



**SPIRIT OF THE PEOPLE**  
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On behalf of the Board of Directors for Spirit of the People Aboriginal Support and Healing Center Society, it is my pleasure to welcome everyone to "Justice Requires Humanity - Gladue: A Message for the Millennium". We would first and foremost like to thank the Coast Salish Nation for allowing us to host this symposium on their traditional territory. Spirit of the People enlisted the funding, support and collaboration of several individuals and organizations without whom this project would have been impossible. In recognition of this overwhelming community involvement and support, the Board of Directors would like to gratefully acknowledge our founder and volunteer Executive Director, Shirley Lang, for her vision and unwavering commitment to build bridges between First Nations communities and the justice system. To research and compile the Gladue Source book, Shirley enlisted Renee Racette, Devinder Basran and Diana Clarmont, three very talented, vibrant and compassionate women. Without the generous contributions from BCGEU, this source book would not have been possible at this time. Thank you, James Cavalluzzo for your incredible magic. We are very appreciative of Larry Wartel for opening doors that we never thought were there.

The objective of this symposium is to educate and facilitate discussion among the various components of the justice system gathered here and the Aboriginal people who are directly involved with this same justice system. Everyone here must have, at one time or another, asked themselves why Aboriginal people are over-represented in our provincial prisons and federal penitentiaries. Is the problem with the Aboriginal people or with the justice system? Functions such as this serve to address that question and raise overall awareness of the problem and its origin.

In the last century the Canadian government "enacted laws depriving Aboriginal people of the right to contract, sell property, engage in business, establish successful farms, vote, go to court, raise their children, practice their spiritual beliefs, manage their own affairs and select their governments in accordance with their traditions. Many Aboriginal children were removed from their homes and raised in oppressive, often racist residential school environments where they were told it was 'bad to be an Indian' and were punished for merely speaking their own languages." In light of these facts, "it would be surprising if First Nations people did not experience ongoing conflict with, and within, the society which had established such practices." It seems safe to assume that being stripped of their independence, tradition and spirituality caused, or at the very least contributed significantly to, First Nations people in constant conflict with the Canadian government, thus with the justice system. However, "identifying reasons why Aboriginal people are being over-incarcerated, and pointing the finger of blame elsewhere, is only temporarily comforting." The real question remains - what can be done about it?

Section 718(2)(e) of the Criminal Code of Canada requires Judges to consider alternatives to incarceration at the time of sentencing. In 1999, the Supreme Court of Canada interpreted this very provision in R. v. Gladue. Through Gladue our country's highest court finally saw that it was essential that the criminal justice system consider and integrate an Aboriginal perspective into its concept of justice. The historical emphasis on punishment needs to be opened to consider opportunities to restore the relationship between the offender, the victim and the community. In this instance it requires building trust between the justice system and the Aboriginal community leading to the sharing of power and resources. The legislation and judicial precedent are now in place to make this goal a reality. The overall objective of the Gladue Symposium is to make available to the various components of the justice system, the information, perspective and the opportunity for dialogue. This symposium provides a venue to overcome the preconceived beliefs, unquestioned assumptions and general lack of knowledge pertaining to Aboriginal people; but more importantly what the First Nations renewal of culture can offer the justice system. We pray that our objectives will be fulfilled and that positive developments will result. Welcome everyone!! Zac Kremler, President September 27, 2001

\*.excerpts from the Foreword written by the Honorable Justice Murray Sinclair in "A Feather Not A Gavel: Working Towards Aboriginal Justice" authored by the Honorable Justice A.C. Hamilton. \* Used with permission by both authors

**Honourary Patrons:** *The Honourable Len Marchand, Okanagan Nation, Retired P.C., C.M., M.S.F., LL.D.*  
*The Honourable Mr. Justice Murray Sinclair, Q.C., Ojibway Nation, The Honourable Alfred Scow, Retired, Kwagwiltz Nation, LLB, LL.D, C.M., Mark Stevenson, Cree Nation, LLB, Councillor Helen Hughes, C.M., City of Victoria, Bill & Maria Seward, Elders, Snuneymuxw First Nation, Mavis Henry, Pauquachin First Nation, Chief Allan Claxton, Tsawout First Nation, Bob Crawford, Algonquin Nation, First Nations Protective Services*

## INFORMATION & ARTICLES REFERENCING R. V. GLADUE

### 1. THE GLADUE DECISION

- R. v. Gladue, [1999] 1 S.C.R. 688, [1999] S.C.J. No.19 (Q.L.)
- <http://www.canlii.org/ca/cas/scc/1999/1999scc21.html>

### 2. CHECKLIST

- Judge M.E. Lafond, *Section 718.2(e) of the Criminal Code: A Judge's Guide to the Process*

### 3. GLADUE ARTICLES

#### **A. Pre-Gladue**

- Associate Judge Chief Murray Sinclair, (Transcript Presentation) Elders-Policy Makers-Academics Constituency Group Meeting, April 16-18, 1997, Aylmer, Quebec

Sinclair discusses the roles that both the Canadian governments and judiciary played in the past and current day in their work toward colonialization of First Nation communities. He explains the deliberate actions taken by government to devastate the First Nations communities across Canada. Sinclair maintains there is an inherent conflict between the Aboriginal and Euro-Canadian philosophy of justice.

- "Indian Justice: Our Vision" *Justice as Healing* 2:3 (fall 1997), online: [http://www.usask.ca/nativelaw/jah\\_FSIN.html](http://www.usask.ca/nativelaw/jah_FSIN.html).

A short vision or purpose statement from the Federation of Saskatchewan Indian Nations' (FSIN) Strategic Plan for Indian Justice that declares FSIN's vision of creating a justice system that restores traditional First Nations values, and spirituality and that is respected and driven by the members of the First Nation Communities.

- Daniel Kwochka, "Aboriginal injustice: making room for a restorative paradigm" *Saskatchewan Law Review* 60:1 (winter, 1996) 153.
- "Justice Minister's Conference" *Justice as Healing* (Winter, 1995), online: [http://www.usask.ca/nativelaw/jah\\_ministers.html](http://www.usask.ca/nativelaw/jah_ministers.html)

The Justice Minister's conference was held in Ottawa, March 23-24, 1994, to discuss the renewal of the Canadian justice system. This excerpt is the Ministers' statement calling for a holistic approach in Aboriginal justice, which also includes the healing process. A statement of priorities or goals is listed regarding Aboriginal justice reform.

#### **B. Post-Gladue**

- "Aboriginal Justice Implementation Commission Final Report Chapter Six: The Courts", Aboriginal Justice Implementation Commission, March 2001, online: [http://www.ajic.mb.ca/reports/final\\_cho6.html](http://www.ajic.mb.ca/reports/final_cho6.html).

The Aboriginal Justice Inquiry's recommendations in the area of court reform were guided by a commitment to the establishment of Aboriginal justice systems. The creation of such systems requires action by both the federal and provincial governments, and is not therefore, within the mandate of this Commission. However, the AJI report also identified needed reforms to the current court system.

Aboriginal witnesses who appeared before the AJI presented compelling evidence that the Canadian justice system had failed Aboriginal people and Aboriginal communities. Witnesses argued that the system did not understand local conditions, failed to rehabilitate, and contributed to Aboriginal over-incarceration. Furthermore, despite the system's expense and power, it did not reduce crime or improve community safety. The reforms proposed by the AJI were intended to enhance community involvement in the courts, probations, and corrections, and, in effect, outline a community justice approach to justice issues.

- Philip Stenning and Julien V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001), 64 Sask. L. Rev. 137-168.
- Melanie Achtenberg, "Understanding restorative justice practice within the Aboriginal context" *Forum* 12:1 (January 2000) 32.

This article discusses the concept of restorative justice in relation to s. 718.2(e) and the overrepresentation of Aboriginal people within the prison system. It also discusses the aims of restorative justice, what it hopes to accomplish and how it can be done (with reference to sections 81 and 84).

- Ross Green, "Crime and Punishment Revisited: Why Unresolved Anger about Past Abuses has a Lot to Do with Why so Many People Continue to Offend" Briarpatch June 2000.
- Kent Roach & Jonathan Rudin "Gladue: The judicial and political reception of a promising decision" (July 2000) 42 Canadian Journal of Criminology 355-388.

Roach and Rudin seek to examine the judicial and political effects that arise from the *Gladue* decision. They feel that the sentencing innovations that result from this decision will not significantly reduce the Aboriginal overrepresentation in the Canadian prison system. Politically, s. 718.2(e) of the Criminal Code was controversial when it was first enacted by Parliament and continues to be so as some view it as a discount on sentencing based on race. In this article, the authors discuss these judicial and political factors around the *Gladue* decision.

- Sanjeev S. Anand, "The sentencing of aboriginal offenders, continued confusion and persisting problems: a comment on the decision in R. v. Gladue" (July 2000) 42:3 Canadian Journal of Criminology 412.

This paper discusses aspects of the *Gladue* decision that can be considered problematic with regards to a lack of clarity in the guidance and directions provided to the lower courts. Anand provides an alternative interpretation of s. 718.2(e) that might better address the overrepresentation of Aboriginal offenders in the prisons while helping increase restorative community-based sentencing options available.

- B.C. Ministry Attorney General, "Conditional Sentencing Pre and Post-*Proulx* Decision", *Focus*, 1:5, (November 2000)

Discusses the effect *Proulx* has had on the use of conditional sentencing.

- Cori Howard, "Racial background key part of argument at sentencing hearing", *Globe and Mail*, January 11, 1999 online: <http://www.fact.on.ca/newspaper/gm990111.html>.

This newspaper article refers to a pre-*Gladue* decision and talks about the effects the amendment will have and the varying viewpoints that people have on it.

- James [Sa'ke'] Youngblood Henderson, *Changing Punishment at the Turn of the Century: Finding Common Ground* "Changing punishment for Aboriginal peoples of Canada" Canadian Institute for the administration of Justice held in Saskatoon September 26-29, 1999 (Henderson is the Director of the Native Law Center in Saskatoon)

- Tim Quigley, *Changing Punishment at the Turn of the Century: Finding Common Ground* “Has the Role of Judges Changed...or Should It?” Canadian Institute for the administration of Justice held in Saskatoon September 26-29, 1999 “Are we Doing Anything about the disproportionate Jailing of Aboriginal People?” 42 Criminal Law Quarterly (May 1999) 129 to 160.
- David Stack, “The Impact of RCAP [Royal Commission on Aboriginal Peoples] on the Judiciary: Bringing Aboriginal Perspectives to the Courtroom” 62 Saskatchewan Law Review (1999) 471 to 514.
- Jonathan Rudin, “From Punishment to Healing” (28 September 1999) Canadian Institution for the Administration of Justice, online: <http://www.ciaj-icaj.ca/sentencing/RUDIN.html>, website: [www.ciaj-icaj.ca](http://www.ciaj-icaj.ca) or email at [ciaj@ciaj-icaj.ca](mailto:ciaj@ciaj-icaj.ca).

The concept of Restorative justice is new to Canadian justice system. Rudin shares his knowledge about the Community Council Program at Aboriginal Legal Services of Toronto, an adult criminal diversion program. Rudin discusses some of the problems Aboriginal offenders face in the criminal justice system. He states that restorative justice initiatives may not mesh with the traditional criminal justice processes since they are based on two distinct philosophies of justice.

- Jonathan Rudin, “*R. v. Gladue*: A step forward in the sentencing of aboriginal offenders” *Aboriginal Justice Bulletin* (summer 1999) 4.

This case study examines the aspect of the *Gladue* decision that relates specifically to the sentencing of Aboriginal offenders. It discusses the Supreme Court’s findings on the overrepresentation of the Aboriginal people in the criminal justice system and in the prisons. It further discusses the meaning of s. 718.2(e) of the Criminal Code after the *Gladue* decision and the challenges that arise as judges attempt to put *Gladue* into practice.

- Susan Haslip, “Aboriginal sentencing reform in Canada - Prospects for Success: Standing tall with both feet planted firmly in air”, online: [http://www.murdoch.edu.au/elaw/issues/v7n1/haslip71\\_text.html](http://www.murdoch.edu.au/elaw/issues/v7n1/haslip71_text.html)

Haslip provides a critique on the notion that s. 718.2(e) will be successful in addressing the overrepresentation of Aboriginal people in the penal institutions. The *Gladue* decision, as well as other post-*Gladue* decisions with Aboriginal offenders, is used as example to illustrate problems in applying s. 718.2(e) in a practical manner. Haslip goes on to provide a number of recommendations aimed at providing s 718.2(e) with more substance in order to allow sentencing judges and appellate courts to be effective in sentencing reform in order to reduce the number of Aboriginal people in Canadian prisons.

- “Application of s. 718.2(e) of the *Criminal Code: R. v. Gladue*” *Justice as Healing* 4:2 (summer 1999), online: [http://www.usask.ca/nativelaw/jah\\_gladue.html](http://www.usask.ca/nativelaw/jah_gladue.html).

The core issue surrounding section 718.2(e) is whether it should be understood as being remedial in nature or simply a codification of existing sentencing principles. The author explains how the section entrenches existing sentencing principles. The author takes into account the legislative history and the context of the enactment. Judges are mandated to consider all available sanctions other than imprisonment and must pay particular attention to the circumstances of offenders. They are obliged to make every effort to determine a sentence that is fit for the offender.

- Rupert Ross, “Restorative Justice: Exploring the Aboriginal Paradigm” *Saskatchewan Law Review* 59:2 (1995).

Ross compares the Aboriginal and Justice systems along seven points of difference (dealing with offenders as individuals versus products of webs of relationships, focusing on particular acts rather than seeing the acts as signals of disharmonies in the relationships between individuals, etc.). Ross uses the Hollow Water’s community holistic circle healings as an example in each of the seven points of difference that he discusses.

#### **A. PUBLIC REACTION – A SAMPLING**

- Teresa Chan, et al., “Supreme Court of Canada” *The Lawyers Weekly* (10 March 2000).

This article mentions the case of *R. v. Wells* with a focus to how violent and serious offenses would result in imprisonment for Aboriginal offenders as often as for non-Aboriginal offenders, despite s. 718.2(e)’s call for special consideration for Aboriginal offenders. Weight should be given equally to both restorative justice and other goals such as deterrence and denunciation. This article supports the 20-month custodial sentence that was initially given and the denial of the appeal for it be replaced by a conditional sentence.

- Ross Gordon Green, “Treat *Gladue* Decision as a Call to Action” *The Lawyers Weekly* (17 March 2000).

In this article, Ross Gordon Green outlines importance of the *Gladue* decision. He discusses some issues such as the need to reallocate resources to the communities (for supervision, treatment, etc.) in order to support the implementation of restorative justice. He raises the question of who is to provide the information on the systemic and background factors required in pre-sentence reports. Green also raises the issue of applying the *Gladue* decision to young offenders, as well as adult offenders.

- Anthony N. Doob, “Transforming the Punishment Environment: Understanding Public Views of What Should Be Accomplished at Sentencing”, *Canadian Journal of Criminology*, (July 2000) 323 to 340

- “Conditional Sentencing: Effective or Not”

Online: <http://cbc.ca/insidesbc/newsinreview/may2000/sentence/time.html>

- Online: [http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/095\\_2000-05-11/han095\\_1550-e.htm8/21/01](http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/095_2000-05-11/han095_1550-e.htm8/21/01)

Parliament discusses *Gladue*.

- Stewart Bell, “Woman cites Metis heritage as reason for light sentence” *National Post* (6 January 1999), online: <http://www.fact.on.ca/newpaper/np990106.html>.

This article was written prior to the Supreme Court of Canada’s *Gladue* decision when federal officials were still awaiting the high courts decision on how broadly s. 718.2(e) was to be interpreted. It discusses previous sentencing decisions and also a particular sentencing hearing in which a Metis woman was planning on using her Metis background as an argument for staying out of prison in addition to her efforts to clean up her life in the time she has appeared before the courts.

- “Badly formed sentencing” Editorial in *Ottawa Citizen*, online: <http://www.ottawacitizen.com/editorials/010405/5036666.html>.

This editorial provides an alternative viewpoint on the subject of the overrepresentation of Aboriginals in the Canadian penal institutions. It discusses the ideas of two criminologists (professors Philip Stenning of the University of Toronto and Julian Roberts of the University of Ottawa) who say that Aboriginals actually receive lower sentences than non-Aboriginals. It also goes on to talk about research from the British

Columbia Corrections Branch which implies that it is the higher crime rates, not sentencing, that results in the large numbers of Aboriginals in prison.

- Ted Morton, “Justice colour-blind; Our legal system must treat everyone equally” *Calgary Sun*, online: <http://www.sfn.saskatoon.sk.ca/~ab133/Archives/Digests/v02n800-899/v02n818.txt>.

Morton is a political science professor at the University of Calgary and a Reform “senator-in-waiting”. In this article, he takes a negative stance towards the Criminal Code amendment and refers to *Gladue* as well as other cases currently before the courts. His viewpoint contrasts the Criminal Code amendments as a law that treats Aboriginals with less harsh treatments than non-Aboriginals with a law in 1969 that treated Aboriginals with harsher treatment than non-Aboriginals.

- Michael Harris, “Time for judges to get a grip” *The Toronto Sun* (27 April 27 1999), online: <http://boards2.parentsplace.com/messages/get/ppcurrentdebates19/31.html>

Harris is very critical of the *Gladue* decision, feeling that social chaos will be created if one imposes differing sentences for the same offense. He also feels that one ends up devaluing and patronizing rather than assisting the people that one seeks to uplift with the unequal justice. The original sentence given to Jamie Tanis Gladue and her release to an electronic monitoring program after six months in jail are seen as an indication of a man’s life becoming meaningless and devalued. The reasoning behind the *Gladue* decision provided by the Supreme Court of Canada is seen as merely a political spin. Needless to say, Harris is very much against the *Gladue* decision.

- Jane George, “Supreme Court Judgement Aims to Keep Aboriginals Out of Jail” *Nunavut Edition Headline News*, (14 May 1999). Online: [http://www.nunatsiaq.com/archives/nunavut990528/nvt90514\\_07.html](http://www.nunatsiaq.com/archives/nunavut990528/nvt90514_07.html)

## 5. JUDICIAL PERSPECTIVE

- The Honourable E. D. Bayda, “Restorative Justice in Canada” *Forum on Corrections Research* 12:1 (January 2000) 28.

This article takes a look at the *Gladue* decision from the judge’s viewpoint and examines what this will mean for judges when making future decisions. Three major steps, from the judicial standpoint, are discussed that need to be taken in order for restorative justice to take hold. They are mentioned in brief as follows. One is for the judges to speak to Aboriginal offenders on their terms rather than the judge’s. The second is to have the tools and resources available within the community in order to be able to effectively implement restorative justice. The final step is to gain public support for the ideas and thinking behind restorative justice.

- Judge M. E. Turpel-Lafond, “Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*” (1999) 43 *Criminal Law Quarterly* 34, online: [http://www.usask.ca/nativelaw/jah\\_turpel-lafond.html](http://www.usask.ca/nativelaw/jah_turpel-lafond.html)

Turpel-Lafond examines the procedural implications of and the impact from the *Gladue* decision with respect to the counsel, judiciary, and aboriginal community. She addresses the questions of what the duties of the sentencing judge become and how counsel should approach the decision. This article provides a checklist of the types of inquires that should be made and of how information should be brought before the court. The defense counsel needs to help in bringing personal info to the court’s attention and the Crown needs to aid in identifying alternatives to incarceration. There is an impact on the judiciary by more time being spent on the sentencing process in order to process all the additional information, more education needed regarding the Aboriginal peoples in Canada, and more emphasis on judicial independence in light of criticism and public attack as a result of the application of the *Gladue* principles. There is also a need to ensure that restorative justice is not passed off onto the Aboriginal communities for them to fix on their own, rather there must be enough resources in the communities in order for them to be able to handle the increased demand.

- Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles*, 1997, available from Aboriginal Justice Directorate Department of Justice of Canada, Ottawa, Ontario, K1A 0H8, (613) 941-2974

This article provides an explanation of use of Circles in resolving conflict. Stuart clarifies myths related to the use of Circles. He explains how community involvement is an integral part of healing work. Governmental agencies also have a responsibility in providing support to the participants in Circles. The Circle process is a holistic approach to dealing with conflicts and justice. Also included is a list of “what not to do in circles” complimented with explanation. Stuart compares and critiques the court process and the traditional principles of peacemaking Circles.

- The Honourable E. D. Bayda, “The Theory and Practice of Sentencing: Are They on the Same Wavelength?” *Justice as Healing* 2:3 (fall 1997), online: [http://www.usask.ca/nativelaw/jah\\_bayda.html](http://www.usask.ca/nativelaw/jah_bayda.html).

In this article, Bayda takes a look at s. 718.2(e) in theory and practice by examining the fictional case of a young Aboriginal offender and the questions that can arise in the judge’s mind when considering the best sentence in consideration of each element with s. 718. It also discusses how negative public opinion can place a judge in a dilemma regarding the public’s concept of a good sentencing system (i.e. strict sentences with imprisonment) and the judge’s own ideas on retributive justice and restorative justice.

- The Honourable E. D. Bayda, “Part Two: The Theory and Practice of Sentencing” *Justice as Healing*, 2:4 (winter, 1997), online: [http://www.usask.ca/nativelaw/jah\\_bayda2.html](http://www.usask.ca/nativelaw/jah_bayda2.html).

Bayda continues this look at the theory and practice of sentencing by first defining restorative and retributive justice, including a chart compiled by Professor Zahn that contrasts some characteristics and implications of these two concepts of justice. Mention is made of the Japanese model of a two-track judicial system in which there are separate formal and informal tracks that operate in parallel but have dependence and interaction between them. Bayda presents a discussion as to how restorative justice can be implemented using such suggestions as changing statutory laws, jurisprudence as well as our psyche.

- Restorative Justice Needs Assessment - Prepared for the Ministry of Attorney General of BC

This report canvasses the views and perspectives of members of the judiciary, Crown and defense counsel regarding restorative justice. Interviews were conducted with a select group using a standardized set of questions provided by the Ministry of the Attorney-General. The needs discovered were as follows: resource issues, properly staffed and funded program initiatives; workload and time pressures are major factors behind rigidity and inflexibility in the sentencing circles; better education and information regarding community-based resources and options; judges want appropriate and well-thought-out proposals put before them with appropriate community backing in place; and better resourcing of probation service to facilitate more widespread option of restorative measures. A final need was education about community-level issues, priorities, and resources that could be drawn upon to support the increased movement of the criminal justice in a restorative direction and better public education regarding criminal justice issues for better community involvement and to breakdown media sensationalism and bias in reporting of justice issues.

## 6. ALTERNATIVES TO SENTENCING

### *Canadian*

- Hon. A.C. Hamilton, *A Feather Not a Gavel: Working Towards Aboriginal Justice*, (Winnipeg: Great Plains Publications, 2001).

Interweaving personal stories from his many years as a lawyer and judge with concrete recommendations for reform, Hamilton provides a sensitive blueprint for overhauling a system, which is a clear failure for everyone involved. "A Feather, Not a Gavel" is must reading for anyone who appreciates the need for change on this fundamental issue of "justice for all."

- Gina Wilson, "Enhancing the role of Aboriginal communities in corrections" *Forum* 12:1 (January 2000) 3.

This article discusses how the Aboriginal communities are taking an active role in corrections and how the two are working together. It talks about various healing lodges and other minimum security facilities that are available to Aboriginal offenders.

- Neil Bennet, "Improving partnerships with Aboriginal communities" *Forum* 12:1 (January 2000) 5.

Bennet's article talks about improving relations with Aboriginal communities and having them take on an active role as service providers and advisors on both policy formulations and policy implementation. He also discusses s. 81 and s. 84, which focus on the release of Aboriginal offenders to Aboriginal communities, as well as the Correctional Service of Canada's Corporate Objectives 3 (to increase the number of Aboriginal offenders who are successfully reintegrated) and 7 (to expand partnerships and consultations as a means to effectively achieve their objectives and to influence the development of criminal justice policy).

- Lawrence A. Ellerby & Jonathan H. Ellbery, "The role of traditional healers in the treatment of Aboriginal sexual offenders" *Forum* 12:1 (January 2000) 40.

This article provides an example of including Elders or traditional healers in treating Aboriginal offenders. A qualitative study was conducted in order to understand and evaluate the role of Elders and traditional healers. The highlights of this study are presented in this article with some example of comments made by the participants. The five primary areas of investigation were the Elders' attitudes towards and understanding of sex offenders, the role of Elders in sex offender treatment, the working relationship between Elders and clinicians, the traditional approaches employed in the healing of sex offenders, and the Elders' views on the assessment of sex offenders.

- "Restorative Justice in Canada: A Consultation Paper" (May, 2000), online:  
<http://canada.justice.gc.ca/en/ps/voc/rjpap.html>

An overview of restorative justice; this paper discusses the nature and principles of restorative justice. Restorative justice is "an approach to crime that focuses on healing relationships and repairing the damage crime causes to individuals and communities." The article features a few core program models. Governments and community members have an important role in restorative justice work. The paper discusses the effects of such processes on the victim, appropriate offences for restorative processes, accountability issues, training and standards of practice.

- *Link*, Aboriginal Justice Learning Network, 1:8 (Summer 2000)

This journal briefs other alternatives in current practice in Canada.

A short article about community based justice. The journal features an article describing the Wet'suwet'en Nation's Unlocking Aboriginal Justice Program as a pre and post charge diversion program for Aboriginal youths. To participate in the program the accused must accept responsibility for his or her actions. This process is highly structured and requires the offender to work through highly involved stages.

The Aboriginal Justice Learning Network has a new website at:  
<http://www.canada.justice.gc.ca/en/ps/ajln/index.html>.

- Ross Green, *Justice in Aboriginal Communities: Sentencing Alternatives*, (Saskatoon: Purich Publishing, 1998).

Ross Green looks at the evolution of the Canadian criminal justice system and the values upon which it is based. He then contrasts those values with Aboriginal concepts of justice. Against this backdrop, he introduces sentencing and mediation alternatives currently being developed in Aboriginal communities, including sentencing circles, elder and community sentencing panels, sentencing advisory committees, and community mediation projects. At the heart of the book are case studies of northern communities, which Green uses to analyze the successes of and challenges to the innovative approaches to sentencing currently involving in Aboriginal communities across the country. He concludes with a discussion of the ways in which the Canadian criminal justice system can facilitate or obstruct such innovations.

- "Sentencing Circle: a General Overview and Guidelines" *Justice as Healing* 3:3 (Fall 1998), online: [http://www.usask.ca/nativelaw/jah\\_circle.html](http://www.usask.ca/nativelaw/jah_circle.html)

This article is useful for those who wish to gain an understanding of sentencing circles and the rules governing them. It also discusses the involvement what requirements of judges, lawyers, police, the community, and the offender as well as the sentencing options available.

- James W. Zion, "Punishment versus Healing: How does Traditional Indian Law Work?" *Justice as Healing* 2:3 (fall 1997), online: [http://www.usask.ca/nativelaw/jah\\_zion.html](http://www.usask.ca/nativelaw/jah_zion.html).

Zion provides a comparison between western law (i.e. punishment) and Aboriginal law (i.e. healing).

- Jean-Paul Restoule, "Moving Toward Native Justice: Intercultural Communication in Aboriginal Sentencing Circles in Canada" *Indigenous Communications* 3:97, online: <http://www.wacc.org.uk/media/restoule.html>.
- Julian V. Roberts & Carol La Prairie, "Sentencing Circles: Some Unanswered Questions" (1996) 39 *Criminal Law Quarterly* 69.

The primary focus of this article is to discuss the utility of sentencing circles to non-Aboriginal culture. After a brief description of sentencing circles, a critical examination is made. Doubt is expressed at the amount of impact sentencing circles have had or can actually make in terms of reducing recidivism, preventing crime, reducing costs, advancing the interests of victims and promoting solidarity among community members. The authors believe that sentencing circles produce wild disparities in treatment and national standards need to be developed in order to ensure a consistent application of the circles across the country. The authors feel that the number of cases which could actually benefit from circles is small and that sentencing circles are a retrograde rather than progressive step when viewed in the context of promoting a more uniform and principled approach to sentencing across the country. This article calls for research carried out by disinterested researchers (rather than advocates or critics) that would produce rigorous scientific evidence on whether sentencing circles are more effective than the system currently in place.

- Gloria Lee, "Defining Traditional Healing" *Justice as Healing* 1:4 (winter, 1996), online: [http://www.usask.ca/nativelaw/jah\\_lee.html](http://www.usask.ca/nativelaw/jah_lee.html).

Lee sees the process of traditional healing to be similar to the process of restorative justice (both seek to reconcile and restore balance and harmony through understanding of traditional teachings and ceremonies). The four elements of a person are the spiritual, emotional, physical, and mental. If an illness occurs, there is an off-balance in some or all of these elements and the disease is an offering of a teaching to the individual. Lee discusses both Aboriginal and Euro-Canadian justice within the context of religion and includes an extensive quote for the Hollow Water material in order to show that culture and values are important in determining what a society or community will accept or develop as justice. The relations between healing and Canadian justice are estranged and should be reconciled and common goals should be found.

- Rupert Ross, “Aboriginal community healing in action: the Hollow Water approach” July 1993, excerpt from his discussion paper: *Duelling Paradigms? Western Criminal Justice versus Aboriginal Community Healing*, online: [http://www.usask.ca/nativelaw/jah\\_ross.html](http://www.usask.ca/nativelaw/jah_ross.html).

This article provides a real-life example of a community that is using the healing approach regarding sexual offenders. There is teamwork involving child protection workers, Community Health Representative, Nurse in Charge, RCMP, members of the school division, and the community churches. Team members often were victims or former victimizers (those who have been honoured for completing their healing process) so they can share experiences and build a rapport with both victims and victimizers. The healing approach moves from initial disclosure to the Healing Contract to the Cleansing Ceremony. The Healing Contract is designed by the people involved in or touched by the offense. All who are affected by the disclosure deserved to be helped. In this healing process, the victimizer is held accountable to and is supported from those who are most affected by the victimization. The interaction with the courts arises in the forms of assessments, pre-sentence reports, and action plans. At the sentencing, the team gives an honest report/assessment about the sincerity of the victimizer’s efforts in the healing process and how much work still has to be done. Overall, this healing approach looks to heal relationships.

- Judge Cunliffe Barnett, “Circle Sentencing/Alternative Sentencing” 1995 Canadian Native Law Reporter Vol.3 1-7. Native Law Center, University of Saskatchewan. ISSN 0225-2279.

This article discusses the subject of alternative sentencing from his perspective as a judge and offers some basic guidelines. Barnett also discusses the relationship between the court and the community with respect to this topic area. He provides many real examples of specific cases in which alternative sentencing worked and also in which it did not work. He also includes a list of some British Columbia cases where alternative or circle sentencing was used with along with a brief description or summary of the cases.

- Backgrounder: Healing Circle and *R. v. O’Connor*

This provides an example of how a healing circle was conducted in the specific case of *R. v. O’Connor*. It starts off with a brief history of the case in the court system, and then moves into the factors that entered into the Crown’s decision to hold a healing circle. Various Esketimc traditions are discussed including the process of the healing circle and how it is facilitated as well the pipe ceremony and the sweatlodge ceremony. The discussion then moves into how the healing circled was structured in its three parts and was conducted in Alkali Lake for the case of *R. v. O’Connor*.

- Correctional Service of Canada, “Aboriginal Alternatives to Incarceration and Aboriginal Parole Supervision: Section 81 and Section 84 of the Corrections and Conditional Release Act”

“The law that governs the way federal corrections is managed makes some very specific provisions to involve Aboriginal communities in the correctional process. Two sections of the *Act* provide communities the opportunity to be active partners in the care and custody of offenders. The purpose of this document is to explain these provisions of the *Act* and to provide assistance to those Aboriginal communities interested in pursuing this partnership.” This article discusses section 81 and 84 of the federal *Criminal Code*.

- Correctional Service of Canada Pacific Region, "Questions on Sections 84 and 81"

Section 84 addresses inmates who apply for a conditional release (parole or day parole) who ask to be released to an Aboriginal community. The Correctional Service of Canada has a duty to inform the community of the inmate's request and provide opportunity for the community to propose a plan for their member to be released back into their community.

This paper is a question and answer about the section. It addresses a variety of questions for the offender, the offender's community and the judiciary.

- Lee Anne Schienbein, "The aboriginal healing lodge: a first step" *Saskatchewan Law Review* 56:2 (summer 1992) 427.

Schienbein outlines the factors that contribute to the failure of the Federal Prison for Women to accommodate Aboriginal women as well as the hopes for the healing lodge's success as an institution to recognize their problems and to provide them with a chance to heal. This paper also explores the limits of the proposal for the healing lodge.

- "Canada's Youth Justice Renewal Initiative – Aboriginal Communities Taking the Lead in Approaches to Youth Justice" Youth Justice Information Network Bulletin No.2, online: <http://qsilver.queensu.ca/rcjnet/research/youthbull2.html>.

Provides a brief discussion on the over-representation of Aboriginal youth in the justice system and community justice programs.

- Online: <http://www.gov.nb.ca/cnb/news/jus/6e0327ju.html>.

The first Native Sentencing Circle is done in the city of Fredricton, New Brunswick. The Justice Minister calls it "...an opportunity for a marriage of traditions." This short article notes the capacity of First Nations' traditions and beliefs to heal unhealthy communities.

## INTERNATIONAL ALTERNATIVES

### Australia

- John Braithwaite, *Changing Punishment at the Turn of the Century: Finding Common Ground*, "Crime, Shame and Reintegration" Canadian Institute for the Administration of Justice held in Saskatoon September 26-29, 1999 (John Braithwaite from the Australian National University)
- Larissa Behrendt, "Implementation of Alternative Structures for Dispute Resolution", *Justice as Healing*, 3:3 (Fall 1998)
- G. Palk, H. Hayes & T. Prenzler, "Restorative justice and community conferencing: summary of findings from a pilot study" *Current Issues in Criminal Justice*, 10:2 (November 1998) 138.

This article discussed the findings from a "community conferencing" pilot program held in Queensland. The Queensland Community Conferencing initiative was shown to be successful with respect to the main victim-offender reparation goal. The satisfaction levels of the participants were found to be above the common international standards of best practice. Victims, although reporting high satisfaction levels, were found to be somewhat less supportive on some aspects of the program; this could be improved with greater pre-conference preparation or aftercare. Another measure of success is the reduction of re-offending, but unfortunately, the data available at this time provide inconclusive findings. One should not just consider the reduction of recidivism as a positive outcome of such an initiative, but one should also consider the value that is found in providing a greater voice to both the victims and young offenders. An initiative can only be successful if the participants endorse it.

## USA

- A. D. Lewis & T. J. Howard, "Parole officers' perceptions of juvenile offenders within a balanced and restorative model of justice." (Statistical Data Included) *Federal Probation*, 64:1 (June 2000) 40.

Balanced and Restorative Justice (BARJ) is a model of justice that takes into account both the risks and the needs of individual offenders without the sacrifice of the needs of the victims. The three basic precepts of BARJ are: offender accountability (the obligation of the offender to restore the harm done to victims), offender competency development (the need for each offender to become a capable and productive member of society, and community protection (the right of each person to be safe and secure within their community environment). This article presents a study that seeks to demonstrate that reliable and valid rating instruments could be developed that would quantify and measure the perceptions of parole officers about their juvenile offenders. It is believed that this information could be used to predict outcomes and to monitor a juvenile offender's progress with respect to parole services.

- "Alternative sentencing found cost-effective in New Mexico" *Criminal Justice Newsletter*, 18:22 (16 November 1987) 4.

This article describes an alternative sentencing program developed in New Mexico, running out of the Public Defender's Department, that costs less than \$85,000 in state and federal grants and that saved the state nearly \$1.4 million in prison costs. That aspects of this program that judges and others like are the requirements that the offender maintain employment, participate in a drug- or alcohol-abuse program, and the recommendations of "split sentences" which involve short terms of incarceration followed by supervised release. Unfortunately recidivism rates were not measured, neither were offenders who received "alternative" sentences compared with a control group.

- Henry Bramwell, "Alternative sentencing or part-time imprisonment is discriminatory" (1983) 26:3 *Howard Law Journal*, Summer, 1265.

Bramwell believes alternative sentencing creates a two-tier system of justice that is indicative of basic unfairness and favoritism. He feels that, at the time of sentencing, judges should either give probation or send a defendant to jail. If the prison should choose to use half-way houses as a part of an early release or community acclimatization program, that decision is left to them. According to Bramwell, alternative sentencing or part-time imprisonment depreciates the value of sentencing, has the effect of lessening the effectiveness of sentencing, and gives the defendant the impression that sentencing is not very important resulting in the defendant feeling that he/she can get away with anything.

## 7. GLADUE REPORT

- Dakota West Consulting, "Reasons for Independent Background Cultural Impact Reports based on the *Gladue* Decision for Pre-Sentencing of an Aboriginal Offender"

This paper provides reasons why a "*Gladue*" report is essential in addition to a standard Pre-Sentence report and why it should be researched and written by First Nations who have the knowledge and sensitivity of Aboriginal communities as well as knowledge of the criminal justice system, in order to properly fulfill the requirements of s. 718.2(e) CCC as interpreted by the Supreme Court of Canada decision *R. v. Gladue*.

**8. POST GLADUE CASE LAW (A SAMPLING)**

**Supreme Court of Canada:**

- *R. v. Wells*, [2000] 1 S.C.R. 207.

(non-custodial sentencing reasonable in circumstances where the paramount sentencing objectives are denunciation and deterrence, Judge consider the Aboriginal background of an offender in an appropriate manner)

- *R v. Proulx*, [2000] 1 S.C.R. 61

*(unanimous decision sets out the guidelines for interpreting the conditional sentencing provisions)*

- *R. v. Bunn*, [2000] 1 S.C.R. 183
- *R. v. Knoblauch*, [2000] 2 S.C.R. 780
- *Delisle v. Canada*, [1999] 2 S.C.R. 989
- *R. v. Morrissey*, [2000] 2 S.C.R. 90
- *R. v. Wust*, [2000] 1 S.C.R. 455

**British Columbia:**

- *R. v. Norris*, [2000] B.C.C.A. 374, [2000] B.C.J. No.1422 (Q.L.)
- *R. v. Armbruster*, (1999) B.C.C.A 0448,  
*online: [www.canlii.org/bc/cas/bcca/1999/1999bccca448.html](http://www.canlii.org/bc/cas/bcca/1999/1999bccca448.html).*

**Other Provinces:**

- *R. v. Elias*, [2001] Y.J. No.45 Y. Terr. Ct. (Q.L.)
- *R. v. Sackanay*, 47 O.R. (3d) 612