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A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code

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A. The Question to be Analyzed

In the context of the Department of Justice's criminal justice review, including reforms to sentencing in the past decade, if the purposes and principles of sentencing in ss. 718-718.21 were to be reformed, how would you reform them and why?

B. Introduction and Overview

An analysis of the reforms, if any, that ought to be made to the current statement of the purposes and principles of sentencing in the *Criminal Code* should first address a few preliminary but fundamental questions:

> (1) Do we need such a Statement, i.e. does such a Statement fulfill any valuable purposes?
>
> (2) If such a Statement is of value, what should be its nature and form?

After making brief comments on these preliminary questions, I will describe the genesis and content of the current Statement, analyze the necessity of the amendments which have been made to the Statement mostly in the past 10 years, and then examine some problematic aspects of the current Statement and recommend reforms to it. Finally, I will argue that regardless of whatever reforms are made to the Statement, a revised statement of purposes and principles will never be sufficient on its own to solve the serious sentencing problems that currently exist.

C. Preliminary Questions

1. Is a Statement of Purposes and Principles Valuable?

In a word, my answer to the above question is Yes.[1] First, sentencing is a public process. It is society's response to a proven breach of our criminal laws, laws which are supposed to reflect the protection of society's fundamental values. In a democratic society, these fundamental values and our response to their breach should be articulated by and be within the overriding control of our elected officials. In that context, a legislative statement of purposes and principles of sentencing is a significant component in a well-

[1] Most commentators seem to take it for granted that a statement of purposes and principles is important and valuable. A few commentators have expressly examined this question and largely agree that such a statement can and should play a valuable role in an overall sentencing scheme. See, e.g. J.K. Roberts & A. von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing" (1995) 37 Crim LQ 220. See also A.N. Doob "The Unfinished Work of the Canadian Sentencing Commission" (2011) 53 Can J Crim & Crim Just 279 who seems to implicitly acknowledge the important role a statement of purposes and principles can play but also argues that our current statement is unclear and in many respects misses the mark.

functioning democratic society based on the rule of law. And since sentencing responses normally interfere with or infringe on a convicted citizen's freedoms and liberties, it is important in the pursuit of an orderly and fair society for Parliament to be clear in indicating to its citizens and its offenders what the purposes of imposing a sentence are and what principles guide a court's determination of a fair and just sentence.

Second, a statement of purposes and principles provides the first layer of guidance to those entrusted with imposing sanctions on individual offenders on behalf of the rest of society. In that respect, a statement of purposes and principles supports a fair and equitable process in sentencing by giving all judges the same starting point and a sense of direction in arriving at a fit sentence. This in turn provides an opportunity for greater coherence in sentencing and lessens opportunities for individual judges to introduce their own irrelevant or conflicting sentencing ideas. Thus, a statement of purposes and principles contributes to greater consistency and less unjustified disparity in sentences; consistency and parity are important goals in establishing public legitimacy in the sentencing process. However, I want to emphasize now, and will elaborate later, that a statement of purpose and principles is only the *starting point* for a fair and just sentencing scheme.

2. Form and Essential Requirements of a Statement of Purposes and Principles

As a Parliamentary enactment designed to serve both as an educative device for the public and offenders and as a basic, first level instrument of guidance for sentencing judges, I suggest that Parliament's statement of purposes and principles needs:

- to be written in clear and accessible language
- to navigate between being too general and too specific
- to provide the rationale and justifications for sentencing and identify the objectives and methods for pursuing that rationale
- to provide guidance which does not constitute virtually unfettered judicial discretion nor virtual elimination of judicial discretion (as occurs with mandatory minimum sentences), and
- to set out a starting point and a set of general directions to assist judges in arriving at a fit sentence

D. The Genesis and Content of the Current Statement

1. Background to the Enactment of Sections 718-718.21

The road to the enactment of Bill C-41[2] in 1995, which provided new sentencing provisions in Part XXIII of the *Criminal Code*, was a long and arduous one. It was

[2] *An Act to Amend the Criminal Code (Sentencing)*, 1995 S.C. c.22.

shaped and influenced by a number of sentencing stops along the way: the *Ouimet Report* in 1969;[3] multiple reports by the Law Reform Commission of Canada [LRCC] between 1973 and 1977;[4] the federal government Report entitled *Criminal Law in Canadian Society* in 1982;[5] and 3 related events in 1984: the release of the federal government's Report entitled *Sentencing*,[6] the introduction and death of Bill C-19[7] dealing with sentencing, and the appointment of a one-time Sentencing Commission to study and report, amongst other things, on sentencing guidelines and how such guidelines may be best utilized.

In 1987, the Canadian Sentencing Commission released its Final Report entitled *Sentencing Reform: A Canadian Approach*,[8] which was the most detailed, extensive and empirically researched study of sentencing ever conducted in Canada. In 1988, Parliament's Standing Committee on Justice and Solicitor General published a report entitled *Taking Responsibility*[9] (*Daubney Report)* which largely reviewed the recommendations in the Canadian Sentencing Commission's Report. In 1990, the federal government issued a Green Paper entitled *Sentencing: Directions for Reform*[10] which followed closely the recommendations in the *Daubney Report*. In June 1992, the Conservative government gave first reading to Bill C-90[11] dealing with sentencing reform. The Bill did not return to Parliament for second reading until May 7th, 1993 and was then partially examined in Committee (May 12 and 25, 1993). But when an election was called later that year, Bill C-90 died on the order paper. On June 14, 1994 the newly elected Liberal government introduced Bill C-41[12] which was enacted in 1995 and came into force as our new sentencing law on September 3rd, 1996. In many significant respects Bill C-41 and Bill C-90 were very similar.

In the twenty-one year journey from Ouimet (1969) to the Green Paper (1990), the authors of these reports repeated again and again the same deficiencies in Canada's sentencing laws:

- absence of any clearly articulated sentencing policy or purposes
- over-use of imprisonment as a sanction

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[3] Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969).

[4] See *Report on Dispositions and Sentences in the Criminal Process* (1977). See also Working Paper 3, *The Principles of Sentencing and Dispositions* (1974); Working Papers 5 and 6, *Restitution and Compensation* (1974); Working Paper 11, *Imprisonment and Release*; Research Paper, *Community Participation in Sentencing* (1976); Research Paper, *Studies on Imprisonment* (1976); Research Paper, *Studies on Diversion* (1975); Research Paper, *Studies on Sentencing* (1974).

[5] Government of Canada, August 1982.

[6] Government of Canada, February 1984.

[7] First Reading February 7, 1984 in the Second Session, 32nd Parliament. Bill C-19 died later that spring when an election was called.

[8] Ministry of Supply and Services Canada, February 1987.

[9] Issue No. 65, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General, House of Commons, August 16-17 1988.

[10] Ministry of Supply and Services Canada, 1990.

[11] *An Act to Amend the Criminal Code (Sentencing)*, First Reading June 23, 1992 in the Third Session, 34th Parliament.

[12] See note 2 above. First Reading June 14, 1994 in the First Session, 35th Parliament.

- the unrealistically high maximum terms of imprisonment set out in the *Criminal Code*
- the inequity of imposing mandatory minimum sentences
- the lack of legislative guidance on the type and length of sentences to be imposed for different types of offences and offenders
- widespread unwarranted disparity in sentences imposed by judges
- public dismay with parole and early release systems (i.e. absence of "truth in sentencing" in respect to the actual time served)
- almost no data and information on sentencing practices available to assist judges, lawyers, politicians and the public in applying, understanding and evaluating current sentencing practices.

Likewise the above noted Commissions and Reports were consistent in their recommendations for remedying these sentencing problems:

- enactment of a legislative statement of purposes and principles
- reassessment of maximum terms of imprisonment and elimination (or significant reduction in the use) of mandatory minimum sentences
- creation of a permanent sentencing commission to fulfill three functions
    - collection and dissemination of information on sentencing to all interested parties
    - development of presumptive or advisory sentencing guidelines for all major offences
    - conduct research and make recommendations on the most problematic areas of sentencing
- abolition of parole to achieve greater "truth in sentencing" was recommended by the Sentencing Commission.

Unfortunately, in its new sentencing laws, Parliament chose not to create a permanent sentencing commission to fulfill the three critical functions noted above. Thus, the 1996 amendments only provided a partial dose of the medicine needed to remedy our sentencing ills. Sadly, but not surprisingly, that partial dose has been largely ineffective in curing our major sentencing deficiencies.

2. The Structure of Sections 718-718.2 as enacted in 1996

In sections 718-718.2, Parliament has constructed a statement of purposes and principles which first sets out the fundamental purpose of sentencing, and then the six objectives or methods that can be used in pursuing that fundamental purpose, followed by six principles of sentencing that should be applied, the first of which is entitled the "fundamental principle" of sentencing.

a) The Fundamental Purpose. Section 718 sets out "the fundamental purpose" of sentencing as:

"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"

b) The Six Objectives. The fundamental purpose of sentencing can be pursued by applying "one or more" of the following six "objectives":

a) denunciation
b) deterrence
c) separation
d) rehabilitation
e) reparation
f) offender-victim-community restoration

c) Proportionality as the Fundamental Principle of Sentencing. Section 718.1 sets out the principle of proportionality; it is expressly entitled the "fundamental principle" of sentencing and s. 718.1 states that it "must" be applied to all sentences. It states:

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

d) Additional Sentencing Principles. The five additional sentencing principles that judges "must take into consideration" are set out in 718.2:

a) the principle that sentences should be increased or reduced in accordance with the existence of aggravating and mitigating circumstances
b) the principle of parity
c) the principle of totality
d) the principle of imposing the least restrictive appropriate sanction
e) the principle of restraint in the use of imprisonment, with particular attention to the circumstances of Aboriginal offenders

3. Amendments to the Statement of Purposes and Principles Since 1996

(a) *Amendments to Section 718*

Section 718 has only been amended once. In 2015, the words "protection of society" in the opening sentence of s. 718 and the words "harm done to victims or community by unlawful conduct" in s. 718(a) were expressly added to emphasize that the purposes of sentencing include protection of society and reparation for harm to victims and community.[13] Clearly, sentencing laws are created to assist in the protection of society.

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[13] *Victims Bill of Rights Act*, 2015 S.C. c.13, s. 23. The revisions to s.718 are noted in bold type below:
Purpose
718 The fundamental purpose of sentencing is to **protect society and to contribute,** along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by

That concept of protection of society is explicit or at least implicit in the original words in s. 718 which refer to "maintenance of a just, *peaceful* and *safe society*" [my emphasis]. Likewise, in my view, the words in the original paragraph s.718(a) "to denounce unlawful conduct" naturally include denouncing the harm that flows from that unlawful conduct to victims and/or the community.

Recommendation: While the above two phrases added in 2015 were both clearly implicit in the original s. 718 and therefore could be deleted, making those concepts more explicit, will increase the clarity of s. 718 at least marginally and therefore I recommend that the words added in 2015 be retained.

(b) *Addition of Sections 718.01, 718.02, and 718.03*

These three sections were enacted in 2005, 2009, and 2015 respectively. They are all drafted in the same fashion. They identify three types of offences: (1) offences involving abuse of a person under 18 [s.718.01][14], (2) assault offences against peace officers or intimidation of justice participants [s. 718.02][15], and (3) offences against certain animals under s.445.01(1) [s. 718.03][16]. In each of these provisions Parliament states that the sentencing judge "shall give primary consideration to the objectives of denunciation and deterrence of such conduct." The other four objectives listed in s.718, especially rehabilitation and reconciliation with victims and community, are by implication of secondary significance. Giving priority to denunciation and deterrence will normally result in a longer, stiffer "punishment".

There is value in trying to prioritize sentencing objectives. The major problem with these three provisions is the fact that they cover only three isolated, unconnected and disparate situations. These are not the most serious offences in the *Criminal Code*. Why are these three offences selected for special treatment when dozens and dozens of other important offences are not? There is no answer to that question other than "hot button, political opportunities".

Recommendation: Delete sections 718.01, 718.02 and 718.03 and look for some more generic way to prioritize sentencing objectives. The development of sentencing

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imposing just sanctions that have one or more of the following objectives:

> **(a)** to denounce unlawful conduct **and the harm done to victims or to the community that is caused by unlawful conduct**;
> **(b)** to deter the offender and other persons from committing offences;
> **(c)** to separate offenders from society, where necessary;
> **(d)** to assist in rehabilitating offenders;
> **(e)** to provide reparations for harm done to victims or to the community; and
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims **or** ~~**and**~~ to the community.

[14] *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons)*, 2005 S.C. c. 32, s. 24.
[15] *An Act to Amend the Criminal Code (Organized Crime and Justice System Participants)*, 2009 S.C. c. 22, s. 18.
[16] See footnote 13 above.

guidelines (by appellate courts or a sentencing commission) for each offence or offence group is the most effective way to meaningfully prioritize sentencing objectives.

(c) *Section 718.1 (Proportionality)*

No amendments have been made to s.718.1. By stating that proportionality is the fundamental principle in imposing a just sanction and by explaining that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender", Parliament is expressing its view that sentencing shall be conducted on a "just desserts" model.[17]

Recommendation: No changes to s.718.1 are required.

(d) *Section 718.2(b) to (e) (Other Sentencing Principles)*

The principles of parity, totality and least restrictive sanction in s.718.2(b), (c) and (d) have not been amended. In my view, they do not need to be changed.

The principle of restraint in the use of imprisonment in s.718.2(e) was amended in 2015 by adding the words "consistent with the harm done to victims or the community."[18] The original wording indicated that sentences other than imprisonment should be imposed if it is "reasonable in the circumstances" to do so. To be "reasonable in the circumstance", a sentence must take into account "the harm done to victims or the community". Thus, the new words added to 2015 simply make express what was already implicit.

Recommendation: While the additional words added to s.718.2(e) in 2015 simply make express what was already implicit, I would nonetheless be inclined to retain them in the interests of removing any future uncertainty. I do, however, issue a caveat on retaining these word in the Recommendation in Part E 4 at page 18 below.

(e) *Section 718.2(a) (Aggravating and Mitigating Factors)*

The principle in s.718.2(a) states that "a sentence should be increased or reduced to account for relevant aggravating or mitigating circumstances relating to the offence or offender". This is an important expression of how the requirement for proportionality in s.718.1 is to be achieved. But in the 1996 amendments, Parliament listed only three aggravating factors and no mitigating factors. They left the job of specifying the other 30 to 40 aggravating or mitigating factors to sentencing judges. The three aggravating factors originally listed in s. 718.2(a) are important, but not necessarily the three most important factors. For example, the nature and length of an offender's criminal record which is one of the most significant aggravating sentencing factors is not listed.

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[17] The concept of a "just desserts model" is explained in a bit more detail below at Part E 2 "Competing Sentencing Objectives".

[18] See footnote 13 above.

Section 718.2(a) has been amended five times since it was enacted in 1996. The amendments have added the following new aggravating factors: clause (iv) in 1997[19], clause (v) in 2001[20], clause (ii.i) in 2005[21], clause (iii.i) in 2012[22], and clause (vi) in 2015[23]. The content of these new aggravating clauses are not in themselves problematic. What is unsatisfactory about s.718.2(a) is the hodge-podge, ad hoc nature of listing some factors and not listing others.

Recommendation: Repeal paragraphs (i) to (vi) of s.718.2(a) and substitute the words "in accordance with the list of aggravating and mitigating circumstances listed in Appendix A". The Appendix would be best drafted and updated by a Sentencing Commission as they develop sentencing guidelines. Lists of aggravating and mitigating factors can be found in books, cases and reports.[24] Guidelines could also be developed to clarify the significance of aggravating or mitigating factors in different types of cases. For example, there is current judicial uncertainty in respect to the circumstances in which an offender's "old age" or frailty should and should not be a mitigating factor.[25]

(f) *Addition of Section 718.21*

Section 718.21 was added to the *Criminal Code* in 2003[26] as part of the reform package dealing with corporate criminal liability. If a corporation (or other "organization") is convicted of an offence, s.718.1 provides that the judge who is sentencing a corporation "shall also take into consideration" the ten factors listed in paras (a) to (j). These factors all appear to be reasonable and useful. For various reasons, which in my opinion are generally inappropriate, corporations and other organizations are virtually never prosecuted, convicted and sentenced for criminal offences. As a result, s.718.21 has received very little judicial attention. Although s.718.21 has been referred to in twenty-

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[19] *An Act to Amend the Criminal Code (Criminal Organizations)*, 1997 S.C. c. 23, s. 17.
[20] *Anti-Terrorism Act*, 2001 S.C. c. 41, s. 20.
[21] See note 14 above.
[22] *An Act to Amend the Criminal Code (Elder Abuse)*, 2012 S.C. c. 29, s. 2.
[23] *Tough Penalty to Child Predators Act*, 2015 S.C. c. 23, s. 16.
[24] See for example Allan Manson, *The Law of Sentencing* (Toronto, Ontario: Irwin Law, 2001) at Ch 7; C. Ruby, G. Chan & N. Hasan, *Sentencing*, 8th ed (Markham, Ontario: Lexis Nexus, 2012) at Ch 5; and *Daubney Report*, Issue No. 65, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General, House of Commons, August 16-17 1988 at 66-67.
[25] In a review of sentencing decisions where the offender was over 60 years of age, the authors conclude that advanced age often influences judicial discretion in sentencing. See Helen Love, Fiona Kelly & Israel Doron, "Age and Ageism in Sentencing Practices: Outcomes from a Case Law Review" (2012) 17 Can Crim L Rev 253. The authors note that courts have considered advanced age as a mitigating (and, rarely, as an aggravating) factor under s. 718.2(a). *Ibid* at 259-260. They note that suggested justifications for using old age as a mitigating factor are that the offender has a smaller portion of his/her life left to live than younger offenders, that old age is accompanied by ill health, or that the accused may have accumulated "good character" over time. Conversely, old age might not be considered a mitigating factor when the court finds that the offender has benefited from "living as a free person for the intervening years while his or her crime went undetected", or if the offender accumulated "bad character" since committing the crime, or the offender does not suffer from any significant frailty or ill health. The inconsistency in the judicial treatment of old age and/or frailty as a mitigating factor in sentencing suggests that guidelines in respect to its use would be helpful.
[26] *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, 2003 S.C. c. 21, s. 14.

nine cases available electronically, only three of those cases involved criminal convictions.[27] All the other cases involved federal or provincial regulatory offences.[28]

Recommendation: There is not enough judicial experience with s.718.21 in the criminal law context to warrant making any amendments to that section at this time.

E. Problematic Aspects with the Current Statement of Purposes and Principles

1. The Fatal Flaw: No Permanent Sentencing Commission

A statement of purposes and principles can accomplish very little by itself. It is an important starting point and a first level of guidance in imposing a fit sentence. But more specific guidance for each type of offence is also needed. Making amendments to the current statement of purposes and principles will accomplish very little unless other changes are incorporated into our sentencing scheme. As already noted, the sentencing package enacted in 1996 only provided part of the solution to the major problems in Canada's sentencing regime. The 1996 package did provide several useful changes, such as (1) the statement of purposes and principles, (2) an important new sentencing remedy – the conditional sentence – to help reduce the problem of overuse of imprisonment, and (3) improvements in the application and administration of fines which significantly reduce the use of imprisonment as a default punishment when fines are not paid. But the most important proposal for solving many of our other sentencing problems was the creation of a permanent sentencing commission which would (1) collect and disseminate important information on sentencing to all interested parties, (2) develop presumptive or advisory sentencing guidelines for all major offences, and (3) conduct research and make recommendations on the most problematic areas of sentencing.

Without a sentencing commission, some of our most challenging sentencing issues remain unanswered. Some of those important issues have already been listed on page 4

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[27] In *R. v. Metron Construction Corp*, 2013 ONCA 541 (Ont CA), the corporation pled guilty in the Ontario Court of Justice to one court under s. 220 of the *Criminal Code* of criminal negligence causing death (even though four persons died), pursuant to ss. 22.1(b), 217.1, and 219 of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge imposed a $200,000 fine. On appeal, the fine was raised to $750,000. After working together to commit fraud, in *R. v. Technique Acoustique (LR) Inc*, 2012 QCCQ 2250, and *R c Construction Exekut Inc*, 2011 QCCQ 3294, both corporations were convicted pursuant to s.380 of the *Code.*

[28] Twenty-four cases involved prosecutions for federal regulatory offences under statutes such as the *Canada Labour Code, Fisheries Act,* and *Competition Act.* In 15 of these cases, s.718.21 was considered in sentencing. The remaining 9 cases mentioned s.718.21 in passing as part of the *Criminal Code* sentencing package, but that section was not applicable or further discussed. Section 718.21 is applicable to federal regulatory offences by virtue of s. 34(2) of the *Interpretation Act*. Section 718.21 is not applicable to provincial regulatory offences (unless the province specifically adopts it for sentencing provincial cases). Nonetheless, there were two cases involving provincial regulatory offences that referred to s.718.21 by way of useful analogy.

and 5 above, such as overuse of imprisonment, significant unwarranted disparity in sentencing, overuse of mandatory minimum sentences of imprisonment and no systematic data on sentencing, no research studies on sentencing and no comprehensive approach to the development of sentencing guidelines that exist in other countries.

Unwarranted disparity in sentencing continues to exist. How widespread and how substantial is the disparity? Nobody knows for sure because there is no sentencing commission or other body to study that issue. There is no reason to believe that sentencing disparity has significantly decreased since 1996. Neither the pre-1996 nor the current sentencing purposes and principles in ss. 718-718.2 are detailed enough to help eliminate unwarranted disparity. This can be dramatically illustrated by looking at just two cases that wound their way to the Supreme Court of Canada:

(1) In *R. v. McDonnell*, [1997] 1 SCR 948, the accused was convicted of two sexual assaults seven years apart. The trial judge imposed a sentence of 12 months imprisonment for the first assault, and 6 months concurrent for the second assault, for a total of one year imprisonment. On appeal, two judges varied that sentence to five years (4 years for the first assault and one year consecutive for the second assault); the third judge thought the one year sentence imposed by the trial judge was fit and should not be varied. At the Supreme Court, four judges held that one year was unfit and that 5 years was the fit sentence, while five judges held that the one year sentence was fit and should not be varied. Thus, in total, six judges thought that 5 years was a fit sentence and seven judges thought that 1 year was a fit sentence even though they were all applying the same sentencing principles to the same case. Clearly those principles permit a wide disparity in the sentence each judge chooses to apply.

(2) A similar result can be observed in *R. v. M.L*. (2008) 231 CCC (3d) 310 (SCC). In respect to two serious sexual offences on the offender's young daughter, the trial judge imposed a sentence of 10 years on the first offence and a consecutive sentence of 5 years for the second offence, for a total of 15 years. On appeal, two judges held that 15 years was unfit and varied the sentence to 9 years (6 years for the first offence and 3 years consecutive for the second offence). At the Supreme Court of Canada, eight judges held 15 years was fit, but one judge held that it was not and would have imposed 9 years. How can three appellate judges decide that 9 years is fit, while nine other appellate judges decide that 15 years is fit in circumstances where they are all applying the same sentencing principles to the same case? Obviously the current statement of purposes and principles is not detailed enough to prevent that dramatic disparity depending on what judge is applying those principles.

In my view, the development of presumptive or advisory sentencing guidelines by a permanent sentencing commission is a critical step in achieving consistency and fairness in sentencing. Courts of appeal cannot undertake this role in a full and complete fashion. It is simply too big a task and requires information and data that is not necessarily available to courts of appeal. It needs to be done by a permanent sentencing commission.

Roberts and Bebbington[29] are correct in suggesting that the absence of a sentencing guidelines scheme in Canada puts us out of sync with a large number of other countries. The first task of a permanent sentencing commission should be to study the various models of sentencing guidelines used elsewhere and to recommend, for Parliament's approval, a scheme that makes the most sense for Canada.

Why did the 1996 sentencing amendments not establish a permanent sentencing commission? There really isn't a good reason! A permanent sentencing commission was recommended by the Canadian Sentencing Commission (1987), by the Daubney Report (1988) and by the government's Green Paper (1990). But when Bill C-90 was introduced by the Conservative government in 1992 as its response to the sentencing reforms recommended by these three bodies, it did not include the establishment of a sentencing commission. Why is that?

There is a political explanation for that omission. In February 1992, in the name of reducing Canada's large deficit, the Conservative government announced the sudden abolition of six agencies, including the Law Reform Commission of Canada and the Economic Council of Canada. As a government restraint policy, the elimination of these six agencies did very little to reduce the size or cost of government which at the time consisted of "over 400 separate organizations and advisory bodies… [including] 80 departmental agencies, 56 Crown corporations and more than 200 boards, tribunals, councils and other advisory bodies."[30] Indeed, many insiders believed that the abolition of these commissions was a political move, not a fiscal one. Those insiders suggested that the Conservative government wanted to get rid of the Economic Council because the government was unhappy with various reports from the Council, and in particular a report from the Council that suggested separation of Quebec from Canada might not have the dire economic consequences that the Conservative government maintained it would have.[31] In order to provide camouflage for the politically motivated abolition of the Economic Council, the government abolished five other commissions at the same time to make it less obvious that they were gunning for the Economic Council. So having just abolished six commissions in the name of fiscal restraint, it is not surprising that the Conservative government a few months later did not want to be seen establishing a new permanent sentencing commission. Indeed, in the 1992 Budget Papers a new sentencing commission was referred to as a "deferred" organization.[32]

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[29] Julian V Roberts & Howard H Bebbington, "Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-Based Policy" (2013) 17 Can Crim L Rev 327.

[30] Government of Canada, Department of Justice, *Law Reform Agencies*, online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/lr-rd/page2.html> at footnote 53.

[31] See Economical Council of Canada, 28th Annual Review, *A Joint Venture: The Economics of Constitutional Option*s (Ottawa: 1991). See also Larry Welsh, "Federal axing called political" *The Globe and Mail* (4 March 1993) at B2.

[32] Indeed, in the 1992 Budget Papers a sentencing commission was specifically referred to as a "deferred" organization, implying that the recommendation to establish a sentencing commission may be picked up later when it was more financially opportune. See the Department of Finance, the Budge Papers (Feb. 25, 1992). Table 3.5 p. 86 from James J. Rice & Michael J. Prince, "Lowering the Safety Net and Weakening the Bonds of Nationhood: Social Policy in the Mulroney Years" in Susan D. Phillips, eds, *How Ottawa Spends, 1993-1994: A More Democratic Canada*…? (Don Mills, Ontario: Carleton's University Press, 1993) at 406.

However, when the Liberal government defeated the Conservatives in the fall of 1993 and introduced their own sentencing bill in May1994 (Bill C-41), there was no longer any reason not to include the establishment of a sentencing commission. But for some reason, the Liberal government blindly followed the Conservative government's approach on that issue, even though a sentencing commission had been so strongly supported by the Canadian Sentencing Commission, the Daubney Report, and the Green Paper. Sadly, the debate surrounding Bill C-41 in the House of Commons contained nary a word about a sentencing commission, and it was only touched on in passing in the Committee debates.

Without a permanent sentencing commission, amendments to our current Statement of Purposes and Principles will have virtually no impact on improving sentencing practices in Canada.

Recommendation: I recommend that Canada establish a permanent sentencing commission after examining other sentencing commissions for best practices. There are many good models of sentencing commissions which Canada can study as a basis for creation of its own sentencing commission; for example, the commissions in the UK,[33] New South Wales[34] and Victoria in Australia[35] provide interesting models. They are each different and they each have their own strengths. In my view it is essential that Canada create a permanent sentencing commission using the best ideas from the other sentencing commissions.

I further recommend that the Department of Justice establish a small working group to study (1) the nature, composition, appointment procedures and reporting mechanism, (2) the form and structure (i.e. the number of commissioners and the nature of their experience, etc.) and (3) the functions of the commission (i.e. sentencing data collection, reports on problematic sentencing issues, and production of guidelines of either an advisory or presumptive nature). I suggest the Working Group could be composed of three judges, two lawyers (one Crown and one defence), two academic specialists (one from law and one from criminology), and one very senior Department of Justice official, with the Working Group being supported by a small group of research assistants. The Working Group's Report and Recommendations on a permanent Sentencing Commission should be submitted within one year of the Group's appointment.

2. Competing Sentencing Objectives

Some commentators consider s.718 to be a "confusing" mix of utilitarian and dessert-based (i.e. retributivist) purposes and objectives. But when s.718 is read in context with ss.718.1 and 718.2. much of the so-called confusion disappears. The overriding sentencing requirement in s. 718 is to impose "just sanctions" and s. 718.1 states that a just sanction must be "proportionate" to the gravity of the offence [judged principally by

[33] Sentencing Council for England and Wales, Website online: < https://www.sentencingcouncil.org.uk/ >.
[34] New South Wales Sentencing Council, Website online: < http://www.sentencingcouncil.justice.nsw.gov.au/>.
[35] Victoria's Sentencing Advisory Council, Website online: < https://www.sentencingcouncil.vic.gov.au/>.

the nature and degree of harm caused or threatened] and the degree of responsibility of the offender. In combination, these two sections establish a just desserts model.[36] The principles of parity, totality and restraint in s.718.2 help to further define what a "just" and "proportionate" sentence should look like.

It is true that s.718 sets out various competing utilitarian objectives such as denunciation, deterrence, separation, rehabilitation, reparation and accountability (i.e. acknowledgment and responsibility by offenders of the harm done). But a proper contextual reading of s.718 and 718.1 makes it clear that these utilitarian objectives are only be pursued within the confines of what otherwise constitutes a just and proportionate sanction. Roberts and von Hirsch have suggested a way to make the just-desserts nature of the current statement more clear.[37] They would simply delete the six competing utilitarian objectives listed in s.718. However, I don't believe it is wise or necessary to eliminate the six objectives. When read in their proper context, the utilitarian objectives can and should be pursued, but only in so far as they operate within the confines of a "just sentence". The attempt to prioritize objectives in ss. 718.01, 718.02 and 718.03 is too ad hoc, arbitrary and incomplete to be retained and thus I have recommended that those three sections be deleted, as noted in Part D 3(b) at page 7 above.

Recommendation: It is not necessary to eliminate or alter the six competing objectives in s. 718. What is required is some direction on situations or types of cases in which one objective should be emphasized more than another. That direction needs to be grounded in the nature of the offence, the degree of harm caused and the moral culpability or blameworthiness of the offender. Those factors are informed by the nature and degree of aggravating and mitigating circumstances. This sort of detailed direction or guidance is the type of function that a sentencing commission can fulfill.

3. Aggravating and Mitigating Factors

As already noted in Part D 3(e), the list of aggravating and mitigating factors in s. 718.2(a)(i) is woefully incomplete; it is also arbitrary in respect to the aggravating factors that are currently listed. My recommendation in Part D 3(e) is to develop a full list of potential aggravating and mitigating factors and also to conduct research and commentary on the nature and degree of relevance of some of the trickier aggravating and mitigating factors. This work would be best done by a sentencing commission or by a similar body.

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[36] Philosophers and sentencing practitioners and theorists have long debated the justifications for imposing punishment/sanctions on offenders. For several centuries the predominate justification was retribution as articulated by Kant and Hegel, amongst others, more than two centuries ago. Justice desserts can be seen as a modern revision of Kant's retributivist philosophy. Forty years ago, Andrew von Hirsch became the most well-known advocate of "just desserts' in his 1976 book, *Doing Justice: The Choice of Punishment*. See also von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993). A just desserts model is essentially a model based on the principle of proportionality. Within the outer bounds of a proportionate sentence, other utilitarian justifications such as deterrence, denunciation and rehabilitation can operate.

[37] Roberts & von Hirsch, *supra* note 1.

4. Section 718.2(a)(i): *Motivated by Bias, Prejudice or Hate*

If the above recommendation to prepare a reasonably full list of aggravating and mitigating factors is not followed, then at least an amendment should be made to s. 718.2(a)(i) which treats crimes motivated by bias, prejudice or hate toward designated groups as an aggravating factor. Commentators have identified multiple problems in the use of s.718.2(a)(i) including concern over evidentiary issues[38] and lack of legislative and judicial guidance on how much impact hate motivation should have on the quantum of a sentence. This has led to inconsistent tests.[39] In cases where s.718.2(a)(i) is successfully used as an aggravating factor, the Crown must prove beyond a reasonable doubt[40] that the offender was "motivated to act" on the basis of bias, prejudice or hate in respect to one of the prohibited grounds. Some commentators have observed that it is extraordinarily difficult to delve into the mind of the offender to determine whether the criminal act was the product of a particular hate, bias or prejudice.[41]

This criticism is overstated. An offender's motivation will sometimes be unmistakably clear based on the offender's words and actions. Other times, the court will have to infer the offender's motivation based on less obvious words and actions. But drawing inferences as to motivation is very similar to drawing inferences as to an accused's intent which is necessary in all subjective *mens rea* offences, and this is a matter which judges

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[38] See, for example, discussion in Michelle S Lawrence & Simon N Verdun-Jones, "Sentencing Hate: An Examination of the Application of s. 718.2(a)(i) of the *Criminal Code* on the Sentencing of Hate-Motivated Offences" (2011) 57 Crim LQ 28. See also discussion in Mark Carter, "Addressing Discrimination through the Sentencing Process: *Criminal Code* s. 718.2(a)(i) in Historical and Theoretical Context" (2001) 44 Crim LQ 399.

[39] See, for example, discussion in Julian V Roberts & Andrew JA Hastings, "Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*" (2001) 27 Queen's LJ 93; see also Lawrence & Verdun-Jones, *supra* note 38.

[40] The burden of proving aggravating factors is on the Crown on the basis of proof beyond a reasonable doubt: s.724(3)(e). See also Lawrence & Verdun-Jones, *supra* note 38 at 38.

[41] Sean Robertson, "Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R. v. Cran*" (2005) 50 CLQ 482 at 484. He states: "many commentators have argued that the requirement of proving motivation beyond a reasonable doubt is so difficult as to render such provisions inoperable and undermine their aims for two reasons. First, since motive is a deep mental state it is inherently difficult to prove and easy to rebut, especially in cases involving hate where intoxication is almost always a factor… Second, commentators have also lamented the difficulties inherent in the admissibility of evidence necessary to prove bias. In the absence of evidence of a motive from bigoted statements of the accused before, during, or after the commission of the offence or through biased acts, such as painting swastikas on buildings, proof of bias would have to be drawn from the accused's past (*e.g*. with reference to a history of bigoted comments, membership in hate groups, etc.). However, evidence of an accused's character is *prima facie* inadmissible because it "invites the trier of fact to convict on the ground that the accused is a bad person, not because they are convinced that the accused committed the offence"" (at 492-493). Lawrence and Verdun-Jones note that the articles cited by Robertson in this argument pre-date the coming into force of s. 718.2(a)(i). It is also important to note that rules of evidence such as the admissibility of character evidence that apply at trial are not, for good reasons, strictly followed at sentencing hearings. Also see Lawrence & Verdun-Jones, *supra* note 38 at 38. Courts have drawn the necessary inferences from sources including: the *actus reus* of the offence, the date of the offence, the location of the offence, the words spoken by the offender, the items in the offender's possession, the conduct of the offender, the offender's membership in a certain group, the victim's membership in a ground, and/or the activities of the victim.

are very familiar with. Yes, sometimes the available evidence of "motivated by hate" will be insufficient to prove this aggravating factor beyond a reasonable doubt, but those are exactly the cases where our system should not increase the severity of a sentence on an alleged, but unproven aggravating factor.

A more significant concern identified by some commentators[42] is the degree or extent to which the offender's crime must be "motivated" by bias, prejudice or hate. The wording of s. 718.2(a)(i) currently requires evidence that the offence "was motivated by" bias, prejudice or hate. The provision is silent on the degree of motivation. Does the crime have to be motivated by hate solely, substantially, significantly, or just a little. Lawrence and Verdun-Jones suggest that to date the judges have used three different adjectives, which represent three different tests, in deciding whether a crime is motivated by hate under s. 718.2(a)(i): (1) offences motivated *predominantly* or *primarily* by bias, prejudice of hate;[43] (2) offences in which bias, prejudice or hate was a *significant contributing* factor; [44] or (3) offences *only partly* motivated by bias, prejudice or hate.[45]

Since bias, prejudice and hate violate our fundamental values of human dignity and equality, it is my view that a crime which is motivated by bias, prejudice or hate to some degree that is significant (i.e. more than trivial) should count as an aggravating factor.[46] Although perhaps more contentious, bias, prejudice or hate should also be considered an aggravating factor when an offender is reckless, willfully blind or penally negligent in respect to the hate-causing effect of their offence. The quantum of that aggravation should increase as the degree of motivation increases and as the extent of the hate-related harm increases.[47]

While some commentators have suggested that the word "hate" should be defined in the provision, [48] I think it is sufficiently understood by the public and the courts and therefore it is unnecessary to include a definition of hate.

Recommendation: I recommend that s. 718.2 (e)(i) be amended as follows. The amendments are noted in bold type below.

> Evidence that the offence was motivated **in a significant (i.e. more than trivial) way** by bias, prejudice or hate**, or the offender was reckless or penally negligent in respect to the harm that would probably be caused by his or her prejudice, bias or hate,** based on race, national or ethnic origin, language, colour, religion,

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[42] Roberts & Hastings,supra note 39 at 116; Lawrence & Verdun-Jones, supra note 38 at 50-51, see Table 4.
[43] See e.g. *R v Baxter*, [1997] OJ No 5811 (Pro Div) and Roberts and Hastings, *ibid.*
[44] See e.g. *R v Nash*, [2002] OJ No 3843 (CJ) and *R v Gholamrezdehshirazi* (2008), 451 AR 326.
[45] See e.g. *R v Vrdoljak* (2002), 53 WCB (2d) 254 (Ont CJ) and *R v Van-Brunt*, 2003 BCPC 559.
[46] The test of "significant (i.e. more than trivial)" is the same test that is used in criminal law in deciding whether an accused's conduct is a "legal cause" of the criminal harm: *R. v. Nette*, [2001] 3 S.C.R. 488.
[47] Craig S MacMillan, Myron G Claridge, & Rick McKenna, "Criminal Proceedings as a Response to Hate: The British Columbia Experience" (2002) 45 CLQ 419, support the partial-motiving-factor test but as noted in Lawrence & Verdun-Jones, *supra* note 38 at n.61, it has not received widespread judicial consideration. Lawrence and Verdun-Jones argue in favour of the significant contributing factor standard because this interpretation is more in line with the strict construction rule regarding penal legislation.
[48] MacMillan, Claridge & McKenna, supra note 47 at 460.

> sex, age, mental or physical disability, sexual orientation or any other similar factor.

5. Section 718.2(e) – Restraint in Imprisonment with Particular Attention to Aboriginal Offenders

There has been extensive commentary discussing the application and use of s.718.2(e).[49] One of the strongest criticisms of the section is that it has been ineffective; the overrepresentation of Aboriginal people in the prison system has not improved, and has indeed worsened since the introduction of s.718.2(e).[50] In *R v Ipeelee*, the Court notes that both the jurisprudence and academic commentary indicate "the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*."[51] In *Ipeelee* the Supreme Court of Canada noted that the historical and social context of Aboriginal offenders can significantly diminish the moral culpability of Aboriginal offenders.[52] Moreover, the Supreme Court encourages judges to take judicial notice of background and systemic factors impacting Aboriginal people:[53]

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.

Many commentators have lauded the decision in *Ipeelee* and argue it invites judges to seriously consider social, economic and political factors in sentencing, including the

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[49] See Philip Stenning and Julian V Roberts, "Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask L Rev 137; Jonathan Rudin and Kent Roach. "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 Sask L Rev 3; Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Consitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR (2d) 461; Jonathan Rudin, "There Must Be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10, and the Charter of Rights (2013) 17 Can Crim L Rev 349 and Jeanette Gevikoglu, "*Ipeelee*/*Ladue* and the Conundrum of Indigenous Identity in Sentencing" (2013) 63 SCLR (3d) 205.

[50] That worsening is described by the Supreme Court in *R. v. Ipeelee*, 2012 SCC13, at para 62.

[51] *Ibid* at para 63. The Court tackles three criticisms (at para 64) advanced in the commentary, and argues that these three criticisms are based on a misunderstanding of s. 718.2(e): "(1) sentencing is not an appropriate means of addressing overrepresentation; (2) the Gladue principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity." This last criticism, and the Court's discussion, is particular relevant to the issues of social disadvantage which is discussed further below.

[52] *Ibid* at para 73.

[53] *Ibid* at para 60.

responsibility of the state in the perpetration of crimes.[54] However, other commentators argue the decision in *Ipeelee* treats indigenous offenders in a way that enforces problematic power differentials. These commentators instead call for more profound changes to fulfill the promises of s.718.2(e).[55]

Recommendation: At this time I do not recommend any changes to s.718.2(e). The Supreme Court of Canada in *Ipeelee* has provided a thorough analysis of the section, including offering guidance on what the lower courts should be taking into account when sentencing an Aboriginal offender pursuant to s.718.2(e). Instead of legislative change to this provision, what is needed is a shift in the way the courts deal with this provision. For example, sentencing judges need to put more emphasis on the significant role social context plays in lowering the degree of responsibility of the offender. More importantly, sentencing judges need realistic options other than imprisonment for Aboriginal offenders. These realistic options require (1) the abolition of the restrictions placed on the availability of conditional sentences in the past 10 years, and (2) more community-based Aboriginal treatment and healing programs. If the prosecutor and the judge were to use aboriginal restorative justice processes more often rather than the normal sentencing process, they could better identify some viable options available in the offender's community.

My one hesitation in recommending no changes to the current wording of s. 718.2(e) is that the addition of the words in 2015 "and consistent with the harm done to victims or to the community" could potentially be seen by some judges as a message from Parliament to favour a victim's desire for "more jail time" over the systemic need to lower the rate of imprisonment of Aboriginal offenders. Such an interpretation would not be a correct interpretation in my view; it ignores the statistical reality that Aboriginal offenders are already being punished more severely than non-Aboriginals. Section 718.2(e) is a Parliamentary direction to use restraint in respect to imprisonment as a sanction; it indicates that non-imprisonment should be imposed whenever it is "reasonable in the circumstances". That legislative direction includes a consideration of a range of factors including harm to the victim and community. Thus, the addition of those words should not result in a reduction in the use of sanctions other than imprisonment. However, if the words added in 2015 do have that effect, then I would recommend their removal.

6. Social Disadvantage

Several commentators argue that social context and social disadvantage should be considered mitigating factors in sentencing because they impact on an offender's degree of responsibility.[56] These commentators applaud the courts' use of social context evidence in

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[54] Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Consitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR (2d) 461 at para 38.
[55] Gevikoglu, *supra* note 49 at para 24 and Jonathan Rudin, "There Must Be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10, and the Charter of Rights (2013) 17 Can Crim L Rev 349 at 352.
[56] See Senem Ozkin, "Down but Not Out: Re-Evaluating the Use of Social Context Evidence in Sentencing" (2012) 32 Windsor Rev Legal & Soc Issues 159 at 164-165; Dale E Ives, "Inequality, Crime and Sentencing*: Borde, Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30 Queen's LJ 114 at 148; J Andres Hannah-Suarez, "Moral Luck in Canadian Law: Socio-

Gladue[57], Ipeelee[58], *Borde*[59], and *Hamilton*[60], but argue that the limits courts have placed on the use of such evidence has reduced the potential for social context evidence to effectively mitigate sentences. Indeed, after *Gladue,* even for Aboriginal offenders, courts have often limited the use of social context evidence where the offence is "violent and serious." Ozkin argues this is not the correct interpretation of *Gladue,* and the Supreme Court of Canada in *R v Wells*, stated that *Gladue* "did not foreclose the possibility that, in appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime."[61] This point was also emphasized in *Ipeelee,* where the Court made it clear that s.718.2(e) applies to all crimes, including "serious" crimes.[62] Furthermore, commentators argue that courts have unreasonably limited the use of social context evidence where there has been a failure to link such evidence (especially systemic factors) to the commission of a crime.[63]

Section 718.2(e) has been cited as authority for considering social disadvantage for Aboriginal and non-Aboriginal offenders.[64] Hannah-Suarez states this is precisely what the courts did in *Borde* and *Hamilton*.[65] Commentators argue that the remedial nature of s. 718.2(e) and interpretive principles support the use of acknowledging social context and social disadvantage for Aboriginal and non-Aboriginal offenders.[66] In *Ipeelee*, the Supreme Court of Canada stated:

> …Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ specifically state, at para. 69, in *Gladue*, that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender".[67]

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economic Deprivation, Retributive Punishment and the Judicial Interpretation of Section 718.2(e) of the *Criminal Code*" (2003) 2 JL & Equal 255 and Richard F Devlin & Matthew Sherrard, "The Big Chill? Contextual Judgment after *R. v. Hamilton and Mason*" (2005) 28:2 Dal LJ 409 at 423.

[57] [1999] 1 SCR 668.

[58] *Supra* note 50.

[59] (2003) 172 CCC (3d) 225 (O.C.A.).

[60] (2003) 172 CCC (3d) 114 (O.S.C.) aff'd but not on the merits (2004) 186 CCC (3d) 129 (O.C.A.)

[61] *R v Wells*, [2000] 1 SCR 207, at para 49.

[62] *Ipeelee*, supra note 50 at 84-87.

[63] Ozkin, supra note 56 at 171.

[64] Hannah-Suarez, *supra* note 56 at 280. Hannah-Suarez acknowledges that in *Gladue* the Court implied that the relative socio-economic deprivation of indigenous people was the fault of Canadian society, but argues that "unless we are willing to say that society is less to blame for the socio-economic disadvantage of other marginalized groups of offenders, logical consistency requires that a consideration under section 718.2(e) be expanded beyond Aboriginal offenders" (at 279).

[65] Hannah-Suarez, supra note 56 at 280.

[66] Richard F Devlin & Matthew Sherrard, "The Big Chill? Contextual Judgment after *R. v. Hamilton and Mason*" (2005) 28 Dal LJ 409 at 423. The authors go on to argue (at 427) that "the systemic forces of racism in Canada that affect African-Canadians are similar to those experienced by Aboriginal people… [and similar] to Aboriginal offenders, African-Canadian offenders are subject to a disproportionate level of incarceration relative to their statistical representation in Canadian society."

[67] *Ipeelee, supra* note 50 at 77.

Support for consideration of socio-economic circumstances is not confined to s.718.2(e).[68] Section 718.1 requires a sentence to be proportionate to the "blameworthiness of the offender". The offender's blameworthiness is clearly affected by the offender's degree of social disadvantage. Nonetheless there is legitimate disagreement whether the wording of section 718.2 should be amended to include specific reference to social disadvantage as a relevant sentencing factor for all offenders.[69] In my view, failure to expressly add "social disadvantage" as a mitigating factor will lead to inconsistency in its use as a mitigating factor.[70]

Recommendation: I recommend that social disadvantage be included as a separate mitigating principle. It could be added as a new paragraph numbered s.718.2(f), or it could be added as a mitigating factor in s.718.2(a). Finally it could be added as a separate subsection to s.718.1, acting as a further explanation of "the degree of responsibility of the offender". In my view it would be best to add it as a new provision numbered s. 718.2(f) along the following lines:

> "(g) in determining 'the degree of responsibility of the offender' and in applying restraint in the use of imprisonment, the court shall consider the nature and extent of the offender's social disadvantage and how that disadvantage may have had an effect on the commission of the offence".

F. Other Problematic Sentencing Issues

Since this paper is already well over the 10 page/5000 word suggested limit, I will identify, but not analyze, a few other important problems in Canada's sentencing scheme.

1. The Problem of Over-imprisonment

Section 718.2(e) directs courts to impose "all available sanctions other than imprisonment that are reasonable in the circumstances". But this provision is not being followed.

- Canada has had, both before and after the 1996 sentencing amendments, a very high rate of imprisonment when compared to other Western countries (except the United States)[71]

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[68] Hannah-Suarez, supra note 56 at 273.
[69] Ives, supra note 56 at 154.
[70] *Ibid.*
[71] Walmsley (2015) "World Prison Population List", 11th ed (London: Institute for Criminal Policy Research, 2015), online: <http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf>; Walmsley (2015) "World Prison Population List", 3rd ed (London: Home Office Research, Development and Statistics Directorate, 2015), online: <http://www.apcca.org/uploads/3rd_Edition_2001.pdf>; Walmsley, "World Prison Population List", 2nd ed (London: Home Office Research, Development and Statistics Directorate, 2015), online: <https://static.prisonpolicy.org/scans/rds/r116.pdf>; Warren Young & Mark Brown (1993) "Cross-national Comparisons of Imprisonment" 17:1 Crime & Just 1 at 5

- Canada's already high rate of imprisonment has increased dramatically in the past ten years (in spite of drops in reported crime). That increase is due to a concerted effort on the part of the Conservative government to enact legislation that is intended to send more offenders to prison.[72]

  Note: The federal penitentiary population in 2004 was approximately 12,000 and in 2014 it was over 15,000; total Canadian prison population in 2001 was 35,500 and in 2013, it was over 41,000. The rate of imprisonment of Aboriginals and Blacks during these time periods increased more rapidly than non-Aboriginal and non-Black offenders.

- To reverse this trend many steps need to be taken, including

  (1) re-asserting the fundamental objective of reducing rates of imprisonment for all offenders
  (2) giving more prominence in s. 718-718.2 to the principle of restraint in the use of imprisonment.
  (3) providing judges with more sentencing options other than imprisonment; this means abolishing the restrictions on conditional sentences introduced by the Conservative government;

  Note: Conditional sentences are currently not available for any offence with a mandatory minimum term of imprisonment. By increasing the number of offences that carry mandatory minimums, the government has automatically excluded conditional sentences for all these offences. Thus most mandatory minimums need to be abolished, or the provision excluding conditional sentences for offences with mandatory minimums needs to be abolished.

2. Significant unwarranted disparity in sentencing. See a brief discussion of this point at pages 11-12 in the context of the need for a permanent sentencing commission.

3. Absence of Adequate Appellate Review of Sentences and the Infrequency of the Appellate Guideline Judgments

4. Absence of Any Direction by Parliament or the Courts as to the Appropriate Amount of Increase or Decrease for Specific Aggravating and Mitigating Factors

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[72] These Conservative government amendments include:
(i) the restrictions on the use of conditional sentences
(ii) the increase in the number of mandatory minimum sentences
(iii) the reduction in credit for pre-trial and pre-sentence detention
(iv) the tightening of parole release laws
(v) the abolition of the faint hope clause for first and second degree murder and provisions allowing parole ineligibility periods for multiple murders to be made consecutively.

5. Consideration of the role of victims in the sentencing process, and in particular, whether victims should be granted a full participatory role in the ordinary sentencing process, as they are in a restorative justice proceedings.