, how could the problem of Aboriginal over-incarceration be better addressed?
59.) Do you think that there is anything else I should be asking?
Appendix F
Tables

Table 1: Information relating to the year and province of the cases.

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7 Note that not all of the percentages listed in the tables in this appendix add up to 100%. This is an inevitable result of rounding.
Table 2: Background information of the case judgments.

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Note: Total N = 177.
Table 3: Information relating to the background circumstances of the offenders.

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Note: Total N = 177.
Table 4: Other offender-specific information indicated in the case judgments.

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Note: Total N = 177.
Table 5: The extent that the courts were informed of the offenders' circumstances.

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<td>123</td>
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Note: Total N = 177.
Table 6: Information relating to the victims as indicated in the case judgments.

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Note: Total N = 177.
Table 7: The application of section 718.2(e) at sentencing.

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Note: Total N = 177.
Table 8: Reasons why section 718.2(e) could not justify lesser penalties.

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Note: Total N = 177.
Table 9: Sentencing objectives cited in support of the judgments rendered.

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Table 11: The judges' university experiences.

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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1960s</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>1970s</td>
<td>2</td>
<td>7</td>
<td>29</td>
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<tr>
<td>1980s</td>
<td>2</td>
<td>7</td>
<td>29</td>
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</table>
Table 13: The judges' careers as lawyers.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Total Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Work</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defence</td>
<td>4</td>
<td>7</td>
<td>57</td>
</tr>
<tr>
<td>Prosecution</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>Types of Cases Handled</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal Law</td>
<td>7</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>Civil Law</td>
<td>6</td>
<td>7</td>
<td>86</td>
</tr>
<tr>
<td>Enjoyed Aspects of Legal Work</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;The Battles in Court&quot;</td>
<td>4</td>
<td>7</td>
<td>57</td>
</tr>
<tr>
<td>&quot;Helping Others&quot;</td>
<td>2</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>&quot;Most Everything&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Disliked Aspects of Legal Work</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;The Business Aspect&quot;</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>&quot;Losing Cases&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>&quot;Too Much Work&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>&quot;Too little Pay&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Refused to respond</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
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</table>
Table 14: The judges' views of the criminal justice system.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Total Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>View of the Criminal Justice System Before Becoming a Lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Fair&quot;</td>
<td>2</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>&quot;Never thought about it&quot;</td>
<td>5</td>
<td>7</td>
<td>71</td>
</tr>
<tr>
<td>View of the Criminal Justice System as a Lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Very Good&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>&quot;Fair&quot;</td>
<td>4</td>
<td>7</td>
<td>57</td>
</tr>
<tr>
<td>&quot;Procedure Line Justice&quot;</td>
<td>2</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>View of the Criminal Justice System as a Judge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Good, but less efficient than previously thought&quot;</td>
<td>2</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>&quot;Dysfunctional, because it sets out to do more than it is able to do&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>&quot;View has not changed&quot;</td>
<td>4</td>
<td>7</td>
<td>57</td>
</tr>
</tbody>
</table>
Table 15: The judges' views of judges.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Total Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>View of Judges Before Becoming a Lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Omnipotent&quot;</td>
<td>4</td>
<td>7</td>
<td>57</td>
</tr>
<tr>
<td>Didn't Know</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>View of Judges as a Lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Humans, with strengths and weaknesses&quot;</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>&quot;Some held in high esteem&quot;</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>&quot;Some unapproachable&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>View of Judges as a Judge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;People, with lonely and difficult jobs&quot;</td>
<td>4</td>
<td>7</td>
<td>57</td>
</tr>
<tr>
<td>&quot;View them more highly&quot;</td>
<td>2</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>&quot;Know more about them&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
</tbody>
</table>
Table 16: The judges' views of judicial decision-making.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>( n )</th>
<th>Total Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>View of Judicial Decision-Making Before Becoming a Lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Didn't think about it&quot;</td>
<td>6</td>
<td>7</td>
<td>86</td>
</tr>
<tr>
<td>&quot;Inflexible&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>View of Judicial Decision-Making as a Lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Function of various factors&quot;</td>
<td>5</td>
<td>7</td>
<td>71</td>
</tr>
<tr>
<td>&quot;Judges apply the law&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>&quot;Didn't think about it much&quot;</td>
<td>1</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>View of Judicial Decision-Making as a Judge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Difficult, because some decisions are very hard to make&quot;</td>
<td>5</td>
<td>7</td>
<td>71</td>
</tr>
<tr>
<td>&quot;Difficult, because it's a solitary exercise&quot;</td>
<td>2</td>
<td>7</td>
<td>29</td>
</tr>
</tbody>
</table>
Table 17: The judges' years of experience on the bench.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>n</th>
<th>Total Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Years of Judicial</td>
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<td></td>
</tr>
<tr>
<td>Experience</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under 5 Years</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>Between 5 and 10 Years</td>
<td>3</td>
<td>7</td>
<td>43</td>
</tr>
<tr>
<td>Over 10 Years</td>
<td>1</td>
<td>7</td>
<td>14</td>
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</tbody>
</table>
Appendix G

Figures

Figure 1: Aboriginal Persons: Proportion of Adult Population* and On-Register Inmates by Jurisdiction


* Based on the 1996 Census.
- Data for PEI suppressed due to small numbers.
Figure 2: Bar graph of the years in which the judgments were rendered by whether or not the sentences were mitigated.
Figure 3: Bar graph of the years in which the judgments were rendered by the sentences that were meted out at trial.
Figure 4: Bar graph of the regions in which the judgments were rendered by whether or not the sentences were mitigated.
Figure 5: Bar graph of the types of offences that the offenders were convicted of by whether or not the sentences were mitigated.
Figure 6: Bar graph of whether or not the offenders had prior records at sentencing by whether or not the sentences were mitigated.
Figure 7: Bar graph of whether or not the offenders had prior records at sentencing by the sentences that were meted out at trial.
Figure 8: Bar graph of whether or not the offenders had prior records at sentencing by the types of sentences that were meted out a trial.
Figure 9: Bar graph of the offenders' background circumstances by whether or not the sentences were mitigated.
Figure 10: Bar graph of the offenders' background circumstances by the sentences that were meted out at trial.
Figure 11: Bar graph of the offenders' background circumstances by the types of sentences that were meted out at trial.
Figure 12: Bar graph of whether or not the offenders had the support of their families at sentencing by whether or not the sentences were mitigated.
Figure 13: Bar graph of whether the offenders had the support of their communities at sentencing by whether or not the sentences were mitigated.
Figure 14: Bar graph of whether or not the offenders had the support of their families at sentencing by the sentences that were meted out at trial.
Figure 15: Bar graph of whether or not the offenders had the support of their communities at sentencing by the sentences that were meted out at trial.
Figure 16: Bar graph of whether or not the offenders had the support of their families at sentencing by the types of sentences that were meted out at trial.
Figure 17: Bar graph of whether or not the offenders had the support of their communities by the types of sentences that were meted out at trial.
Figure 18: Bar graph of whether or not the courts were informed of the offenders' background circumstances at sentencing by whether or not the sentences were mitigated.
Figure 19: Bar graph of whether or not the courts were informed of the offenders' background circumstances at sentencing by the sentences that were meted out at trial.
Figure 20: Bar graph of whether or not the courts were informed of the offenders' background circumstances at sentencing by the types of sentences that were meted out at trial.
Figure 21: Bar graph of the parties that raised section 718.2(e) at sentencing by whether or not the sentences were mitigated.
Figure 22: Bar graph of the parties that raised section 718.2(e) at sentencing by the sentences that were meted out at trial.
Figure 23: Bar graph of the parties that raised section 718.2(e) at sentencing by the types of sentences that were meted out at trial.
Appendix H
Case Citations of the Case Judgments Analyzed

R. v. Andres (2002) SKCA 98 (Quicklaw)
R. v. Arcand (2000) SKCA 60 (Quicklaw)
R. v. C. (A.C.) 2000 ABQB 654 (Quicklaw)
R. v. C. (C. L.) 2001 MBQB 60 (Quicklaw)
R. v. C. (S.) (2001) BCPC 112 (Quicklaw)
R. v. Carpenter (2002) BCCA 301 (Quicklaw)
R. v. Casimir (2001) BCCA 310 (Quicklaw)
R. v. Cleary (2002) NWTSC 30 (Quicklaw)
R. v. Cooper May 12, 2000 (BCSC) Docket CC991286
R. v. Curran (2001) ABPC 34 (Quicklaw)
R. v. Dedam (2002) NBQB 90 (Quicklaw)
R. v. Fireman (2001) O.J. No. 4731 (Quicklaw)
R. v. Fox (2001) A.J. No. 268 (Quicklaw)
R. v. G. (J.D.) June 25, 1999 (BCSC) Docket X36573
R. v. Healy July 7, 1999 (ABCA) Docket 18298
R. v. J. (L.L.) June 3, 1999 (BCSC) Docket X19883
R. v. L. (D.) 2002 BCSC 1015 (Quicklaw)
R. v. Leclaire July 7, 1999 (ABCA) Docket 18273
R. v. Mills 2002 BCCA 35 (Quicklaw)
R. v. Sam (1997) (YTSC) Y.J. No. 100 (Quicklaw)
R. v. Stewart (1999) S.J. No. 413 (Quicklaw)
R. v. Whitemanleft March 6, 2000 (Alta. Prov. Ct.) Docket 05244157P10101
REFERENCES


Cases Cited

Moleku v. Canada (Minister of Citizenship and Immigration) [2002] F.C.J. No. 1023 (Quicklaw)