

# Inequality, Crime and Sentencing: *Borde, Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law

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*Reforms to the sentencing provisions of the Criminal Code in 1996 altered the law's approach to sentencing in Canada. Among these reforms was the requirement that alternatives to imprisonment be considered especially for aboriginal offenders. The Supreme Court of Canada in R. v. Gladue and R. v. Wells held that judges must determine whether the unique systemic and background factors that affect aboriginals, such as poverty, colonialism and substance abuse, have contributed to the actions of the particular offenders' actions. If they have, these factors should generally mitigate the sentences. In addition, the Court confirmed that judges must take into account the fact that traditional aboriginal sentencing practices focus on restorative justice principles and the use of community-based sanctions, rather than on incarceration, denunciation and deterrence.*

*More recently, in R. v. Borde and R. v. Hamilton, the Ontario Court of Appeal took a similar approach to two African-Canadian offenders. Through an analysis of these cases and their impact, the author considers whether such an approach should be taken to offenders from other disadvantaged social groups. The author concludes that it should, and she argues that recognizing social disadvantage as a potential mitigating factor in the sentencing of all offenders will contribute to a fairer and more just sentencing regime. However, she acknowledges that there are mixed opinions on the matter and she identifies the heart of the debate as being over competing conceptions of the purposes of sentencing in Canada. She compares two models of sentencing—the desert model, which emphasizes the principles of proportionality and parity, and the mixed model, which allows these principles to be overridden in some cases by utilitarian concerns.*

*The author acknowledges that there is still work to be done and questions to be answered to ensure the fairness and success of a sentencing approach that takes account of social disadvantage. She concludes by identifying the increased obligations that judges and counsel will have to meet under this approach, and by outlining other unresolved issues that the lower courts will need to address if it is to operate satisfactorily.*

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## Introduction

In *R. v. Gladue*<sup>1</sup> and *R. v. Wells*,<sup>2</sup> the Supreme Court of Canada adopted a new methodology for sentencing aboriginal offenders in the hope of reducing the overrepresentation of aboriginal peoples in Canada's prisons. Relying on section 718.2(e) of the *Criminal Code*,<sup>3</sup> the Court held that in deciding on a fit sentence for an aboriginal offender, a judge must address two issues. First, the judge must take into account the unique systemic and background factors that may have contributed to the aboriginal offender being before the court. Second, the judge must consider the type of procedures and sanctions that may be appropriate in the circumstances given the offender's specific aboriginal heritage or connection to an aboriginal community.

The new sentencing methodology adopted by the Court in *Gladue* and *Wells* was expressly limited to aboriginal offenders. However, there are other groups in Canadian society that arguably suffer from many, if not all of the adverse social and economic conditions experienced by

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1. [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5th) 197 [*Gladue* cited to S.C.R.].

2. [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368, 30 C.R. (5th) 254 [*Wells* cited to S.C.R.].

3. R.S.C. 1985, c. C-46.

aboriginal peoples.<sup>4</sup> An obvious question, therefore, was whether the courts would eventually apply the *Gladue* approach, or a similar approach, to members of other identifiably disadvantaged social groups.

In *R. v. Borde*,<sup>5</sup> the Ontario Court of Appeal was confronted with this exact issue. Although Rosenberg J.A., writing for a unanimous court, ultimately found it unnecessary to resolve the matter, he accepted in *obiter* the extension of a *Gladue*-like approach to African-Canadian offenders.<sup>6</sup> Shortly thereafter, in *R. v. Hamilton*,<sup>7</sup> Hill J. of the Ontario Superior Court of Justice, relying in part on *Borde*, concluded that the systemic and background factors that had contributed to the two African-Canadian offenders committing their offences were relevant and could be used to mitigate their sentences.<sup>8</sup> On a broader level, Hill J. indicated that such factors should potentially be relevant to mitigate the sentence of any socially disadvantaged offender.<sup>9</sup> On appeal, Doherty J.A., writing for a unanimous Court of Appeal, followed Rosenberg J.A.'s earlier reasoning in *Borde* in accepting that systemic and background factors that contribute to the commission of the offence might be used to mitigate an offender's sentence.<sup>10</sup> However, he concluded that Hill J. had erred in applying this principle in the immediate cases in several respects.<sup>11</sup>

The ultimate result of *Gladue*, *Wells*, *Borde* and *Hamilton* is that aboriginal and other socially disadvantaged offenders can be treated differently from other offenders with respect to sentencing. More

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4. See below, Part IV.A. for a discussion of whether the circumstances of aboriginal peoples are in fact comparable to those experienced by members of other socially disadvantaged groups.

5. (2003), 172 C.C.C. (3d) 225, 8 C.R. (6th) 203 (C.A.) [*Borde* cited to C.C.C.].

6. *Ibid.* at para. 30.

7. (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (Ont. S.C.J.), *aff'd* on different grounds [2004] O.J. No. 3252 (C.A.) (QL) [*Hamilton* (S.C.J.), cited to C.C.C.].

8. *Ibid.* at paras. 221, 224.

9. *Ibid.* at para. 221, where Hill J. remarks that "[b]ecause the sentencing function is an inherently individualized process, important systemic and background circumstances playing a part in the offence should be relevant to do justice *in every case*" [emphasis added].

10. *R. v. Hamilton and Mason*, [2004] O.J. No. 3252 (C.A.) (QL) at paras. 134-135 [*Hamilton* (O.C.A.)].

11. *Ibid.* at para. 143.

specifically, in an appropriate case a judge may impose a more lenient sentence on an aboriginal or other socially disadvantaged offender than he or she would impose on a non-disadvantaged offender. The four decisions therefore seem to permit and promote disparity in sentencing. Whether this is their actual result, however, depends on whether there are relevant differences for sentencing purposes between aboriginal offenders, other socially disadvantaged offenders, and non-disadvantaged offenders.

This raises two main questions. First, are aboriginal offenders comparable to other socially disadvantaged offenders, so that the same considerations should apply to individuals in both groups? Second, are socially disadvantaged offenders, including aboriginal offenders, sufficiently different from non-disadvantaged offenders to justify differential sentences? These questions raise complex issues about the purposes of sentencing in Canada and the meaning and importance of the principles of proportionality, parity and restraint. At the heart of this debate are competing conceptions about the purposes of sentencing, the extent to which the Canadian sentencing regime implements a desert-based model that gives priority to the principles of proportionality and parity in sentencing, and the meaning of those principles in Canada.

I ultimately conclude that by recognizing and addressing the reality and impact of social disadvantage, *Gladue*, *Wells*, *Borde*, and *Hamilton* contribute to the development of a fairer and more just sentencing regime in Canada. There are, however, a number of specific issues that remain to be resolved if social disadvantage is to operate fairly as a mitigating factor in sentencing. Moreover, the recognition of that mitigating factor is not a cure for social inequality in Canadian society or for the overrepresentation of the socially disadvantaged in Canada's prisons.

This article begins with a brief overview of the 1996 statutory sentencing reforms and the Supreme Court's decisions in *Gladue* and *Wells*. I then review and analyze Rosenberg J.A.'s decision in *Borde*, Hill J.'s decision in *Hamilton*, and Doherty J.A.'s decision in *Hamilton*. Next, I explain and contrast the two competing models of sentencing and their implications for the underlying debate about the legitimacy of the judicial approaches in *Gladue*, *Wells*, *Borde* and *Hamilton*. I conclude

by considering the potential impact on sentencing in Ontario, for both judges and counsel, if the lower courts embrace and apply the approach contemplated in *Borde* and *Hamilton*.

## I. Setting the Scene: The Supreme Court's Decisions in *Gladue* and *Wells*

In September 1996, new sentencing provisions came into force in Canada that included for the first time an explicit statement of the purposes and principles of sentencing.<sup>12</sup> Among other things, these provisions added sections 718.1 and 718.2 to the *Criminal Code*. Section 718.1 sets out the fundamental principle of sentencing, the principle of proportionality: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Section 718.2 defines additional principles that a judge must consider in deciding on the appropriate sentence. The most important of these secondary principles for present purposes are sections 718.2(b) and 718.2(e).

Section 718.2(b) codifies the principle of parity by stating that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." Section 718.2(e) provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." Section 718.2(e) therefore codifies not only a general principle of restraint in the use of imprisonment for all offenders, but also explicitly identifies aboriginal offenders for special consideration. However, the *Criminal Code* provides no guidance on how a judge is to implement this principle of restraint in cases involving aboriginal offenders, and leaves it to the courts to devise the precise method of giving effect to the principle.

The Supreme Court of Canada addressed the interpretation and application of section 718.2(e) in cases involving aboriginal offenders in

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12. *An Act to Amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

*Gladue*<sup>13</sup> and *Wells*.<sup>14</sup> In these two cases, the Court held that section 718.2(e) was remedial in nature and that it mandated a new and different approach to sentencing aboriginal offenders, in an effort to reduce the overrepresentation of aboriginal peoples in Canada's prisons. Cory and Iacobucci JJ., writing for a unanimous Court, said in *Gladue*:

The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, *in singling out aboriginal offenders for distinct sentencing treatment* in s. 718.2(e) intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to the members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.<sup>15</sup>

The Court also confirmed that the most important remedial aspect of section 718.2(e) was "its direction to sentencing judges *to undertake the process of sentencing aboriginal offenders differently.*"<sup>16</sup>

The *Gladue* approach comprises two basic steps that a judge must follow in deciding on a fit sentence for an aboriginal offender. First, the judge must take into account the unique systemic and background factors that contributed to the commission of the offence, such as

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13. Gladue was a Cree woman who pleaded guilty to manslaughter in the stabbing death of her common law husband. The sentencing judge did not consider Gladue's aboriginal status when imposing a three year sentence of imprisonment because Gladue was living off of the reserve in an urban community at the time of the offence. The Supreme Court of Canada concluded that the sentencing judge had erred in not considering Gladue's aboriginal status, but it nonetheless dismissed her appeal. In the Court's view, a three year sentence was not unreasonable given the seriousness of the offence and the fact that Gladue had been released on parole with conditions after being incarcerated for six months. The actual results of the sentence therefore served her interests and the interests of society.

14. Wells, an aboriginal male, was convicted of sexually assaulting an eighteen-year-old aboriginal woman in her own bedroom while she was either sleeping or had passed out due to alcohol consumption. The Supreme Court of Canada dismissed his appeal, holding that the sentencing judge had not erred in characterizing the offence as serious, nor acted unreasonably in imposing a twenty month custodial sentence rather than a conditional sentence.

15. *Gladue*, *supra* note 1 at para. 64 [emphasis added].

16. *Ibid.* at para. 33 [emphasis added].

racism, poverty, unemployment, poor education, limited opportunities, substance abuse, loneliness, and family or community breakdown.<sup>17</sup> If these factors played a role in the offender's criminality, they will generally serve to mitigate his or her responsibility for the offence, thereby warranting a more lenient sentence. Alternatively, if due to these factors, the offender is not particularly well-suited to the type of sentence that would normally be imposed for such an offence, a search for a different but potentially equivalent sanction would be warranted.

Second, the judge must consider the type of sentence that is appropriate given the offender's specific aboriginal heritage or connection to an aboriginal community.<sup>18</sup> In making this determination, the judge must recognize that traditional aboriginal sentencing practices focus on restorative justice principles and the use of community-based sanctions, rather than on denunciation, deterrence and incapacitation. The judge may therefore give greater weight, in appropriate cases, to restorative justice principles in deciding whether a community-based sentence would be reasonable in the circumstances in that it would more effectively respond to the needs of the victim, the community and the offender.

The judge's ultimate task is to determine a fit sentence for a particular aboriginal offender given the specific circumstances of the offence, the offender, the victims and the community. As the Court explained, "the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For *this* offence, committed by *this* offender, harming *this* victim, in *this* community, what is the appropriate sanction under the *Criminal Code*?"<sup>19</sup> The assessment remains a holistic one, even in cases involving aboriginal offenders.

To satisfy the new approach recognized in *Gladue*, the Court held that judges *must* take judicial notice of the systemic and background factors that affect aboriginal peoples generally, as well as the importance attached to restorative justice in aboriginal cultures.<sup>20</sup> The judge has "no discretion as to whether to consider the unique situation of the

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17. *Ibid.* at paras. 67-68, 80.

18. *Ibid.* at paras. 66, 70.

19. *Ibid.* at para. 80 [emphasis in original].

20. *Ibid.* at para. 83.

aboriginal offender.<sup>21</sup> In addition, each individual offender, if he or she so chooses, may adduce specific evidence on his or her own background and circumstances.<sup>22</sup> If the offender is unrepresented at the sentencing hearing, the judge must attempt to obtain the relevant information from other sources.<sup>23</sup>

The Court also emphasized that a judge must use this approach for *all* aboriginal offenders: it applies not only to those offenders who live on reserves, but also to those who live elsewhere.<sup>24</sup> In addition, the judge must consider *all* reasonable alternatives to imprisonment, whether or not they have a specific cultural component.<sup>25</sup> If a term of imprisonment is required, the judge must consider its duration, and may impose a shorter sentence than would be imposed on a non-aboriginal offender.<sup>26</sup> However, in some instances, the nature of the case will require that the judge give priority to the goals of denunciation, deterrence and incapacitation. As a practical matter, therefore, an aboriginal offender convicted of a serious and violent crime is likely to receive a sentence of imprisonment that is the same as, or similar to, the sentence that would be imposed on a non-aboriginal offender.<sup>27</sup>

In the subsequent decision in *Wells*, Iacobucci J., writing again for a unanimous Court, reaffirmed the general methodology set forth in *Gladue*,<sup>28</sup> including its practical limitation in cases of serious and violent crime.<sup>29</sup> He justified this limitation on the basis that denunciation and deterrence take on increased importance in cases of serious and violent

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21. *Ibid.* at para. 82.

22. *Ibid.* at para. 83.

23. *Ibid.* at para. 84.

24. *Ibid.* at para. 91.

25. *Ibid.* at paras. 74, 92.

26. *Ibid.* at para. 79.

27. *Ibid.* at para. 78.

28. *Wells*, *supra* note 2 at paras. 37-42. See also *ibid.* at para. 44, where Iacobucci J. reiterated that “s. 718.2(e) requires a *different methodology* for assessing a fit sentence for an aboriginal offender” [emphasis in original].

29. *Ibid.* at paras. 42, 44. Iacobucci J. stated that “[w]hether a crime is indeed serious in the given circumstances is . . . a factual matter that can only be determined on a case-by-case basis. I am not suggesting that there are categories of offences which presumptively exclude the possibility of a non-custodial sentence.” *Ibid.* at para. 45.

crime.<sup>30</sup> However, Iacobucci J. recognized a potential exception to the limitation in cases where there are programs in the offender's community that are specifically designed to apply restorative justice principles in cases of serious crime.<sup>31</sup> He also clarified the scope of the judge's duty to conduct his or her own inquiry into the offender's particular circumstances, emphasizing that a judge is not "a board of inquiry" and that section 718.2(e) requires "a practical inquiry, not an impractical one."<sup>32</sup> Iacobucci J. added that in most cases, a judge should be able to discharge his or her duty to inquire into the offender's particular circumstances by reviewing and considering the information in the offender's pre-sentence report.

## II. Extending *Gladue* to Other Disadvantaged Groups: The Decisions in *Borde* and *Hamilton*

Politicians, the media and academic commentators gave the Supreme Court's decision in *Gladue* a decidedly mixed reception. While there was favourable commentary,<sup>33</sup> some politicians and members of the media criticized the Court for creating a "race-based discount" for aboriginal offenders.<sup>34</sup> Desert theorists, an influential group of criminal law scholars who give priority to the role of proportionality and parity in sentencing, also criticized the Court, as they had earlier criticized Parliament itself,<sup>35</sup> for paying insufficient attention to the principles of

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30. *Ibid.* at para. 42.

31. *Ibid.* at para. 50.

32. *Ibid.* at para. 55.

33. See below, Part IV.A. for a discussion of the favourable academic commentary on *Gladue*.

34. For a brief review of the political and media response, see Kent Roach & Jonathan Rudin, "*Gladue*: The Judicial and Political Reception of a Promising Decision" (2000) 42 Can. J. Crim. 355 at 357, 379-80. See also Julian V. Roberts & Philip Stenning, "The Sentencing of Aboriginal Offenders in Canada: A Rejoinder" (2002) 65 Sask. L. Rev. 75 at 92.

35. See e.g. Julian V. Roberts & Andrew von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing" (1995) 37 Crim. L.Q. 220 at 230-31 [Roberts & von Hirsch, "Legislating Sentencing"]; Julian V. Roberts & Andrew von Hirsch, "Legislating the Purpose and Principles of Sentencing" in Julian V. Roberts & David P.

proportionality and parity and thereby creating a discriminatory sentencing regime that favoured aboriginal offenders over other similarly disadvantaged social groups.<sup>36</sup> These theorists called for the recognition of social disadvantage as a general mitigating factor for any offender where by the circumstances warranted.<sup>37</sup> It was not until three years later, however, that the courts themselves began explicitly to consider extending the *Gladue* approach, or a similar approach, to members of other identifiably disadvantaged social groups. There are three key Ontario decisions of note: Rosenberg J.A.'s decision in *Borde*, Hill J.'s decision in *Hamilton*, and Doherty J.A.'s decision in *Hamilton*.

### A. Overview of *Borde*

The appellant, *Borde*, was a young African-Canadian male who pleaded guilty to aggravated assault and various other offences and received a sentence of five years and two months. On appeal, he argued that a lesser sentence was warranted in light of the systemic and background factors that had contributed to his offences. *Borde* filed various reports that documented the existence of systemic racism against African-Canadian communities in Ontario and the overrepresentation of African-Canadian offenders both in the criminal justice system and in the prison population. As summarized by Rosenberg J.A., these reports “chronicle[d] a history of poverty; discrimination in education, the media, employment and housing; and overrepresentation in the criminal

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Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 48 at 58. For the history and further criticism of section 718.2(e), see Philip Stenning & Julian V. Roberts, “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders” (2001) 64 Sask. L. Rev. 137 at 138-51. According to Stenning and Roberts, *ibid.* at 166, “[t]he responsibility for the current confusion with respect to the sentencing of Aboriginal offenders lies as much with Parliament as with the Supreme Court.”

36. *Ibid.* at 155-63.

37. *Ibid.* at 165. For a different solution to the interpretative puzzle created by s. 718.2(e), see Sanjeev Anand, “The Sentencing of Aboriginal Offenders, Continued Confusion and Persisting Problems: A Comment on the Decision in *R. v. Gladue*” (2000) 42 Can. J. Crim. 412 at 415-17.

justice system and in prisons.”<sup>38</sup> The reports also claimed that the African-Canadian community was the only community in Canada, other than the aboriginal community, to have experienced this degree of disadvantage. Borde’s personal circumstances were also unquestionably unfortunate: an absentee father, a mother who suffered from mental illness and who had abandoned the family for a brief period, a chaotic home life including stays in foster homes, alcohol abuse, chronic truancy and limited employment skills and prospects. He also had a young common law wife and child, and a lengthy record in the youth criminal justice system.

Rosenberg J.A., writing for a unanimous Court, accepted that systemic and background factors relating to African-Canadians might be taken into account in sentencing African-Canadian offenders if these factors had played a role in the commission of the offence.<sup>39</sup> He acknowledged that the situation of African-Canadians was, similar in certain respects to that of aboriginal peoples, particularly in relation to the social and economic conditions that had contributed to a disproportionately high rate of incarceration.<sup>40</sup> These factors included poverty, family dislocation, and substance abuse.

However, there was no evidence that African-Canadians viewed the aims of sentencing differently than other Canadians. In this respect, therefore, the situation of African-Canadians did differ from that of aboriginal peoples. Rosenberg J.A. concluded that this was not fatal to the possible extension of a *Gladue*-like approach to an African-Canadian offender in an appropriate case. In his words:

The importance that the Supreme Court attached to the sentencing conceptions of aboriginal communities results from the specific reference to aboriginal offenders in s. 718.2(e). In this regard, aboriginal communities are unique. However, the principles that are generally applicable to all offenders, including African-Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes.<sup>41</sup>

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38. *Borde*, *supra* note 5 at para. 17.

39. *Ibid.* at para. 27.

40. *Ibid.* at paras. 29-30.

41. *Ibid.* at para. 32.

While Rosenberg J.A. concluded that in an appropriate case a sentencing judge might derive assistance from *Gladue* and *Wells*,<sup>42</sup> he also emphasized that a sentencing judge's *automatic* duty, in the case of aboriginal offenders, to take judicial notice of and inquire into unique systemic and background factors does not apply in the case of African-Canadian offenders.<sup>43</sup>

Rosenberg J.A. ultimately held that it was not necessary to resolve the issue in the immediate case. Given the serious and violent nature of Borde's crimes, including the deliberate and unprovoked use of a loaded handgun to pistol whip a victim, even the application of a *Gladue*-like approach would not result in a different sentence.<sup>44</sup> However, this did not negate the need to consider any background factors in the pre-sentence report;<sup>45</sup> a judge could not impose a fit sentence on an individual offender without understanding the offender's background and other factors that had contributed to his or her appearance before the court. Therefore, Rosenberg J.A. took into account as mitigating factors not only Borde's age but also his "chaotic background as part of a dysfunctional family being raised in poverty by a mother who unfortunately had few parenting skills and suffered from a mental illness."<sup>46</sup> As a result, he allowed the appeal and reduced the sentence by one year, to four years and two months.

### *B. Overview of Hamilton*

The offenders, Hamilton and Mason, two African-Canadian single mothers, pleaded guilty to unlawfully importing cocaine from Jamaica into Canada. Since the two offenders proposed to rely on the same expert evidence, a joint sentencing hearing was conducted even though the two cases were otherwise factually unrelated. Hamilton and Mason had each received a one-time payment to act as drug couriers by

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42. *Ibid.* at para. 30.

43. *Ibid.* at para. 31.

44. *Ibid.* at para. 35.

45. *Ibid.*

46. *Ibid.* at para. 37.

swallowing pellets of cocaine.<sup>47</sup> They each had only limited education and employment skills, received no financial support from the fathers of their children, and were financially dependent on social assistance. Neither offender had a criminal record, and both of their pre-sentence reports were favourable. Each of them expressed remorse for her crime. Hamilton indicated that she had been motivated by financial hardship to commit the offence;<sup>48</sup> there was otherwise no information before the court on the nature and extent of her involvement in the offence.<sup>49</sup> On the advice of her counsel, Mason declined to explain or discuss her role in the offence.<sup>50</sup>

The sentencing hearing extended over thirteen days. Hamilton and Mason filed evidence that called into question the assumed link between harsher prison sentences and general deterrence.<sup>51</sup> At the request of Hill J., the Crown filed evidence dealing with governmental efforts to detect and combat drug trafficking.<sup>52</sup> On his own motion, Hill J. also provided Crown and defence counsel with considerable evidence on incarceration rates of women and their risk of re-offending, on the increasing overrepresentation of African-Canadian offenders in the Canadian prison system, particularly women convicted of drug offences, and on the differing impacts of incarceration on women and men, especially in relation to childcare responsibilities.<sup>53</sup> The Crown did not object to the admissibility of this material, and subsequently filed further information on matters of detection, race and gender.<sup>54</sup>

In addition to reviewing the evidence and the background of Hamilton and Mason, Hill J. relied on his own experience in presiding over cases in Brampton, and on various concessions by Crown counsel. He concluded that the rate of conviction and imprisonment for importing cocaine for African-Canadian women, many of whom were single

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47. *Hamilton* (S.C.J.), *supra* note 7 at paras. 23-25.

48. *Ibid.* at para. 59.

49. *Ibid.* at para. 24.

50. *Hamilton* (O.C.A.), *supra* note 10 at para. 18.

51. *Ibid.* at paras. 45-46.

52. *Ibid.* at para. 46.

53. *Ibid.* at paras. 52-53.

54. *Ibid.* at paras. 60-61.

mothers, was disproportionate to their percentage of the population.<sup>55</sup> After examining the decisions in *Gladue*, *Wells* and *Borde*, he held that systemic and background factors could potentially be used to mitigate the sentence of an African-Canadian offender insofar as these factors had played a role in the commission of an offence.<sup>56</sup> Despite the paucity of evidence from the two offenders explaining their involvement in the offences, Hill J. found that systemic and background factors identified in the evidence, particularly systemic racism, gender discrimination, poverty, and single motherhood, had contributed to each offender's decision to act as a drug courier.<sup>57</sup> Finally, he concluded that while importing cocaine was unquestionably a serious offence, it was not a "violent *and* serious offence" as defined in the *Wells* and *Borde* cases.<sup>58</sup> Therefore, the nature of the crime did not negate the potential mitigating effect of the systemic and background factors that were present in both the Hamilton and Mason cases.

Notably, Hill J. did not restrict his analysis to African-Canadian offenders. In his view, the individualized nature of the sentencing process meant that in every case involving a socially disadvantaged offender, a sentencing judge should consider any relevant systemic and background factors that had played a part in the commission of an offence.<sup>59</sup> Hill J. justified this approach on the basis that "society cannot shirk its responsibility, such as it may be, for the offender being before the court."<sup>60</sup> He relied on general sentencing purposes and principles and the need to ensure that sentencing decisions conform to *Charter* values, rather than on the specific language of section 718.2(e). He said:

Whether or not for other groups s. 718.2(e) permits, or compels, a similar approach to that articulated in the *Gladue* and *Wells* cases respecting aboriginal offenders, the purposes and principles of sentencing and the exercise of sentencing discretion in accordance with *Charter* values commands consideration of systemic factors in this case

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55. *Hamilton* (S.C.J.), *supra* note 7 at para. 180.

56. *Ibid.* at para. 186.

57. *Ibid.* at para. 224.

58. *Ibid.* [emphasis in original].

59. *Ibid.* at para. 221.

60. *Ibid.*

insofar as they are related to the commission of the offences for which the accused have been convicted.<sup>61</sup>

In Hill J.'s view, this type of approach was at the very heart of fairness and an individualized approach to the sentencing of offenders. Nonetheless, he further noted that the Supreme Court's comments on the existence of systemic racism and its detrimental impact on aboriginal peoples were observations that could equally be applied to African-Canadians.<sup>62</sup>

In setting the specific sentences, Hill J. relied primarily on the systemic and background factors he had identified to mitigate the offenders' sentences. Based on these and other factors,<sup>63</sup> he imposed conditional sentences of twenty months on Hamilton and a conditional sentence of twenty-four months less a day on Mason.<sup>64</sup> The terms of each sentence provided for partial house arrest followed by a curfew.

The Crown appealed the two sentences. Doherty J.A., writing for a unanimous Court of Appeal, accepted that systemic and background factors which have played a role in the commission of an offence can potentially be used to mitigate the sentence of a socially disadvantaged offender.<sup>65</sup> In his words, "[a] sentencing judge is . . . required to take into account all factors that are germane to the gravity of the offence and the personal culpability of the offender. That inquiry can encompass systemic racial and gender bias."<sup>66</sup> However, Doherty J.A. ultimately concluded that Hill J. had erred in applying this principle in the immediate cases in three key respects.

First, on a purely procedural level, Doherty J.A. held that Hill J. had erred by exceeding the limited power accorded to him to introduce

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61. *Ibid.* at para. 186.

62. *Ibid.* at para. 187.

63. The other factors included each offender's guilty plea and expressed remorse, the impact incarceration would have on their children, and the potential immigration consequences that incarceration would have for Mason. *Ibid.* at paras. 231-33.

64. In the alternative, Hill J. concluded that the conditional sentences were appropriate given the test case nature of the sentencing proceeding and the resulting delay. *Ibid.* at paras. 218-19.

65. *Hamilton* (O.C.A.), *supra* note 10 at paras. 134-35.

66. *Ibid.*

issues on sentencing that had not been raised by the parties.<sup>67</sup> Although a sentencing judge is entitled to suggest new issues, he or she should first frame the issue narrowly, then ascertain whether counsel consider it to be relevant. If they do, the judge may inform them of any useful material known to him or her, but should otherwise rely on counsel to provide the evidentiary record. If counsel do not accept the relevancy of the issue, the judge should generally not pursue the matter. In the immediate cases, Hill J. had not only introduced the issue of social disadvantage, but had pushed it forward by producing material on his own initiative and pressing Crown counsel to provide further material. In doing so, he effectively took on the role of advocate, witness and judge, thereby jeopardizing the appearance of impartiality.<sup>68</sup>

Doherty J.A. also questioned Hill J.'s interpretation of the statistical data on the rates of incarceration for African-Canadian women, particularly his conclusion that the data established that black women were overrepresented in Canada's penitentiaries.<sup>69</sup> The meaning of the data was not obvious and, absent expert assistance, it could be misunderstood and misapplied. Doherty J.A. concluded that expert assistance was required before any conclusions or inferences could be drawn from the data and before its relevance in the immediate cases could be ascertained.

Second, on a substantive level, Doherty J.A. held that Hill J. had properly recognized the need for a causal link between the social disadvantage experienced by the specific offenders and the commission of the offence, but that he had ultimately erred by concluding, in the absence of evidence, that such a link had been established in relation to systemic racial and gender discrimination.<sup>70</sup> That is, rather than relying on the actual evidence, Hill J. had simply based his conclusions on his view of the type of individual who was the typical cocaine drug courier.<sup>71</sup> Given the absence of evidence in this regard, Hill J. could not

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67. *Ibid.* at paras. 67, 69-70.

68. *Ibid.* at paras. 65, 71.

69. *Ibid.* at paras. 75-79.

70. *Ibid.* at para. 137.

71. *Ibid.* at paras. 73-74, 137.

properly conclude that the two offenders' difficult economic circumstances had been caused by systemic racial and gender bias.

However, Doherty J.A. accepted that the economic disadvantage experienced by the two offenders could itself justify some mitigation of their sentences. In his view, there was sufficient evidence in the two cases to establish that this disadvantage had played a significant role in the decision of each offender to commit the offence.<sup>72</sup> Moreover, the disadvantage was largely due to choices that they were legitimately entitled to make or to circumstances outside their control, namely the assumption of parental responsibilities and the fathers' decisions to abandon their children. It could not therefore be said that the offenders had chosen to be poor.

Finally, Doherty J.A. concluded that Hill J. had correctly characterized the importation of cocaine as a serious offence, but had erred in finding that it was not also a violent offence.<sup>73</sup> In particular, while the act of importing cocaine is not in itself a violent act, it has to be considered in relation to the violent and harmful conduct invariably associated with the use and sale of cocaine. Consequently, a significant period of incarceration was required for each offender, notwithstanding the mitigating effect of her personal circumstances.<sup>74</sup>

Doherty J.A. ultimately held that Hill J. had erred in imposing conditional sentences on the two offenders,<sup>75</sup> and that imprisonment for twenty months in Hamilton's case and twenty-four months less a day in Mason's would have been appropriate. However, since both offenders would already have been paroled if they had been sentenced appropriately at first instance, Doherty J.A. concluded that altering the two sentences would serve neither the interests of society nor the interests of the two offenders. He therefore dismissed the Crown's

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72. *Ibid.* at para. 136. For further discussion on the quality of the evidence on this point, see text accompanying note 159.

73. *Ibid.* at para. 104.

74. *Ibid.* at para. 7.

75. *Ibid.* at paras. 146-48.

appeal despite the errors made by Hill J., thereby allowing both offenders to finish serving their conditional sentences.<sup>76</sup>

### C. Reactions to the Decisions

The Supreme Court of Canada's decision in *Gladue*, Rosenberg J.A.'s decision in *Borde*, and Hill J.'s decision in *Hamilton* have all provoked considerable controversy. In particular, members of the media have condemned the three decisions for sanctioning a "race-based discount" for aboriginal and African-Canadian offenders.<sup>77</sup> In contrast, the media reaction to Doherty J.A.'s decision in *Hamilton* has been surprisingly positive, given that it essentially agreed with Rosenberg J.A.'s earlier approach in *Borde*.<sup>78</sup> This point is one which may have escaped the attention of many critics. Even the more moderate criticisms of *Gladue*, *Borde* and the initial decision in *Hamilton*, however, are overstated: none of the decisions envisages an automatic, across-the-board "discount" for every aboriginal and black offender.

In all of the cases, including Doherty J.A.'s decision in *Hamilton*, the judges were careful to stress that systemic and background factors relevant to the offender are to be taken into account only insofar as they played a part in the commission of the offence. They also emphasized that a judge's consideration of systemic and background factors, as well as different cultural conceptions of the aims of sentencing, will not generally result in a different sentence for aboriginal or African-

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76. In contrast, in the companion case of *R. v. Spencer*, [2004] O.J. No. 3262 (C.A.) (QL), Doherty J.A. concluded that the mitigating factors that were present in *Hamilton*, including the history of economic disadvantage, were absent. Moreover, unlike *Hamilton* and *Mason*, the amount of cocaine imported by *Spencer* fell within the *Madden* range. Given these differences, he concluded that Hill J. should have sentenced *Spencer* to forty months' imprisonment. Since *Spencer* had only served sixteen months of a conditional sentence, Doherty J.A. allowed the Crown's appeal and substituted a sentence of twenty months' imprisonment.

77. For a brief overview of the media reaction to *Borde*, see Kent Roach, "Editorial: Race and Sentencing" (2003) 47 *Crim. L.Q.* 233. For an example of the media reaction to Hill J.'s decision in *Hamilton*, see "Justice is blind, not colour-blind," Editorial, *Toronto Star* (24 February 2003) A22.

78. See e.g. "Sentencing by Race," Editorial, *National Post* (5 August 2004) A5.

Canadian offenders convicted of serious and violent crimes. In other words, a sentencing judge's consideration of one or both of these factors is likely to result in a different type or duration of sentence primarily in cases involving less serious crimes. Finally, although focused on African-Canadian offenders, *Borde* and *Hamilton* arguably sanction extending a *Gladue*-like approach to other socially disadvantaged groups.<sup>79</sup>

Despite these qualifications, *Gladue*, *Wells*, *Borde* and *Hamilton* ultimately accept that aboriginal offenders can be treated differently from other socially disadvantaged offenders. They also accept that both aboriginal and other socially disadvantaged offenders can be treated differently from other offenders. First, at the procedural level, a sentencing judge has a positive duty to take judicial notice of systemic and background factors and differing conceptions of sentencing only in cases involving aboriginal offenders; there is no such duty in other cases.<sup>80</sup> Second, at the substantive level, the judge may impose differential sentences on aboriginal offenders, other socially disadvantaged offenders, and non-disadvantaged offenders. These differential sentences may take one of two forms. The judge may impose a different but equally severe sentence on the aboriginal offender. Alternatively, the judge may impose a more lenient sentence on an aboriginal or other socially disadvantaged offender than he or she would impose on a non-disadvantaged offender.<sup>81</sup>

The first type of differential treatment—a different but equally severe sentence—is not generally considered to be problematic. Although the two sentences are not identical, they are functionally equivalent. Parity between aboriginal offenders, other socially disadvantaged offenders, and non-disadvantaged offenders is therefore maintained.<sup>82</sup> However,

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79. H. Archibald Kaiser, "Borde and Hamilton: Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence" (2003) 8 C.R. (6th) 289 at 296.

80. *Borde*, *supra* note 5 at para. 31. See also *Hamilton* (O.C.A.), *supra* note 10 at paras. 66-70 emphasizing the limited nature of a sentencing judge's power to introduce new issues into the sentencing hearing.

81. Stenning & Roberts, *supra* note 35 at 159; Michael C. Plaxton, "Nagging Doubts About the Use of Race (and Racism) in Sentencing" (2003) 8 C.R. (6th) 299 at 299-300.

82. Stenning & Roberts, *ibid.* at 161-162; Plaxton, *ibid.*; Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 Sask. L. Rev. 3 at 29.

the second type of differential treatment—a mere lenient sentence—is extremely controversial since it seemingly permits and promotes disparity in sentencing. Whether it actually results in a disparity, however, depends on whether there are relevant differences for sentencing purposes between aboriginal offenders, other socially disadvantaged offenders, and non-disadvantaged offenders.

Whether there are such relevant differences involves two distinct questions. First, are aboriginal offenders in a comparable position to other socially disadvantaged offenders, such as African-Canadians, so that the same considerations ought to apply to both groups? Second, are socially disadvantaged offenders as a whole, including aboriginal offenders, sufficiently different from non-disadvantaged offenders to justify the differential sentences that may be imposed on socially disadvantaged individuals? These two questions raise complex issues about the purposes of sentencing in Canada and the meaning and importance of the principles of proportionality, parity and restraint.

### III. Purposes of Sentencing

At the heart of the debate over the legitimacy of the *Gladue*, *Wells*, *Borde* and *Hamilton* decisions are competing conceptions of the proper purposes of sentencing in Canada. More specifically, the debate concerns the extent to which the Canadian sentencing regime reflects and is intended to implement a desert-based model of sentencing that prioritizes the principles of proportionality and parity. On a secondary level, the debate reflects differing views over the meaning of proportionality and parity in the Canadian sentencing regime.

#### A. Desert Model

Critics of *Gladue* strongly adhere to the desert model of sentencing. According to that model,<sup>83</sup> the purpose of punishment

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83. The account of desert theory set out in this article draws mainly on the work of Andrew von Hirsch, the leading proponent of desert theory.

is twofold.<sup>84</sup> Most importantly, punishment serves to communicate to the offender and others in society the blameworthy nature of the offender's conduct. It thereby speaks both to the victim by acknowledging the harm that has been done to him or her, and also to the offender as a moral agent by asking the offender to recognize and accept the wrongfulness of his or her conduct.<sup>85</sup> Second, punishment provides all members of society with a practical reason for avoiding such conduct. Since it is the sentence imposed on the offender that expresses the desired message of blame to its intended audience, the quantum of the sentence should reflect the blameworthiness of the offender's conduct as measured by the seriousness of his or her offence.

The key principle in the desert model of sentencing, therefore, is the principle of proportionality: the sentence imposed on the offender should be proportionate in its severity to the seriousness of the offence.<sup>86</sup> The seriousness of the offence is determined by two factors: the gravity of the harm caused or risked by the conduct; and the offender's degree of responsibility for that harm given his or her intent, motive and circumstance.<sup>87</sup> Utilitarian considerations that look to the potential benefits or harms of a particular sentence do not factor into

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84. Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993) at 9-14 [von Hirsch, *Censure and Sanctions*].

85. Andrew von Hirsch, "Sentencing Reform: Its Goals and Prospects" in Antony Duff et al., eds., *Penal Theory and Practice, Tradition and Innovation in Criminal Justice* (Manchester: Manchester University Press, 1994) at 27 [von Hirsch, "Sentencing Reform"].

86. Desert theorists generally justify the central role of proportionality in their theory by arguing that it comports with intuitive understandings of justice. As von Hirsch explains, "[t]he principle embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not." Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" in Michael Tonry, ed., *Crime and Justice, A Review of the Research*, vol. 16 (Chicago: University of Chicago Press, 1992) at 56. For a brief review of the other main desert-based justification for punishment, the unfair advantage or benefits-burden justification, see von Hirsch, *Censure and Sanctions*, *supra* note 84 at 7-8.

87. Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick, N.J.: Rutgers University Press, 1985) at 64-65.

the determination of the quantum of the sentence.<sup>88</sup> The only factors that should therefore be considered to mitigate or aggravate an offender's sentence are those that relate directly to the seriousness of the offence by increasing or decreasing the harmfulness of the conduct or the culpability of the offender.<sup>89</sup>

Proportionality itself has two aspects: ordinal proportionality and cardinal proportionality.<sup>90</sup> Ordinal proportionality is concerned with the relative comparability of punishments. It imposes several significant restraints on sentencing discretion. Most importantly, it requires that offenders who commit crimes of similar seriousness, and who are therefore similarly blameworthy, receive similar punishments.<sup>91</sup> This does not require that each offender receive the same type of sentence, but it does necessitate imposing equally onerous sentences on each offender. The principle of parity, therefore, is an essential secondary principle in the desert model: equally blameworthy offenders who commit equally harmful offences should receive similar sentences.<sup>92</sup>

Ordinal proportionality operates as the determining condition, and not simply as a limiting condition, in calculating the amount of punishment that is warranted.<sup>93</sup> It not only sets the upper limit or ceiling on the amount of punishment that *can* be imposed on an offender for a specific offence, it also sets the lower limit or floor on the amount of punishment that *must* be imposed on the offender for that

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88. Utilitarian considerations may factor into what type of sanction to impose on a particular offender if the sanctions being considered are roughly comparable in severity. See von Hirsch, "Sentencing Reform", *supra* note 85 at 30-31 and Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976) at 112 [von Hirsch, *Doing Justice*].

89. von Hirsch, "Sentencing Reform", *supra* note 85 at 30.

90. von Hirsch, *Censure and Sanctions*, *supra* note 84 at 18-19.

91. *Ibid.* at 18.

92. The other two requirements that flow from ordinal proportionality are the rank-ordering of penalties and the spacing of penalties. That is, punishments should be positioned on the scale in a way that properly reflects the relative seriousness of each crime in comparison to all of the other crimes on the penalty scale. *Ibid.*

93. See e.g. Andrew von Hirsch, "Proportionate Sentences: a Desert Perspective" in Andrew von Hirsch & Andrew Ashworth, eds., *Principled Sentencing: Readings on Theory and Policy*, 2d ed. (Oxford: Hart Publishing, 1998) 168 at 173-174.

offence.<sup>94</sup> Ordinal proportionality must act as the determining condition in calculating the quantum of punishment because it is only in this way that parity can be achieved. It is just as problematic in the desert model, to impose a more lenient sentence than the offender deserves as it is to impose a harsher sentence than he or she deserves.<sup>95</sup>

Cardinal proportionality, on the other hand, is concerned with setting the overall magnitude of the penalty scale. It requires that the upper limit of that scale be at a level that avoids the infliction of excessively harsh punishments.<sup>96</sup> However, cardinal proportionality does not necessarily impose any limit on the lower end of the penalty scale, since the preventative function of punishment is secondary to its censuring function.<sup>97</sup> Consequently, unlike ordinal proportionality, cardinal proportionality is only limited, and not determined, by the need to impose punishments that reflect the severity of the crime.

Finally, the desert model advocates restraint in setting the anchoring points of the penalty scale within the overall cardinal proportionality constraints,<sup>98</sup> including restraint in the use of imprisonment as a sanction. As von Hirsch has stated, “[t]he leeway permitted [by cardinal proportionality] in anchoring the scale permits one to devise an array of penalties that is more, or less, sparing in the use of substantial punishments.”<sup>99</sup>

### *B. Mixed Model*

Supporters of *Gladue* accept that proportionality and parity have important roles to play in the sentencing process. They insist, however, that the application of the desert model must be tempered by the

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94. Julian V. Roberts & Andrew von Hirsch, “Conditional Sentences of Imprisonment and the Fundamental Principle of Proportionality in Sentencing” (1998) 10 C.R. (5th) 222 at 226-30 [Roberts & von Hirsch, “Conditional Sentences”].

95. Julian V. Roberts, “Utilitarianism versus Desert in the Sentencing Process” (1999) 4 Can. Crim. L. Rev. 143 at 150.

96. von Hirsch, *Censure and Sanctions*, *supra* note 84 at 19, 37.

97. *Ibid.* at 14-15, 38-39.

98. *Ibid.* at 38-46.

99. von Hirsch, “Sentencing Reform”, *supra* note 85 at 33. See also von Hirsch, *Doing Justice*, *supra* note 88 at 107-17, 136.

recognition and acceptance of instrumental or utilitarian goals in sentencing—goals that can in some circumstances override proportionality and parity concerns.<sup>100</sup> They therefore promote the use of a mixed model of sentencing that assigns more limited, albeit still critical, roles to the proportionality and parity principles.

The mixed model accepts the desert model's emphasis on proportionality as an important constraint in setting the upper limit or ceiling on the sentence that can be imposed on an individual offender.<sup>101</sup> However, with respect to the lower limit, the desert model's emphasis on proportionality and parity between similar offenders who commit similar crimes is seen as a less important and often detrimental constraint on sentencing decisions. The concern is that the desert model's focus on parity leads to an acceptance of imprisonment as the standard sanction for many offences.<sup>102</sup> Its reliance on a formal vision of equality to define the meaning of parity also results in systemic and background factors being ignored in the process of determining appropriate sentences.

The mixed model of sentencing therefore treats proportionality as a limiting condition in calculating the amount of punishment that should be imposed on an offender, rather than as a determining condition. It also downplays the role of parity, focusing instead on the principle of restraint in the use of imprisonment. In addition, it understands parity in a different way than the desert model, by emphasizing the need for substantive equality and not formal equality in sentencing decisions.<sup>103</sup> Consequently, while disproportionately harsh punishments are to be avoided in the mixed model just as much as in the desert model, there is significantly more tolerance in the mixed model for disproportionately lenient sentences. A sentence can be less severe than is strictly warranted

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100. Rudin & Roach, *supra* note 82 at 29-30.

101. Allan Manson, "A Brief Reply to Professors Roberts and von Hirsch" (1998) 10 C.R. (5th) 232 at 233 [Mason, "Brief Reply"].

102. Tim Quigley, "Has the Role of Judges in Sentencing Changed . . . or Should It?" (2000) 5 Can. Crim. L. Rev. 317 at 324; Rudin & Roach, *supra* note 82 at 27-28. Desert theorists reject this assertion, arguing that desert theory is compatible with, and in fact promotes, restraint in the use of imprisonment. See especially von Hirsch, *Doing Justice*, *supra* note 88 at 107-117 and von Hirsch, *Censure and Sanctions*, *supra* note 84 at 91-97.

103. Rudin and Roach, *ibid.* at 22-25, 30.

by the harm caused and by the offender's degree of responsibility, in order to achieve the utilitarian goal of satisfying rehabilitation and restorative justice concerns.<sup>104</sup>

### *C. Canada's Existing Statutory Sentencing Regime*

The Canadian statutory sentencing regime represents a confusing mix of purposes, objectives and principles that are to be used in sentencing individual offenders. There are three main components to this regime. The first is the statement of purpose and objectives in section 718:

#### *Purpose*

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- to denounce unlawful conduct;
- to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or to the community; and
- to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

The second component is the statement of a "fundamental" principle in section 718.1:

#### *Fundamental principle*

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

The final component is the delineation of a series of "other" principles in section 718.2. The most important of these principles, for our purposes, are the following:

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104. Rudin and Roach argue, for example, that "[i]f a sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" *Ibid.* at 20.

*Other sentencing principles*

718.2. A court that imposes a sentence shall also take into consideration the following principles:

a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .

a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

It is apparent from even a cursory reading of these provisions that the Canadian sentencing regime as currently structured can be interpreted to provide support for both the desert model and the mixed model of sentencing.

For desert theorists, the existing regime, should be seen to accord priority to the principle of proportionality, for two reasons. First, the statement of purpose in section 718 offers little guidance to judges. Not only is it a confusing mix of retributive and utilitarian considerations; it also fails to assign any priority to the various competing objectives that are intended to promote that purpose.<sup>105</sup> Second, unlike the statement of purpose, the current regime does assign priority to one of the principles of sentencing set out in sections 718.1 and 718.2, namely, the principle of proportionality. According to Roberts and von Hirsch, for example, “the use of the adjective ‘fundamental,’ the absence of any other principle so designated and the presence of the secondary principles suggest that proportionality carries a weight not attributed to those other principles.”<sup>106</sup> Consequently, in their view, it is the principle of proportionality that is predominant, and Parliament must have intended

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105. Roberts & von Hirsch, “Legislating Sentencing”, *supra* note 35 at 52-54. The authors also point to the use of “must” in the section as a further indication of Parliament’s intention to emphasize the proportionality principle. *Ibid.* at 61, n. 9.

106. Roberts & von Hirsch, “Conditional Sentences”, *supra* note 94 at 226.

it to operate as a restraining influence on the general objectives set out in the purpose section.<sup>107</sup>

On the other hand, for supporters of the mixed model, there are three reasons why the current sentencing regime must be read holistically as supporting both retributive and utilitarian objectives.<sup>108</sup> First, the principle of proportionality is only referred to as a fundamental principle; it is not said to be the paramount concern in sentencing decisions. Allan Manson, for example, argues that the use of the term “fundamental” rather than “paramount” signifies Parliament’s rejection of a pure desert model of sentencing in favour of a mixed model that assigns proportionality “a significant but lesser role.”<sup>109</sup> Second, desert considerations are not the sole focus of the current sentencing provisions; utilitarian considerations such as deterrence, denunciation, and rehabilitation, as well as restorative justice concerns, are also recognized as valid aims.<sup>110</sup> Finally, the principle of restraint is recognized in a variety of ways. Separation is to be used only when necessary;<sup>111</sup> an offender is not to be deprived of his or her liberty if an appropriate and less restrictive sanction is available;<sup>112</sup> and all available and reasonable alternatives to imprisonment are to be considered for all offenders.<sup>113</sup> It is therefore apparent to mixed model supporters that

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107. Roberts & von Hirsch, “Legislating Sentencing”, *supra* note 35 at 51, 54. Roberts and von Hirsch recognize that there are two competing influences in the sentencing regime that could be used to undermine the principle of proportionality, namely, the multiple objectives listed in the purpose provision and Parliament’s failure to provide express guidance on how each of the individual components of the regime relates to the others. *Ibid.* at 54-55.

108. A further point, which is acknowledged by theorists on both sides of the debate, is that the actual penalty structure in the *Criminal Code* does not reflect the principle of proportionality in its allocation of maximum punishments and its use of mandatory minimum punishments. See Anthony N. Doob, “Sentencing Reform: Where are We Now?” in Roberts & Cole, *supra* note 35 at 349-355.

109. Manson, “Brief Reply”, *supra* note 101 at 233. See also Allan Manson, “Sentencing” in Don Stuart, R.J. Delisle & Allan Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) 457 at 471.

110. Rudin & Roach, *supra* note 82 at 29.

111. *Supra* note 3, s. 718(c).

112. *Ibid.*, s. 718.2(d).

113. *Ibid.*, s. 718.2(e).

Parliament has assigned significant priority to the principle of restraint in sentencing decisions.<sup>114</sup>

## IV. Implications of the Competing Models

### A. *Competing Perspectives on Gladue*

Proponents of the desert model who have focused on the *Gladue* decision argue that the decision is inconsistent with the existing sentencing regime in Canada, because aboriginal people are not the only disadvantaged social group that is overrepresented in Canada's prisons. More particularly, they argue that the systemic and background factors identified by the Supreme Court of Canada in *Gladue* are not unique to aboriginal peoples, but they affect many other disadvantaged and marginalized groups in Canadian society.<sup>115</sup> It is unfair to require judges to consider these factors only when sentencing aboriginal offenders, since this will inevitably result in sentences that conflict with the principles of proportionality and parity. That is, compared to other socially disadvantaged offenders, aboriginal offenders are less likely to be imprisoned, or to be imprisoned for a shorter time.<sup>116</sup>

The crux of the complaint, in other words, is that the life circumstances of aboriginal offenders and other socially disadvantaged offenders are sufficiently comparable to justify applying the same considerations to both groups. Accordingly, if an aboriginal offender and an offender from another similarly disadvantaged social group

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114. See e.g. the comments of the Minister of Justice, the Honourable Allan Rock, during passage of Bill C-41, set out in *Gladue*, *supra* note 1 at para. 46. Based on these and other remarks, Cory and Iacobucci JJ. concluded that one of the main remedial purposes of the sentencing reforms was to reduce the overuse of imprisonment in Canada. *Ibid.* at para. 48. See also Rudin & Roach, *supra* note 82 at 30.

115. Stenning & Roberts, *supra* note 35 at 158.

116. Stenning and Roberts, for example, argue that "the result [of *Gladue*] will be that some Aboriginal offenders will receive community-based sanctions where comparable, equally disadvantaged, non-Aboriginal offenders would be sentenced to prison. Despite all of the Court's rationalizations to the contrary, it is hard to see how this could be regarded as equitable or consistent with the value of parity in sentencing." *Ibid.* at 167.

commit crimes of similar seriousness, they should receive sentences of similar severity. As Stenning and Roberts explain:

Two visible minority offenders who have both endured similar social deprivations can be considered “similar” even if one is Aboriginal and the other a Black immigrant. Similarity in this context does not turn upon an offender’s ethnicity or heritage, but rather on his or her relative culpability and/or unsuitability for a particular kind of sentence in light of the social disadvantage he or she has experienced.<sup>117</sup>

The *Gladue* approach is therefore fatally flawed because it is under-inclusive. The solution, Stenning and Roberts argue, is to require that social disadvantage or deprivation be taken into account as a mitigating factor for all offenders where warranted regardless of racial or cultural origin.<sup>118</sup>

Supporters of *Gladue* have responded to this criticism in three main ways. First, they reject the claim that aboriginal offenders are comparable to other socially disadvantaged offenders. They argue that aboriginal peoples are different from all other offenders because of their unique legacy of colonialism. Their overrepresentation in prisons, is best explained by this unique legacy, rather than by their adverse social and economic conditions.<sup>119</sup> In addition, the overall degree of disadvantage experienced by aboriginal peoples differs from that of other socially disadvantaged groups, both in terms of the percentage of the aboriginal community that suffers from such disadvantage and in its severity.<sup>120</sup> In particular, as the Supreme Court recognized in *Gladue*,

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117. *Ibid.* at 159-60.

118. For further discussion of their proposal, see text accompanying note 154.

119. Rudin & Roach, *supra* note 82 at 16-19. Stenning and Roberts accept that a history of colonialism has contributed to the disadvantaged position of aboriginal peoples in Canada. They argue, however, that this history does not offer much in the way of explaining or attempting to deal with the modern problem of overrepresentation or in deciding what is a fit sentence for individual aboriginal offenders. Roberts & Stenning, “Sentencing of Aboriginal Offenders,” *supra* note 34 at 82-83.

120. David Daubney, “Nine Words: A Response to ‘Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders’” (2002) 65 Sask. L. Rev. 35 at 41-42.

the circumstances of aboriginal offenders differ from those of the majority because *many* aboriginal people are victims of systemic and direct discrimination, *many* suffer from the legacy of dislocation, and *many* are substantially affected by poor social and economic conditions.<sup>121</sup>

This is not to deny that other social groups, and indeed many individuals in Canada's prisons, have experienced poverty, substance abuse, and limited educational and employment opportunities. Nonetheless, abstract descriptions of system and background factors can shelter striking differences in the actual scope of the problem. In Jean-Paul Brodeur's words:

"[H]igh unemployment" has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; "substance abuse" is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; "loneliness" is not experienced in the same way in bush reservations and urban ghettos.<sup>122</sup>

In short, as Brodeur asserts, "a surface similarity [between systemic factors can] be shown to conceal a substantial difference when context is taken into account."<sup>123</sup>

Second, supporters of *Gladue* argue that the principles of proportionality and parity in Canada have to be read as encompassing a vision of substantive equality, not formal equality, in sentencing decisions. As the Supreme Court stated in *Gladue*, "the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders *fairly by taking into account their difference*."<sup>124</sup> When this is done, it is clear that *Gladue* promotes rather than diminishes equality, because it recognizes and is designed to ameliorate conditions of social disadvantage.<sup>125</sup> Consequently, even if one were to accept that the circumstances of

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121. *Gladue*, *supra* note 1 at para. 68 [emphasis added].

122. Jean-Paul Brodeur, "On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts" (2002) 65 Sask. L. Rev. 45 at 49.

123. *Ibid.*

124. *Gladue*, *supra* note 1 at para. 87 [emphasis added].

125. Rudin & Roach, *supra* note 82 at 24-25; Mark Carter, "Of Fairness and Faulkner" (2002) 65 Sask. L. Rev. 63 at 70-71.

aboriginal offenders and other socially disadvantaged offenders are comparable, and that *Gladue* is therefore under-inclusive in its focus on aboriginal offenders, this would not be fatal to its reasoning. A substantive vision of equality, in other words, accepts under-inclusiveness in ameliorative programs.

To bolster this claim, supporters of *Gladue* make three further assertions that directly challenge the presumed centrality of the desert model which underlies the claims of *Gladue*'s critics. First, and most important, *Gladue*'s supporters argue that the principle of proportionality has to be tempered by utilitarian considerations, and that since 1996, one such consideration has been the instrumental goal of reducing the overrepresentation of aboriginal peoples in Canada's prisons.<sup>126</sup> Second, they argue that a judge should give priority to the principle of restraint in the use of imprisonment, rather than to the principle of parity,<sup>127</sup> particularly given the practical difficulty in achieving parity.<sup>128</sup> In this respect, they note that the Supreme Court itself has recognized that "the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction."<sup>129</sup> The principle of parity as set out in section 718.2(b) also requires a consideration of the similarity of offences, offenders and circumstances, and this is broad enough to include a consideration of systemic and background factors and any differing conception of the aims of sentencing.<sup>130</sup> Finally, supporters of *Gladue* argue that section 718.2(e) is not restricted to aboriginal offenders; rather, it instructs judges to consider alternatives to imprisonment for *all* offenders. Consequently, there is nothing to prevent a judge from taking systemic and background factors into account in sentencing non-aboriginal offenders.<sup>131</sup>

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126. Rudin & Roach, *ibid.* at 15.

127. *Ibid.* at 30.

128. Quigley, *supra* note 102 at 324-25. For a practical illustration of the difficulty that arises in deciding whether offences, offenders, circumstances or sentences are similar, see Doob, *supra* note 108 at 352.

129. *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at 567 cited in *Gladue*, *supra* note 1 at para. 76.

130. Rudin & Roach, *supra* note 82 at 29.

131. *Ibid.* at 16.

Critics and supporters of *Gladue* therefore not only have very different conceptions of the proper purposes of sentencing; they also have diametrically opposed views on the validity of the final clause in section 718.2(e) and on the Supreme Court's interpretation of that clause in *Gladue*. Although critics of *Gladue* raise a number of compelling points, in the final analysis<sup>132</sup> it is preferable, in my view, that the Canadian sentencing regime accord some recognition to social disadvantage when devising fit and appropriate sanctions, even if that recognition is limited to aboriginal offenders. However, a far better solution, as both critics and supporters of *Gladue* acknowledge,<sup>133</sup> is the recognition of social disadvantage as a potential mitigating factor for *all* offenders. The Ontario Court of Appeal's decisions in *Borde* and *Hamilton* go a considerable distance toward achieving this goal.

### B. Impact of *Borde* and *Hamilton*

*Borde* and *Hamilton* dealt with African-Canadian offenders. However, both Rosenberg J.A. and Doherty J.A. appeared to accept that systemic and background factors which have played a role in the commission of an offence can be considered in any case involving a socially disadvantaged offender. Indeed, given the reasoning of the two judges, there would seem to be no logical basis for limiting the decisions to African-Canadian offenders. In *Borde*, for example, Rosenberg J.A. relied on "the principles that are generally applicable to *all* offenders" to ground his decision.<sup>134</sup> Similarly, in *Hamilton*, Doherty J.A. based his decision on general sentencing principles,<sup>135</sup> as well as drawing support from Rosenberg J.A.'s earlier decision in *Borde*.<sup>136</sup>

Recognizing social disadvantage as a potentially relevant mitigating factor for all offenders has two important consequences. First, despite

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132. See text accompanying notes 153-55.

133. There is, however, some disagreement on the proper mechanism for achieving this goal. See text accompanying notes 140-41.

134. *Borde*, *supra* note 5 at para. 32 [emphasis added].

135. See *Hamilton* (O.C.A.), *supra* note 10 at paras. 87-103, particularly para. 98 where Doherty J.A. recognizes that "s. 718.2(e) applies to all offenders."

136. *Ibid.* at paras. 134-35.

the focus on systemic racism in *Gladue* and *Borde*, as well as in Hill J.'s trial decision in *Hamilton*, there seems to be no requirement that the offender be a member of a visible minority. In particular, in *Hamilton*, Doherty J.A. noted that the two offenders had failed to introduce evidence linking their particular circumstances to systemic racism and gender discrimination, but he went on to conclude that such evidence was not essential because economic disadvantage alone may itself be sufficient to warrant some mitigation of an offender's sentence. In his view, "[w]hat is important for the purpose of sentencing is that the respondents' very difficult economic circumstances, the underlying causes of their crimes, are very real and are to a large extent the product of circumstances that are either beyond their control, or for which they cannot be faulted."<sup>137</sup>

Given this analysis, Doherty J.A. would surely have reached the same result if he had been dealing with white offenders who had experienced the same disadvantage as the two African-Canadian offenders in *Hamilton*. The issue, in other words, is social disadvantage broadly construed, not race, or for that matter, gender. As Archibald Kaiser earlier suggested, "[w]herever there is a nexus between the commission of an offence and social deprivation and marginality, for whatever reason, [*Borde* and *Hamilton*] herald the permissibility of taking such factors into account in mitigation of sentence."<sup>138</sup>

Second, if it is underlying social disadvantage that ultimately justifies mitigating an offender's sentence,<sup>139</sup> it is arguably not essential that the offender be a member of a group that is disproportionately represented either in Canada's prisons or in the conviction statistics for the relevant offence. Put another way, there are only two relevant questions: is the offender socially disadvantaged, and if so, to what extent did that social disadvantage contribute to the commission of the offence?

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137. *Ibid.* at para. 138.

138. Kaiser, *supra* note 79 at 297 [emphasis in original]. Kaiser was commenting on Hill J.'s decision in *Hamilton* but the same conclusion can be drawn from Doherty J.A.'s decision in *Hamilton*. Coughlan and Plaxton reached similar conclusions about the potential impact of Hill J.'s decision. See Steve Coughlan, "Annotation: *R. v. Hamilton*" (2003) 8 C.R. (6th) 216 at 218; Plaxton, *supra* note 81 at 304.

139. See text *infra* notes 149-51.

The recognition in *Borde* and *Hamilton* that social disadvantage may be a relevant mitigating factor for all offenders goes a considerable way toward satisfying the concerns raised by *Gladue*'s critics. However, the fact that this was accomplished judicially rather than legislatively does raise the question of whether *Borde* and *Hamilton* are compatible with section 718.2(e) and *Gladue*. Stephen Coughlan, for example, argues that applying the *Gladue* approach to other socially disadvantaged offenders ignores the uniqueness of aboriginal offenders that underlies both section 718.2(e) and *Gladue*. In his words, "[i]t is difficult enough to find a unique way to approach the difficulty of over-representation of Aboriginal peoples at the sentencing stage; no matter how well-intentioned, to suggest that that approach should then be expanded to others makes it cease to be unique."<sup>140</sup>

In Coughlan's view, regardless of the merit of any claim that African-Canadian offenders may have to special consideration of their circumstances, the decision to extend *Gladue* to encompass any other socially disadvantaged group is a decision for Parliament, not the courts.<sup>141</sup> He therefore concludes that *Borde* and *Hamilton* conflict with the existing statutory regime.

Despite its initial appeal, Coughlan's claim is ultimately unconvincing. First, neither *Borde* nor *Hamilton* actually extends the *Gladue* approach fully to other socially disadvantaged offenders. As Rosenberg J.A. emphasized in *Borde*, a sentencing judge is under a duty to consider the relevance of systemic and background factors only in cases involving aboriginal offenders.<sup>142</sup> In all other instances, as Doherty J.A. stressed in *Hamilton*, the sentencing judge may suggest to counsel that systemic and background factors should be considered, but the judge will normally have to defer if counsel rejects that suggestion.<sup>143</sup>

Moreover, as both Rosenberg and Doherty JJ.A. pointed out, there is no evidence yet that other groups in Canadian society share the aboriginal perspective on the purposes of punishment.<sup>144</sup> Accordingly,

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140. Coughlan, *supra* note 138 at 217-18.

141. *Ibid.* at 217.

142. *Borde*, *supra* note 5 at para. 31.

143. *Hamilton* (O.C.A.), *supra* note 10 at paras. 67-70.

144. *Ibid.* at paras. 98-99; *Borde*, *supra* note 5 at para. 32.

the principle of restraint still takes on added importance only in cases involving aboriginal offenders, who are thus more likely than other offenders to receive a non-custodial sentence. It is for these reasons that *Borde* and *Hamilton* only partially satisfy the concerns of *Gladue*'s critics.

Second, the Supreme Court of Canada in *Gladue* accepted that systemic and background factors "explain in part the incidence of crime and recidivism for non-aboriginal offenders."<sup>145</sup> In addition, the Court specifically recognized that systemic and background factors would "be of importance for a judge in sentencing a non-aboriginal offender."<sup>146</sup> *Gladue* itself therefore sanctions the use of systemic and background factors in cases involving other socially disadvantaged offenders.

Finally, section 718.2(e) expressly requires that a judge consider alternatives to imprisonment for *all* offenders. In Rosenberg J.A.'s view, this general statement of the principle of restraint itself gives a judge the authority in appropriate cases to consider systemic and background factors and the values of the offender's community.<sup>147</sup> This point was expressly adopted by Doherty J.A. in *Hamilton*.<sup>148</sup>

### C. Social Disadvantage as a Mitigating Factor

The debate over section 718.2(e) and the Supreme Court's interpretation of the section in *Gladue* has focused on the under-inclusiveness of the Court's approach, given that there are other socially disadvantaged groups in society. Judicial recognition in *Borde* and *Hamilton* of social disadvantage as a potential mitigating factor in the sentencing of offenders from all such groups has largely addressed this concern. However, in so doing, *Borde* and *Hamilton* have directly raised the broader question of whether the courts *ought* to recognize social disadvantage for that purpose.

For desert theorists, the answer to this question depends on the extent to which social disadvantage affects the offender's ability to choose

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145. *Gladue*, *supra* note 1 at para. 68.

146. *Ibid.* at para. 69.

147. *Borde*, *supra* note 5 at para. 32.

148. *Hamilton* (O.C.A.), *supra* note 10 at para. 134.

whether to comply with the law. According to the desert theory, a factor should not be recognized as mitigating or aggravating the seriousness of an offence unless it serves to increase or decrease either the harmfulness of the conduct or the offender's degree of responsibility for that harm.<sup>149</sup> Since social disadvantage does not affect the harmfulness of the conduct, it should only be accepted as a mitigating factor if it serves to lessen in some way the offender's responsibility for that harm.<sup>150</sup>

Desert theorists accept that individuals who are socially and economically marginalized may find it more difficult to conform to the law because they have fewer opportunities than others do to live tolerable lives within the law.<sup>151</sup> When they break the law, they may therefore be less culpable than other offenders. Desert theorists do not reject outright the recognition of social disadvantage as a potentially mitigating factor in sentencing, but for three main reasons, they question whether it can play a significant role in sentencing decisions.<sup>152</sup>

First, desert theorists note that there are implementational difficulties that would have to be overcome in order to make social disadvantage work properly as a mitigating factor. Among them are the difficulty of identifying with any precision the degree of disadvantage and the type of connection to the impugned conduct that must exist, as well as "the sentencing quantum of [the] discount with respect to the principles of proportionality and parity."<sup>153</sup> Second, desert theorists are concerned that recognizing social disadvantage as a mitigating factor risks reintroducing into sentencing the use of social factors as predictors of future reoffending, which has traditionally had a negative effect on the socially disadvantaged.<sup>154</sup> Finally, they are concerned that recognizing

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149. See text accompanying notes 88-89.

150. von Hirsch, *Censure and Sanctions*, *supra* note 84 at 107.

151. *Ibid.*

152. *Ibid.* at 108. Also see generally Barbara A. Hudson, "Doing Justice to Difference" in Andrew Ashworth & Martin Wasik, eds., *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford: Oxford University Press, 1998) 223 at 242-43.

153. Brodeur, *supra* note 122 at 94. See also von Hirsch, *Censure and Sanctions*, *supra* note 84 at 108.

154. von Hirsch, *Doing Justice*, *supra* note 88 at 147-48. See also von Hirsch, "Sentencing Reform", *supra* note 85 at 30.

social disadvantage as a mitigating factor may result in sentences that do not adequately reflect the harm done to the victims of crime.

Despite these concerns, Stenning and Roberts, who are desert theorists, have argued that the recognition of a general mitigating factor for social disadvantage is desirable for four reasons.<sup>155</sup> First, it would reduce the use of imprisonment for socially disadvantaged offenders who establish a valid claim for mitigation. Second, aboriginal offenders would continue to benefit from a general mitigating factor, since they would often be able to make a convincing case for mitigation. Third, a general mitigating factor would be more likely to receive support from the judiciary, because it is more consistent with the statutory principles of sentencing. Finally, a general approach is likely to generate less negative commentary because it should be more acceptable to the public, the media and other commentators.

Proponents of the mixed model of sentencing have expressly supported judicial recognition of social disadvantage as a mitigating factor for all socially disadvantaged offenders.<sup>156</sup> They believe that this approach is more realistic, and that it accords more fully with the Canadian vision of substantive equality and the various statutory directions to judges to exercise restraint in the use of imprisonment. Further, they argue that the statutory principles of sentencing are broad enough to support this approach. In particular, they say that the phrase “degree of responsibility” in section 718.1 is broad enough to include both the traditional focus on the offender’s mental state at the time of the offence and his or her reasons for committing it.<sup>157</sup>

Ultimately, therefore, there is support in Canada amongst proponents of both the desert model and the mixed model of sentencing for recognizing the role that social disadvantage may play in the commission of a crime. Both sides also acknowledge, however, that if

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155. Roberts & Stenning, “Sentencing of Aboriginal Offenders”, *supra* note 34 at 94-95. This is not to suggest that all desert theorists in Canada believe that social disadvantage ought to be recognized as a mitigating factor in all cases. In particular, although Brodeur does not explicitly reject this approach, his comments on Stenning and Roberts’ article suggest that he has considerable doubts about the merits of such an approach. See Brodeur, *supra* note 122 at 51.

156. Roach, *supra* note 77 at 234-35. See also Kaiser, *supra* note 79 at 297.

157. Rudin & Roach, *supra* note 82 at 29.

social disadvantage is to be a factor in the sentencing regime, judges will have to work out its specific relationship to the fundamental principle of proportionality. They will need to develop a “desert calculus that specifically relates social disadvantage to penalty, and provides a means to decrease the use of imprisonment for all offenders.”<sup>158</sup> This calculus will have to provide answers to three issues: the degree of disadvantage that will allow the offender to raise the issue of mitigation; the strength of the causal link needed between the disadvantage and the offence; and the quantum of the mitigation in the particular case.

*Gladue*, *Borde* and *Hamilton* provide answers or partial answers to some of these questions. The cases collectively indicate that the social disadvantage must at least be sufficient to have constrained the offender’s ability to obey the law. Moreover, there must be some evidence before the court to establish a causal link between the disadvantage and the commission of the crime; the existence of social disadvantage alone does not warrant any mitigation of sentence. At the same time, despite a clear judicial preference for specific evidence demonstrating the offender’s motive for committing the offence,<sup>159</sup> it is apparently sufficient if the causal link is merely implicit in the evidentiary record.<sup>160</sup>

The cases also suggest that the practical impact of taking social disadvantage into account in the sentencing process may be limited, for three main reasons. First, in sentencing for serious and violent crimes, the courts have consistently held that priority is to be given to denunciation and deterrence. Factors affecting the offender’s personal culpability, including systemic and background factors that played a role in the commission of the offence, are given less weight.

Second, while the assessment of personal culpability must be approached in a holistic manner that takes into account the circumstances that led the offender to commit the crime, that assessment

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158. *Ibid.* at 31.

159. See in particular *Hamilton* (O.C.A.), *supra* note 10 at paras. 117-18 where Doherty J.A. criticizes the two offenders for failing to present evidence on their role and involvement in the two crimes, given that this information was clearly within their knowledge.

160. *Ibid.* at para. 136.

is still ultimately focused on the issue of individual choice. This factor alone has the potential to limit significantly the practical impact that social disadvantage can have on setting the quantum of the sentence imposed on an offender. According to Doherty J.A. in *Hamilton*, for example, “[t]he blunt fact is that a wide variety of societal ills—including, in some cases, racial and gender bias—are part of the causal soup that leads some individuals to commit crimes. *If those ills are given prominence in assessing personal culpability, an individual’s responsibility for his or her own actions will be lost.*”<sup>161</sup> This suggests that significant mitigation will be warranted only if the court can conclude that the social deprivation that played a role in the commission of the offence was so significant that it seriously constrained the offender’s circumstances and life choices.

Finally, the sentence ultimately imposed on an offender must be consistent with the fundamental purposes of sentencing. The courts must ensure that an offender’s sentence does not undermine respect for the law by encouraging the commission of future crimes or ignoring the views of the community and victims of the crime.<sup>162</sup>

## V. Sentencing, Social Disadvantage and Judicial Decision-Making

The judicial approach to sentencing will have to change if the approach in *Borde* and *Hamilton* is generally accepted and applied by Canadian courts. Both lawyers and judges will have to adapt if the process is to work properly.<sup>163</sup> The length and complexity of many sentencing hearings, at least initially, will undoubtedly increase.

Defence counsel will have a crucial role to play in bringing forward relevant information in cases involving non-aboriginal offenders, since there is no positive duty on the court in such cases to take judicial notice of systemic and background factors or to apply any differing conception

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161. *Ibid.* at para. 140 [emphasis added].

162. *Ibid.* at paras. 147-48.

163. For a discussion of the procedural implications of *Gladue*, see generally Judge Mary Ellen Turpel-Lafond, “Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*” (1999) 43 *Crim. L.Q.* 34.

of sentencing.<sup>164</sup> While a sentencing judge may independently raise the issue of social disadvantage if counsel does not, it is ultimately for counsel to decide whether to pursue the issue, and if so, to provide the necessary evidentiary support.<sup>165</sup> Defence counsel will therefore have to ensure that the pre-sentence report provides information on general systemic and background factors affecting their clients, on how these factors influenced the life of the particular offender, and on the availability of any community-based programs. This will often require defence counsel to spend more time with their clients, and to contact representatives from their clients' community to ascertain what programs are available and how they might assist the offender.<sup>166</sup> It is not clear whether it is realistic to expect defence counsel to do this, given current levels of funding for legal aid.

Judges and prosecutors will also have to take a fresh look at their role when faced with an offender who may be from a socially disadvantaged background, especially if the offender is not represented by counsel. In particular, judges will have to get used to dealing with complex and sometimes contentious evidence on such matters. At least initially, expert evidence will be needed to ensure the proper interpretation and application of statistical and other information on social disadvantage and its impact on the community and the offender.<sup>167</sup> As in other areas, the judicial role will eventually become easier as a body of case law develops, but information will still be needed on the offender's personal experience of social disadvantage and on the options available for that offender in the community.<sup>168</sup>

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164. *Borde*, *supra* note 5 at para. 31.

165. *Hamilton* (O.C.A.), *supra* note 10 at paras. 66-70.

166. It will be important for counsel to explain to the court how the offender will benefit from the program. In *Borde*, for example, Rosenberg J.A. noted that the two pamphlets describing community programs for black youth which defence counsel had filed with the court "were not particularly helpful in showing how these community programmes could assist the appellant." *Borde*, *supra* note 5 at para. 23.

167. *Hamilton* (O.C.A.), *supra* note 10 at paras. 76, 81.

168. Kaiser, for example, suggests that "[g]radually, proceedings like *Hamilton* could become more focused and economical as what now demands extensive justification is accepted as official policy." Kaiser, *supra* note 79 at 295.

## Conclusion

*Gladue*, *Wells*, *Borde* and *Hamilton* expressly acknowledge the inequalities that exist in Canadian society, their potential link to criminal behaviour, and the fact that they may contribute to the overrepresentation of certain groups in Canada's prisons. The cases also address the question of what role, if any, these systemic and background factors ought to play in the sentencing of individual offenders. Each case reaches the same conclusion: to the extent that such factors played a role in the particular offender's actions, they can potentially be used to mitigate the sentence. None of the decisions, however, endorses an automatic sentence "discount" for a socially disadvantaged offender. Instead, a causal link must be established between the social disadvantage and the commission of the crime. Each of the cases also accepts that systemic and background factors will normally have little impact on sentences for serious and violent crimes. The practical impact of the decisions in *Borde* and *Hamilton* in individual cases may also be limited if, as Doherty J.A. suggested in *Hamilton*, the social deprivation experienced by the offender must have been significant enough to seriously constrain his or her circumstances and choices.

There are several specific issues that will ultimately have to be resolved if social disadvantage is to operate fairly as a mitigating factor in sentencing. Exactly how much social disadvantage is required to sustain a claim for mitigation? How strong must the causal connection be between the disadvantage and the commission of the crime? How much of a discount is warranted? What are the judge's and prosecutor's roles in cases involving an unrepresented offender who may come from a socially disadvantaged background? Answers to some of these questions are hinted at in *Gladue*, *Wells*, *Borde* and *Hamilton*. To answer others, the lower courts will have to look to first principles. Their task will be made more difficult by the conflicting messages about the purposes, objectives and principles of sentencing found in both the *Criminal Code* and the case law.

Ultimately, it must be conceded that recognizing social disadvantage as a potential mitigating factor in sentencing is not a cure for social inequality or for the overrepresentation of the socially disadvantaged in

Canada's prisons. As the Supreme Court of Canada first recognized in *Gladue*, sentencing reform alone cannot remedy complex social and economic problems.<sup>169</sup> Nevertheless, by recognizing and addressing the reality and impact of social disadvantage in Canada, these three cases contribute to the development of a fairer and more just sentencing regime. A society that seeks to impose just sanctions on an offender should not simply turn a blind eye to the fact that inequities and injustices within the society may have contributed to the offender's actions in the first place.

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169. *Gladue*, *supra* note 1 at para. 65.

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