Eyes Wide Shut: The Alberta Court of Appeal's Decision in *R. v. Arcand* and Aboriginal Offenders

Jonathan Rudin*

R. v. Arcand *was no ordinary sentence appeal. It was a reconsideration of four previous Alberta Court of Appeal sexual assault decisions. It was an opportunity to discuss the significance of starting point sentences – essentially appellate court mandated starting points to be followed by lower court judges when issuing sentences for specific sub-categories of offences. The decision also purports to provide a clear-eyed assessment of the problems with sentencing in Canada since the passage of Bill C-41 in 1996 and a way out of the morass of unprincipled sentencing decisions by lower judges that have eroded Canadians' faith in the justice system itself. However, there is something missing in the decision. The force of the reasoning advanced in* Arcand *is strongly diminished by the Court of Appeal's failure to advert to the Supreme Court of Canada's decision in* R. v. Gladue *and to the realities of Aboriginal overrepresentation in Canadian and, more specifically, Alberta corrections facilities. Recognition of* Gladue *should lead to a reconsideration of the conclusions in* Arcand *on the issues of proportionality, Aboriginal concepts of sentencing, circumstances of the Aboriginal offender, general deterrence, and the way sentences reflect harm to victims.*

R. c. Arcand *n'était pas un appel contre la peine ordinaire. Il s'agissait en effet du nouvel examen de quatre décisions antérieures de la Cour d'appel de l'Alberta relatives à des agressions sexuelles; la cour d'appel a essentiellement instruit de respecter les points de départ des juges du tribunal inférieur au moment de décider de la peine pour des sous-catégories précises d'infractions. La décision est aussi censée donner une évaluation claire des problèmes relatives aux peines au Canada depuis l'adoption du projet de loi C-41 en 1996 et fournir une voie de sortie du marasme des décisions sans principes de juges de tribunaux inférieurs ayant érodé la confiance des Canadiens dans le système de justice en soi. Cependant, quelque chose manque à la décision. La force du raisonnement invoqué dans* Arcand *est sérieusement réduite par l'échec de la Cour d'appel de se référer à la décision de la Cour suprême du Canada dans* R. c. Gladue *et aux réalités de la surreprésentation autochtone dans les pénitenciers canadiens, et surtout albertains. La reconnaissance de* Gladue *devrait amener un nouvel examen des conclusions dans* Arcand *en ce qui concerne la proportionnalité, les concepts autochtones de peines, les circonstances du délinquant autochtone, la dissuasion du public et la manière dont les peines reflètent le préjudice aux victimes.*

Table of Contents

I. Introduction . . . 988
II. The Decision Itself . . . 990
III. What Is Missing? . . . 995
  A. Proportionality . . . 1001
  B. Aboriginal Concepts of Sentencing . . . 1002
  C. Circumstances of the Aboriginal Offender . . . 1004
  D. General Deterrence and *Gladue* . . . 1005
  E. Harm and Jail . . . 1006
IV. Conclusion . . . 1007

* Program Director, Aboriginal Legal Services of Toronto; member of the Law and Society Program in the Faculty of Liberal Arts and Professional Studies, York University. I would like to thank Aleksandra Simic, counsel for Jordan Arcand at the Alberta Court of Appeal, for providing background information and documentation regarding the case. I would also like to thank Justice David Cole, Professor Kent Roach, and Barbara Yip for their helpful suggestions for this article. Any errors and omissions are, of course, solely my responsibility. As well, the opinions expressed in this article are mine alone.

I. INTRODUCTION

On 2 December 2010, the Alberta Court of Appeal released its decision in *R. v. Arcand*[1] — an appeal of a 90-day intermittent sentence imposed on a first offender in a sexual assault. While, under normal circumstances, a decision such as this would not merit much attention from anyone other than the parties to the case, *Arcand* was no ordinary sentence appeal. The majority judgment, delivered by Fraser C.J.A. and Côté and Watson JJ.A., is 300 paragraphs long and includes 313 footnotes. The dissent, concurring in part, was delivered by Hunt and O'Brien JJ.A. and is 140 paragraphs long. Four hundred and forty paragraphs for a sentence appeal on a sexual assault case suggests that something else was involved in this decision. In fact, the majority spent only 46 paragraphs on the sentence appeal itself. The dissent, while significant, did not challenge the decision of the majority on the actual sentence.

So what was *Arcand* about? It was about a lot of things. On the one hand, it was a reconsideration of four previous Alberta Court of Appeal sexual assault decisions. It was also an opportunity for the Court to discuss the significance of starting point sentences — essentially appellate court mandated starting points to be followed by lower court judges when issuing sentences for specific sub-categories of offences (as determined by the court rather than the legislature). Indeed, it was this issue that was the reason for the dissent in the case.

But the case was about much more than sentencing starting points. The majority decision (concurred with by the minority) was also a survey of sentencing history in Canada, with particular, but not exclusive, emphasis on the period following the 1996 amendments to the *Criminal Code*[2] contained in Bill C-41: *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*.[3] It was this aspect of the decision, a plainspoken admonition to judges against too much individualized sentencing, that captured widespread attention. To emphasize this point, the decision begins: "Without public confidence in the criminal justice system, respect for the rule of law is imperilled."[4]

It is pointless to speculate as to who the authors of the decision thought might be the audiences for it. It is undeniable, however, that the decision reached well beyond judges and lawyers. The 8 December 2010 edition of *The Globe and Mail* featured the *Arcand* decision on the front page under the headline: "Top court urged to overhaul sentencing philosophy." Justice reporter Kirk Makin stated in the article:

> In a ruling designed to prod the Supreme Court of Canada into revamping sentencing philosophies, a five-judge Alberta Court of Appeal panel said trial judges must be restrained from injecting their personal views and predilections into the sentencing process.

---

1 2010 ABCA 363, 264 C.C.C. (3d) 134 [*Arcand*].
2 R.S.C. 1985, c. C-46.
3 1st Sess., 35th Parl., 1995 (assented to 13 June 1995), S.C. 1995, c. 22 [Bill C-41].
4 *Arcand*, *supra* note 1 at para. 1.

> They warned that, unless the judiciary gets its own house in order and fashions a predictable regime of minimum sentences, politicians will do it for them.[5]

In an editorial the following day, entitled "Making punishment fit the crime," *The Globe and Mail* wrote, in part:

> The Alberta Court of Appeal this week has made an important contribution toward making criminal sentences more fair and consistent, by reasserting the principle of "starting points," that is, strong sentencing guidelines developed by the higher courts, to be departed from only for clear and cogent reasons. This is the sensible, comparatively flexible alternative to legislated mandatory minimums.
>
> …
>
> Eventually, the Supreme Court will have to establish some sentencing consistency all across Canada, by affirming the starting-point principle, especially for major sexual assaults. But the Alberta court's 139-page decision has shown the way forward.[6]

This was not the only national media attention the decision received. Many other media outlets also featured the decision, including the *Toronto Sun*,[7] the *Edmonton Journal*,[8] and the *Winnipeg Free Press*.[9] CBC Radio One's morning current affairs program *The Current* featured a discussion of the case on its 15 December 2010 show, featuring former Supreme Court of Canada Justice John Major (who was appointed from Alberta), former British Columbia Court of Appeal Justice and Attorney General Wally Oppal, and retired Alberta Provincial Court Judge Herb Allard. In her introduction to the discussion, host Anna Maria Tremonti stated:

> The Alberta Court of Appeal has issued a warning to Canada's Supreme Court — [rein] in Canadian judges and tighten up Canada's sentencing rules, or risk losing Canadians' faith in the justice system.
>
> The view was in a ruling issued last week in the case of a man who was sentenced to nine months for sexually assaulting a friend. The Alberta Court of Appeal ruled the sentence was too lenient. It went further,

---

5 Kirk Makin, "Top court urged to overhaul sentencing" *The Globe and Mail* (9 December 2010) A1. Arcand has instructed his counsel to seek leave to appeal to the Supreme Court of Canada: email correspondence from Aleksandra Simic, counsel for Arcand, to the author (21 January 2011).

6 "Making punishment fit the crime," Editorial, *The Globe and Mail* (10 December 2010) A18.

7 Alan Shanoff, "Canada's judges face fire for sentencing" *Toronto Sun* (2 January 2011), online: Toronto Sun <http://www.torontosun.com/comment/columnists/alan_shanoff/2010/12/30/16711421. html>.

8 "Judges call for uniform sentencing; Justice a 'lottery,' appeal court says," Editorial, *Edmonton Journal* (9 December 2010) B7.

9 "Toward consistent sentences," Editorial, *Winnipeg Free Press* (13 December 2010) A12, online: Winnipeg Free Press <http://www.winnipegfreepress.com/opinion/editorials/toward-consistent-sentences-111773304.html>. The editorial concluded:

> The public and the police in Manitoba have long complained about leniency and the "revolving door" of justice. A fraction of court cases go to the appeal court, which means judicial review of sentences is minimal. In absences of bench marks to better guide sentencing, the public is justified in wondering if sanctions imposed from case to case are fair.
>
> Justice Minister Andrew Swan ought to heed the Alberta court's warning, and survey judges here on the effects of judicial discretion. Judges may favour the option of starting points for sentences, which leaves in their hands broad control over sanctions, but a closer look may show a swifter reform that only a permanent sentencing commission can force is required.

> saying trial judges should not be allowed to inject their own views into sentencing and adding … "public confidence is eroded when the requirements of legality are not apparent in a criminal sentence."
>
> The appeal judges also called for minimum sentences for some crimes, regardless of the mitigating circumstances in a given case.[10]

While the media analysis and summary of the decision might not capture all of the nuances and legal aspects of the decision with complete accuracy, it is clear that the decision reached well beyond the legal community.

There is much in the decision that will be the subject of comment from the legal profession. Some of these issues are particular to Alberta, such as the appellate reconsideration process itself and the particular provincial starting points.[11] On a national level, the significance of judicially imposed starting points will likely generate renewed interest. As well, the decision raises questions about judicial attitudes and/or stereotypes towards sexual assault cases and the evolution of sentencing, particularly in the wake of increased parliamentary interest and direction in this area over recent years.

The purpose of this article will not be to touch on those issues, other than to discuss, to a limited extent, Parliament's recent forays into sentencing. Rather, the focus will be on what is not in the extensive and wide-ranging Alberta Court of Appeal decision, namely, a substantive discussion of the fact that the offender in this case was an Aboriginal person and that both the *Criminal Code* and jurisprudence of the Supreme Court of Canada direct courts to consider this factor in sentencing. Despite its apparent comprehensiveness, this issue was conspicuous in its absence — an absence that weakens the arguments raised by the Court of Appeal significantly. This absence, this unwillingness to acknowledge legislative, judicial, and penological realities, is not restricted to the Alberta Court of Appeal and verges upon what might be considered wilful blindness.

II. THE DECISION ITSELF

In its introduction, the majority of the Court signalled its intention to address a wide-ranging set of issues in its decision. The Court indicated that it was going to face five sentencing truths: (1) sentencing is controversial in both its theoretical and practical application; (2) it is not true that judges would substantially agree on a sentence for a particular offence if the facts of a given case were know by all; (3) as a result, judge shopping by counsel is a reality in Canada; (4) because of the above truths it is impossible to actually arrive at "just sanctions" for a particular sentence; and (5) if "courts do not act to vindicate the promises of the law, and public confidence diminishes, then Parliament will."[12]

---

10 "Mandatory Sentences — Judges Panel" *The Current* at 2:40-3:29, online: CBC Radio <http://www.cbc.ca/thecurrent/episode/2010/12/15/mandatory-sentences---judges-panel/>.

11 There are other aspects of the case that will likely generate discussion. On the motion of the Crown, one of the judges who was to hear the case recused himself. Following that recusal, counsel for Arcand sought the recusal of the five judges then set to hear the case although that motion was unsuccessful. The Alberta Trial Lawyers Association sought intervener status in the case, but their motion was refused.

12 *Arcand*, *supra* note 1 at para. 8.

The Court then embarked on a review of the history of sentencing legislation in Canada, with particular emphasis on the background to the 1996 amendments to the sentencing provisions of the *Criminal Code* contained in Bill C-41. In reviewing the background documents that led to the amendments as well as speeches by Ministers of Justice in the House of Commons, the Court concluded that the idea of proportionality was at the heart of the amendments.

Proportionality, the Court found, was now "the *only* governing sentencing principle under the [*Criminal*] *Code*."[13] Proportionality was explained as being

> based on a simple, yet compelling, premise. The severity of sanction for a crime should reflect the overall degree of moral blameworthiness … of the criminal conduct … measured by two things: the gravity of the offence and the offender's degree of responsibility.[14]

Proportionality was made a requirement to ensure that "just sanctions" were imposed.[15] It allows for a standard that judges can rely on when imposing sentences and it "makes the blunt tool of punishment a valid and itself morally acceptable element of social order."[16] While the sentencing provisions of the *Criminal Code* include many other measures (found in ss. 718, 718.1, and 718.2), they are all part and parcel of proportionality.[17] The Court concluded its discussion on this aspect by saying that "no matter what objectives or combination of objectives a sanction is intended to achieve, to be a just sanction, the sentence imposed must comply with the proportionality principle."[18]

While sentencing is an individualized process, it does not mean that judges should be free to impose any sentence they choose. Sentencing disparities, the Court maintains, "breed disrespect for the law."[19] The consequence of unwarranted disparities is that Parliament will intervene to impose order.[20]

The Court was particularly concerned with the way in which lower courts used conditional sentences, first introduced in the 1996 amendments. In reference to the purpose of the amendments, the Court quotes Minister of Justice Allan Rock in 1997, saying: "*One would have thought it was clear that someone who had committed a serious violent crime would not be granted a conditional sentence*."[21] The Court went on to find that "the problems associated with some conditional sentences did not end. Public disapproval continued to be

---

13 *Ibid.* at para. 47 [emphasis in original].
14 *Ibid.* at para. 48.
15 *Ibid.* at para. 52 [emphasis omitted].
16 *Ibid.* at para. 54.
17 *Ibid.* at paras. 56-65.
18 *Ibid.* at para. 65.
19 *Ibid.* at para. 70.
20 The sub-headings the Court uses in Part V of its decision, entitled "Parliament Implements Sentencing Reforms in Canada," illustrates this concern. Section A is entitled "Parliament Prescribes a Framework for Sentencing"; Section B, "Parliament Leaves Sentencing to the Courts But Moderates Discretion"; Section C, "Parliament Further Explicitly Confines All Sentencing Discretion to Statutory Sentencing Principles"; and Section D, "Parliament Further Limits Sentencing Discretion vis à vis Conditional Sentences": *ibid.* at paras. 28-43.
21 *House of Commons Debates*, No. 152 (10 April 1997) at 9549-50 (Hon. Allan Rock), cited in *ibid.* at para. 39 [emphasis in original].

voiced about some offenders receiving conditional sentences.… Parliament decided to further confine the discretion to grant a conditional sentence. And it did."[22]

The Court then listed the various pieces of legislation that restricted access to conditional sentences, concluding with s. 742.1 of the *Criminal Code*, which restricts conditional sentences in cases of serious violent offences. The Court explained this section by saying that "Parliament's concerns about erosion of public confidence led to legislative reform and further limits on conditional sentences."[23] The Court of Appeal's message is clear: courts need to address public concern about sentencing or they risk losing widespread discretion to set sentences, as Parliament will step in instead:

> Courts of appeal must also accept that if egregious sentencing errors are not corrected or sufficient steps taken to reduce the risk of their occurring, public criticism is neither misplaced nor unwarranted. This may result in the sentencing pendulum swinging too far towards rigidity. Parliament may then conclude, in light of public concerns, that it must further curtail the courts' discretion in sentencing. It may impose minimum sentences or restrict sentencing options. Since the 1996 Sentencing Reforms, Parliament has done both.[24]

The Court was also concerned about addressing the issue of harm in the context of sexual assaults. Their concern is this area was motivated, in part, by the fact that the sentencing judge stated, after finding Mr. Arcand guilty of having sex with the victim after she had passed out, that "the circumstances are such that I really have difficulty considering it a major sexual assault, although technically it is."[25]

"Major sexual assault" is not an offence found in the *Criminal Code*, though there is, of course, an offence of sexual assault, which can be prosecuted summarily or by indictment and covers a wide range of actions. There are also offences of aggravated sexual assault and sexual assault causing bodily harm. Having sex with an unconscious victim, as Arcand did, absent any other action, does not fall within these latter two offences.

The Court began by defining a major sexual assault as one where "the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs."[26] The Court then went on to detail the nature of such harm, particularly because they felt that the cases that were subject to reconsideration (and the instant case) failed to really appreciate this notion.[27] The Court identified two types of harm resulting from major sexual assaults: harm to the victim and harm to society. These types of assaults are serious violations of a person's body and autonomy as well as their human dignity.[28] Additionally, major sexual assaults intrinsically lead to the "likelihood of other very real psychological or emotional harm,"[29] which, while not visible, "may be equally or even more serious than the physical ones."[30]

---

22 *Arcand*, *ibid.* at para. 40.
23 *Ibid.* at para. 43.
24 *Ibid.* at para. 89.
25 *Ibid.* at para. 255 [emphasis omitted].
26 *Ibid.* at para. 171.
27 *Ibid.* at para. 173.
28 *Ibid.* at para. 176.
29 *Ibid.* at para. 177 [emphasis omitted].
30 *Ibid.*

In terms of harm to society, the Court states, "[h]arm to one member of the community affects the rights and security of others. This is particularly striking in cases involving violence against women."[31] Later in the judgment, following up on this point, the Court stated that

> [t]he purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society. A just society is one which rejects improper myths and stereotypes about people. A peaceful society is one in which the criminal law adequately controls those whose actions violate the security of others. A safe society is one in which people can fall asleep in their home without being sexually molested; and if they are, where the criminal law responds effectively with just sanctions.[32]

After 251 paragraphs, the majority was ready to address the substantive issues arising from the appeal. After reviewing the facts of the case,[33] the Court addressed the information that was before the sentencing judge. In addition to a pre-sentence report (PSR), an assessment by the Forensic Assessment and Community Services Office (FACS) was ordered by the sentencing judge.[34]

Arcand was an 18-year-old first offender. The PSR outlined Arcand's disrupted childhood, health problems, and substance abuse issues. It also noted that he had sought out counselling subsequent to the offence.[35] FACS noted that Arcand's school problems and psychological testing "suggested impairment in some aspects of intellectual functioning, difficulty with concentration and perceptual organization, and also neurological deficits in impulse control."[36]

Arcand, a member of the Fort Alexander First Nation, was referred to the local Justice Committee, which expressed "strong support for the offender, his sobriety and educational and cultural activities since the crime and recommended a community disposition."[37] Other letters of support were provided to the Court from a number of sources.[38] No victim impact statement was filed and the Court noted that there appeared to have been a failure on the part

---

31 *Ibid.* at para. 179.

32 *Ibid.* at para. 271.

33 The only other substantive fact referred to was that the offence took place after the victim offered Arcand a place to stay. They visited in her bedroom where she passed out after consuming alcohol: *ibid.* at para. 253.

34 *Ibid.* at para. 256.

> Forensic Assessment and Community Services (F.A.C.S.) is a community-based subprogram of the Forensic Psychiatry Services based at Alberta Hospital Edmonton (AHE), operated by Alberta Health Services - Edmonton and area…. The target population served by the F.A.C.S. program includes adults and adolescents who:
> - are 12 years of age or older
> - are, or are at risk of being, in conflict with the law
> - are thought to have mental disorders or behavior problems
> - require assessment to determine the existence of mental disorders or behavior problems
> - require treatment for mental disorders or behavior problems.

Alberta Health Services, "Forensic Assessment and Community Services," online: Alberta Health Services <http://www.albertahealthservices.ca/services.asp?pid=service&rid=1003766>.

35 *Arcand*, *ibid.* at para. 257.

36 *Ibid.* at para. 258. The specific nature of the impairments is not elaborated upon in the materials.

37 *Ibid.* at para. 259.

38 *Ibid.* at para. 260. The letters came from an executive member of the reserve, the manager of youth programs, a representative of the Education Centre, coaches, family members, and a local cultural official — all of the letters were supportive.

of both the judge and the Crown prosecutor to provide the victim's perspective at the sentencing.[39]

The sentencing judge concluded that an appropriate sentence was a 90-day intermittent sentence, plus three years of probation. In passing his sentence, the judge followed submissions from defence counsel and rejected the Crown prosecutor's proposal of three to four years' imprisonment.[40]

On appeal the positions of the parties shifted somewhat — the Crown prosecutor now sought a two-year jail sentence and defence counsel agreed that the 90-day sentence was too lenient, and instead suggested a one-year term of imprisonment.[41] On appeal new evidence was presented, including a positive report from the probation officer, who indicated that Arcand had completed 240 hours of community service work and attended counselling and Alcoholics Anonymous meetings. The psychologist who provided 21 months of counselling reported that Arcand had, through his work and the support of others, effectively rehabilitated himself. She further stated that she felt that jail "would not have a rehabilitative effect."[42]

In finding the sentence insufficient, the Court found a number of errors of law.[43] First, by characterizing the offence as "only 'technically' a major sexual assault," the sentencing judge "trivialized" the offence.[44] By alluding to the fact that Arcand was drunk at the time and finding that "temptation just got to you,"[45] the judge implied that the victim was somehow at fault and that "a man is unable to control himself in the presence of an unconscious woman."[46] The findings of the sentencing judge perpetuated myths about rape,[47] and the Court emphasized that "[n]on-consensual sexual intercourse under any circumstances constitutes a profound violation of a person's dignity, equality, security of the person and sexual autonomy."[48]

The Court also found that the sentence failed to give proper weight to deterrence and denunciation. With respect to deterrence the sentencing judge concluded that he did not feel jail would do "any good" for Arcand, in fact he felt that "it could destroy you."[49] While the Court did not take issue with that finding with respect to specific deterrence, they felt that ignoring general deterrence in fashioning the sentence was an error of law. Since general deterrence was included as an objective in s. 718 of the *Criminal Code*, its validity could not be questioned, and even if a jail sentence does not stop a particular offender from re-offending, "it is equally important to stop ten others from starting."[50]

---

39 *Ibid.* at para. 262.
40 *Ibid.* at para. 264.
41 Email correspondence from Aleksandra Simic, counsel for Arcand, to the author (26 January 2011).
42 *Arcand*, *supra* note 1 at para. 261.
43 Also found to be errors of law, but not discussed here, are the failure to follow the Court of Appeal sanctioned starting point for major sexual assaults and failure to treat the fact that the victim was unconscious at the time of the sexual assault as an aggravating factor.
44 *Arcand*, *supra* note 1 at para. 266.
45 *Ibid.* at para. 267 [emphasis omitted].
46 *Ibid.* at para. 268.
47 *Ibid.* at para. 269.
48 *Ibid.* at para. 272.
49 *Ibid.* at para. 276.
50 *Ibid.* at para. 277 [footnote omitted].

Denunciation, another sentencing objective, was also not properly considered in the sentence passed. Denunciation not only affirms community values, but also "serves the objective of maintaining the morale of the law-abiding."[51]

To add to these problems, the sentence also failed to meet the parity principle. Section 742.1, which the Court had referred to earlier, removed the possibility of a conditional sentence for sexual assault.[52] While a 90-day intermittent jail sentence is not a conditional sentence, the Court nevertheless found that it contravened the intention of Parliament since "[s]electing the top end of the intermittent sentence as the lowest custodial sentence for a major sexual assault is akin to searching for a way [around] Parliament's intention."[53]

The Court concluded that the errors of law were sufficiently serious to require a new sentence to be passed. In arriving at this conclusion, the Court considered, as an aggravating factor, the fact that the victim was unconscious at the time of the offence.[54] In mitigation was the offender's age: 18.[55] In addition, there were his neurological problems, including a lessened impulse control.[56] In the end, a fit sentence was found to be imprisonment of two years less a day and two years of probation.[57] Given the long period of time that it had taken to get the appeal to the Court[58] and the fact that Arcand had now completed the intermittent sentence and most of his probation, the Court stayed the imposition of the sentence.[59]

III. WHAT IS MISSING?

As the media coverage of *Arcand* illustrates, the Court of Appeal constructs a compelling decision. The 1996 sentencing amendments were designed to provide a "uniform approach to sentencing," and courts would "be bound to serve the purpose, and apply the principles, of sentencing that Parliament prescribed."[60] At the heart of these principles was the idea of proportionality, with the other objectives listed in the sections serving that primary objective.

The continued reluctance of many judges to follow this directive in sentencing has brought on cynicism and distrust from the public and has led Parliament to further restrict the discretion of judges. If unprincipled sentencing decisions in which judges choose which sentencing principles to rely upon in particular cases, as though diners at a buffet, persist without reference to proportionality and the clear direction of Parliament, then legislation will further, and perhaps unduly, restrict judges in their sentencing activities. *Arcand*, in this context, is a shot across the bows of sentencing judges in Alberta (and perhaps more widely) to rein in their personal predilections and focus on the intention of Parliament.

---

51 *Ibid.* at para. 275 [footnote omitted].

52 *Criminal Code*, *supra* note 2. Section 742.1 rules out conditional sentences not only for serious violent offences, but any sexual assault offence, by way of reference to the definition of "serious personal injury offence" contained in s. 752.

53 *Arcand*, *supra* note 1 at para. 281.

54 *Ibid.* at para. 288.

55 *Ibid.* at para. 289.

56 *Ibid.* at para. 290.

57 *Ibid.* at para. 296.

58 The original sentence was passed in October 2008, and the appeal decision was not released until over two years later.

59 *Arcand*, *supra* note 1 at para. 298.

60 *Ibid.* at para. 29.

In order to reach its conclusions, however, the Court of Appeal had to ignore decisions of the Supreme Court of Canada and construct a rationale for parliamentary decisions that often are not necessarily rational. In particular, the Court ignored both parliamentary and judicial direction regarding the sentencing of Aboriginal offenders, as well as the stark reality that Alberta jails are disproportionately made up of Aboriginal inmates.

Reasonable people can disagree as to how to represent the meaning of particular events. Scholars often develop conflicting and contrasting explanations for the actions of governments. In this way it is difficult to say that one person's interpretation is necessarily wrong, while another's is right. This is not to say that it is pointless to construct interpretations of what governments mean when they enact legislation; it is often a necessary but challenging endeavour. When judges are required to discern the intention of government, as they are frequently required to do, there is a brake on the multiplicity of perspectives that can be brought to this issue, and that brake is the notion of precedent. While lower court judges can each come to their own conclusions as to the purpose of particular pieces of legislation, they are bound to respect the decisions of superior courts. Indeed, it seems that one of the purposes behind the Court of Appeal's decision in *Arcand* was to set a precedent for Alberta sentencing judges. Courts of Appeal, however, are also bound by precedent from the Supreme Court of Canada, and some of the conclusions of the Court of Appeal in *Arcand* seem to deviate from the directives of the highest court in the land.

In *R. v. Gladue*[61] and *R. v. Proulx*,[62] the Supreme Court had the opportunity, as did the Court of Appeal in *Arcand*, to look at the sentencing amendments contained in Bill C-41. Their interpretations differed from that of the Alberta Court of Appeal.[63] In *Proulx*, the Supreme Court found that Bill C-41 was "in large part a response to the problem of overincarceration in Canada."[64] Citing *Gladue*, the Court found that incarceration was not only costly and harsh, but often ineffective as well.[65] The Court went on to find that

> Parliament has mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society. By placing a new emphasis on restorative principles, Parliament expects both to reduce the rate of incarceration and improve the effectiveness of sentencing.[66]

These findings as to the intention behind the sentencing amendments are nowhere to be found in the *Arcand* decision, which instead suggests that the amendments were motivated by the sole desire to standardize the sentencing process.

In *Arcand*, the Alberta Court of Appeal also finds meaning and intention in acts of Parliament where intention and meaning may not be readily discernible. As noted earlier, the Court found that recent amendments to the *Criminal Code* were motivated by public disapproval and the inability of judges to truly justify many of the sentences they passed.

---

[61] [1999] 1 S.C.R. 688 [*Gladue*].
[62] 2000 SCC 5, [2000] 1 S.C.R. 61 [*Proulx*].
[63] Of course, in *Gladue*, the Supreme Court of Canada also spoke extensively about the sentencing of Aboriginal people, as will be discussed below.
[64] *Proulx*, *supra* note 62 at para. 16.
[65] *Ibid.*, citing *Gladue*, *supra* note 61 at para. 54.
[66] *Proulx*, *ibid.* at para. 20.

Public opinion is difficult to measure, and measuring public opinion about sentencing decisions is no different. Although the majority decision in *Arcand* has over 300 footnotes, none provide any basis for the assumptions regarding how the public feels about sentencing. Instead, Parliament's acts are taken as a proxy for public sentiment. The Court cites the 2005 amendment to s. 718.01 of the *Criminal Code*, which imposed minimum sentences for child sexual offences, thus making the option of conditional sentences unavailable, as proof of this discontent.

Section 718.01 is actually an object lesson in the difficulty of trying to find motivation for government action. The amendment was passed at the tail end of the Liberal minority government. The Bill dealt not only with child sexual offences, but also, and more prominently, with issues relating to pornography and obscenity. The debates in the House of Commons do not reveal the government's rationale for imposing a 14-day minimum sentence for the offence of sexual interference.

Only during committee hearings on the Bill did an explanation for the minimum sentences emerge. Paul Macklin, the Parliamentary Secretary to the Minister of Justice, appeared before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on 2 June 2005. Macklin stated:

> Mr. Chair, let me start by saying, first of all, that as part of a minority government … and the proposition that we see before us also within this committee is that we have to come to an understanding that on certain issues there has to be some type of mediated middle ground, if we possibly can, in terms of trying to come to a consensus on issues before us.
>
> In this case we have done that reluctantly, but also by understanding the reality of the situation. We would much prefer that we left the courts with full opportunity to examine all of the factors that come with sentencing. I do hear the message that within the court system there at least is an appearance, with certain cases, that possibly the full extent of the law has not been meted out. Quite often that is an exceptional case, or in many cases the full facts haven't been brought before us.[67]

This is hardly a strong statement about concerns of untrammelled judicial sentencing of child sexual offenders. On the contrary, it would have been the preference of the government of the day to leave things as they were. Parliament is, of course, entitled to pass legislation as it sees fit, and the courts must follow the dictates of such legislation, providing, of course, that it meets the provisions of the *Canadian Charter of Rights and Freedoms*.[68] A review of the parliamentary committee discussions on sentencing bills over the past five years or more shows that legislators are truly passionate about the issues, but there is not necessarily any strong philosophical rationale or evidentiary basis for the propositions that are being presented. As a result, trying to anticipate what Parliament might do and guessing what actions might address those concerns, as the Court of Appeal is suggesting in *Arcand*, is a no win proposition.

---

[67] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness Meeting (Hansard), 38th Parl., 1st Sess., No. 042 (2 June 2005).

[68] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

More problematic, however, is the way in which the decision ignores the specific direction from the Supreme Court of Canada regarding the sentencing of Aboriginal offenders in *Gladue*. In order to construct the narrative, and thus the philosophical underpinnings for its particular view of sentencing, the Alberta Court of Appeal engaged in a process of legal revisionism that virtually ignores the substantive aspects of *Gladue*.[69]

While the fact that Arcand is an Aboriginal person is mentioned in a few places in the decision, the significance of this fact is never addressed. Arcand is described as an offender "of Aboriginal heritage"[70] and the Court refers to the material filed on sentencing addressing his "Aboriginal background."[71] The only significance of this fact that can be gleaned from the decision is the finding by the Court that

> [t]he particular attention to be given to the circumstances of the offender as an Aboriginal person under s. 718.2(e) of the [*Criminal*] *Code* does not adjust the situation greatly here. If those circumstances were to be replicated for a non-Aboriginal young person, the effect would be much the same. Serious sexual assaults on women, including Aboriginal women, continue to be a clear and pressing problem in this country.[72]

This analysis seriously misapprehends the direction provided by the Supreme Court in *Gladue*. However, before the specific issues relating to the interpretation of *Gladue* in the context of this particular sentencing are discussed, it is important to look at what *Gladue* said about the sentencing amendments contained in Bill C-41, and how that impacts on the rationale developed by the Alberta Court of Appeal.

Gladue interpreted s. 718.2(e) of the *Criminal Code*. The sections states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."[73] Apart from that found in the quote above, the Court of Appeal's only reference to the section was to place it alongside s. 718.2(d)[74] as examples of the restraint principle and to say that "restraint and restorative justice do not conflict with the proportionality principle."[75]

As did the Alberta Court of Appeal, in *Gladue* the Supreme Court of Canada reviewed some of the background behind the introduction of Bill C-41, and cited many of the same reports referred to in *Arcand*. The two courts, however, reach different conclusions about both the significance of these reports, and of the amendments as a whole. As noted above, for the Court of Appeal the amendments were significant as they made proportionality the centrepiece of sentencing. For the Supreme Court, however, the amendments had a more practical and tangible goal: to address the problem of overincarceration in Canada, particularly, but not exclusively, with respect to Aboriginal people. The Court concluded that

---

69 *Arcand*, *supra* note 1 at n. 14, contains the only reference to *Gladue*, and that is to a portion of the decision that examines statutory construction.

70 *Ibid.* at para. 12.

71 *Ibid.* at para. 256.

72 *Ibid.* at para. 294.

73 *Supra* note 2.

74 *Ibid.* Section 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."

75 *Arcand*, *supra* note 1 at para. 62 [footnote omitted].

> although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(*e*) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.[76]

The Supreme Court went on to find that Aboriginal overincarceration was an even more serious problem than overincarceration generally.[77] After reviewing figures relating to Aboriginal overrepresentation, the Supreme Court found that

> [t]hese findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. 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 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.[78]

Section 718.2(e) thus

> instruct[s] the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:
>
> > (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
> >
> > (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[79]

Further, the Court also found that "aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions."[80]

Gladue is particularly concerned with the development of restorative responses and non-custodial sentences for Aboriginal offenders, but that is not the sole thrust of the decision.

---

76 *Gladue*, *supra* note 61 at para. 57.
77 *Ibid.* at para. 58.
78 *Ibid.* at para. 64.
79 *Ibid.* at para. 66.
80 *Ibid.* at para. 68.

Indeed, the Supreme Court also concludes that the length of sentence must be considered for Aboriginal offenders and that, in some cases, the custodial sentence for an Aboriginal offender will be less than that of a non-Aboriginal offender.

It must be acknowledged that the Supreme Court was less than unequivocal on this point. The Court states that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."[81]

The Court in *Arcand* refers to *Gladue* for the principle that it is not true that in all cases preference will be given to principles of restorative justice rather than those of denunciation and deterrence.[82] However, in *R. v. Wells*[83] the Supreme Court, perhaps in part to clear up some of the confusion caused on this front, states that "[t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application."[84]

The concern expressed in *Gladue* regarding Aboriginal overrepresentation in prison, while not remarked upon at all in *Arcand*, has been the subject of study in Alberta. Twenty years ago, in 1991, a commission chaired by Mr. Justice R.A. Cawsey[85] released a three-volume report, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*.[86] The Commission was alarmed at the

---

81 *Ibid.* at para. 79.

82 *Arcand*, *supra* note 1 at n. 203.

83 2000 SCC 10, [2000] 1 S.C.R. 207 [*Wells* (S.C.C.)].

84 *Ibid.* at para. 50. *Wells* has relevance to *Arcand* for other reasons as well. Both cases were from Alberta and both dealt with what the courts characterized as major sexual assaults involving Aboriginal offenders and victims. In both cases the victim was asleep or unconscious. In both cases the offender participated in some treatment programs and had favourable pre-sentence reports. Following a trial, Mr. Wells received a 20-month sentence — defence counsel had asked for a conditional sentence. The Alberta Court of Appeal heard the matter prior to the decision of the Supreme Court in *Gladue*. The Court of Appeal considered fresh evidence, specifically adverted to s. 718.2(e) and the offender's Aboriginal heritage, and upheld the sentence: *R. v. Wells*, 1998 ABCA 109, 216 A.R. 61 [*Wells* (C.A.)]. The Court stated:

> We reject the suggestion that s. 718.2(e) would displace the rationale in *Brady*, and faced as we are here with a crime worthy of denunciation and deterrence, and the fact that the sentence must be proportionate to the gravity of the crime, it is clear that s. 718.2(e) cannot be interpreted to mean that in some fashion an alternative to imprisonment *must* be imposed as a sentence for the Appellant.

(*Wells* (C.A.) at para. 68 [emphasis in original].)

The Supreme Court upheld the decision of the trial judge, recognizing that the offence was a serious one and that, while a conditional sentence was possible (at the time), it was necessary, as s. 718.2(e) made clear, for the sentence to be reasonable in the circumstances. The Court was clear, however, that they were not setting out a general statement that deterrence and denunciation always had to take precedence over restorative considerations in serious offences. Justice Iacobucci, for a unanimous Court, stated that

> the reasons in *Gladue* … do not foreclose the possibility that, in the appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime. As was concluded in *Gladue*, at para. 81, the remedial purpose of s. 718.2(*e*) directs the sentencing judge not only to take into account the unique circumstances of aboriginal offenders, but also to appreciate relevant cultural differences in terms of the objectives of the sentencing process.

(*Wells* (S.C.C.) at para. 49 [citation omitted].)

85 While the Commission was chaired by Cawsey J., there were six other commissioners: Leroy Little Bear, Cynthia Bertolin, Cleve Cooper, Janet Franklin, Arnold Galet, and Michael Gallagher.

86 *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (N.p., 1991) [*Justice on Trial*].

rates of Aboriginal overincarceration that they found in the province, but was particularly troubled by what those figures portended for the future:

> Projections indicate that by the year 2011, Aboriginal offenders will account for 18,552 (38.5%) of all admissions to federal and provincial correctional centres in Alberta, compared to 29.5% of all such offenders in 1989.… In some age categories, for example the 12-18 years age group, Aboriginal offenders are projected to account for 40.0% of the admission population to correctional facilities by the year 2011.[87]

The Commission's fears were well placed. By 2008, Aboriginal offenders already made up 40 percent of all adult admissions to provincial custody in Alberta.[88] Aboriginal youth in Alberta were six times more likely to be in custody than non-Aboriginal youth; the highest rate among the provinces.[89] Anticipating the conclusions later reached by the Supreme Court of Canada, the Commission also found that Aboriginal people experienced systemic discrimination in the criminal justice system.[90]

Failing to advert to the Supreme Court of Canada's decision in *Gladue* and to the realities of Aboriginal overrepresentation in prisons in Canada and, more specifically, Alberta, strongly diminishes the power of the arguments advanced in *Arcand*. Viewed in a more complete light, a number of the conclusions drawn by the Court might need to be reconsidered. Specifically, recognizing what the Supreme Court said in *Gladue* should lead to a reconsideration of the conclusions that the Court of Appeal reached on issues of proportionality, Aboriginal concepts of sentencing, circumstances of the Aboriginal offender, general deterrence, and the ways in which sentences reflect harm to victims.

A. PROPORTIONALITY

In *Arcand*, the Court of Appeal identifies proportionality, and its sister value parity, as the key to understanding the 1996 sentencing amendments. For the Court, proportionality is exemplified in similar sentences for similar offenders. The statement in *Gladue* that sentences for Aboriginal offenders may well differ from those of non-Aboriginal offenders, even where incarceration is required, erodes the idea of proportionality as the fundament upon which the sentencing amendments are built. In this context, individualized sentences for Aboriginal offenders are understood not as aberrant and unprincipled actions by judges choosing to ignore the rule of law, but rather the proper exercise of judicial decision-making in keeping with the dictates of the *Criminal Code* and the Supreme Court of Canada.

---

87 Vol. 1, *ibid.* at 8-17.

88 Statistics Canada, "Adult correctional services, admissions to provincial, territorial and federal programs (Alberta)," online: Statistics Canada <http://www40.statcan.gc.ca/l01/cst01/legal30k-eng. htm>.

89 Donna Calverley, Adam Cotter & Ed Halla, "Youth custody and community services in Canada, 2008/2009" *Juristat* 30:1 (April 2010) at 5, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.pdf>.

90 *Justice on Trial*, vol. 1, *supra* note 86 at 2-46. In *Gladue*, *supra* note 61 at para. 61, the Supreme Court concluded:

> Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system."

B. ABORIGINAL CONCEPTS OF SENTENCING

In *Gladue*, the Supreme Court noted that Aboriginal concepts of sentencing often differ from those of the non-Aboriginal community. Elaborating on that point the Court said:

> What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions.… [O]ne of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.[91]

In *Arcand*, the Court of Appeal noted that the local Justice Committee recommended a non-custodial sentence for Arcand. The local Justice Committee in this case was the Justice Committee for the Fort Alexander First Nation and it could be assumed to have spoken for the wishes of a significant number of the members of the community. Support for a less onerous custodial sentence was also manifested in the case by the presence in the Court, both at the sentencing itself and the appeal, of many members of the First Nation,[92] along with the letters of support submitted to the Court.

The Court of Appeal dismissed the recommendations of the Justice Committee because there was no evidence that the views of the victim were considered in the process. The Court went on to find that "[r]eports from justice committees can be of considerable assistance. But a one-sided inquiry can compromise the credibility and utility of that process."[93]

As the Court of Appeal noted in a number of places in their decision, the seriousness of sexual assaults among Aboriginal women must be acknowledged.[94] As well, the victim in this case did not appear before the Justice Committee. However, these facts do not necessarily lead to the conclusion that the recommendations of this Justice Committee were in fact "one-sided" or compromised. In fact, the recommendation from the psychologist that Arcand would be damaged by a jail sentence would seem to provide independent support for the conclusions of the Committee.

Arcand bears striking similarities to the pre-*Gladue* decision of the Alberta Court of Appeal, sitting as the Northwest Territories Court of Appeal, in *R. v. Naqitarvik*.[95] *Naqitarvik*, decided in 1986, concerned a major sexual assault against a 14-year-old girl by her 21-year-old cousin. The trial judge held a special sentencing hearing in the community of Arctic Bay, Northwest Territories. Approximately 200 residents attended and there were 12 hours of evidence and submissions.[96] A community group of Elders known as the Inumarit

---

91 *Gladue*, *ibid.* at para. 74.
92 Email from Aleksandra Simic, counsel for Arcand, to the author (5 January 2011).
93 *Arcand*, *supra* note 1 at para. 263.
94 See e.g. *ibid.* at para. 294.
95 (1986), 69 A.R. 1 (N.W.T.C.A.) [*Naqitarvik*].
96 *Ibid.* at para. 22.

expressed their opinion that the offender should remain in the community to be counselled. Echoed by the decision in *Arcand*, the trial judge sentenced the offender to a 90-day intermittent sentence, with two years of probation.[97]

The majority of the Court of Appeal overturned the sentence, finding it "wholly inadequate."[98] As in *Arcand*, the Court commented on the marked departure of the sentence from the starting point sentence set earlier by the Court of Appeal.[99] The Court felt that a three-year sentence was appropriate. However, given the length of time that had elapsed from the passing of the original sentence to the appeal, the sentence was reduced to 18 months' imprisonment. Unlike *Arcand*, the serving of the sentence was not suspended.

The decision in *Naqitarvik* could be understood in that it predated both the 1996 sentencing amendments and *Gladue*.[100] It is harder to justify the Court of Appeal's dismissive approach in *Arcand* towards the recommendations of the Justice Committee, which reflected the perspective of the Aboriginal community in regards to the appropriate punishment for this offender.

The approach in *Arcand* can be contrasted with the manner in which the Ontario Court of Appeal addressed this issue in *R. v. Jacko*.[101] *Jacko* involved the sentencing of an Aboriginal offender convicted of a home invasion.[102] In *Jacko*, the Court was faced with a decision by a judge who imposed a jail sentence within the prescribed range for a home invasion committed by a young adult offender, despite the fact that a community sentencing circle strongly recommended that a non-custodial sentence be imposed. The sentencing judge ignored the recommendations of the circle because it did not have the input of the victims or Crown prosecutor in its deliberations.[103]

The Ontario Court of Appeal found that the sentence was in error because, among other things, "the trial judge failed to give sufficient weight to the nature of the community in which these offences were committed and the views of that community (as reflected in the recommendation of the sentencing circle) about the nature of punishment best suited to respond to the community's needs and notions of justice."[104]

---

[97] *Ibid.* at para. 1.

[98] *Ibid.* at para. 17.

[99] In both *Arcand* and *Naqitarvik*, the relied upon starting point decision was *R. v. Sandercock* (1985), 62 A.R. 382 (C.A.).

[100] The Aboriginal Justice Inquiry of Manitoba, reporting in 1991, also prior to the amendments and *Gladue*, was critical of the decision:

> In our opinion, this is an example of a court of appeal insisting on applying a standard non-Aboriginal sanction. In the process, the sentence developed by a judge who was familiar with the case and the community was rejected. The initiative shown by the community and the trial judge, and other communities (and, by implication, other trial judges), could only have been discouraged.

Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, vol. 1 (Winnipeg: Queen's Printer, 1991) at 401. The trial decision in *Naqitarvik* also drew criticism, particularly from women's groups, including Aboriginal women's organizations: see Sherene H. Razack, *Looking White People In the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 70-71.

[101] 2010 ONCA 452, 101 O.R. (3d) 1 [*Jacko*].

[102] As in *Arcand*, a "home invasion" is not a specified offence in the *Criminal Code*. Rather, this is a judicial concept that has been used describe a particular subset of the offence of break and enters.

[103] *Jacko*, *supra* note 101 at para. 32.

[104] *Ibid.* at para. 81.

In almost every respect, *Jacko* presents the counter-argument to that developed in *Arcand*. Both cases involved young offenders, convicted at trial for crimes of violence where the starting point sentences or ranges would otherwise have dictated a significant jail sentence. In both cases the local Aboriginal community strongly recommended non-custodial sentences, and in both cases the young person did exceptionally well in following up on the recommendations of the community. What distinguishes the two decisions is that the Ontario Court of Appeal actively considered the application of *Gladue* and imposed a conditional sentence on the offender, while the Alberta Court of Appeal ignored the decision altogether.

C. CIRCUMSTANCES OF THE ABORIGINAL OFFENDER

As noted above, the only time the Alberta Court of Appeal specifically adverted to s. 718.2(e) of the *Criminal Code* and the need to consider the circumstances of Aboriginal offenders was to dismiss the relevance of the section in this case:

> If those circumstances were to be replicated for a non-Aboriginal young person, the effect would be much the same. Serious sexual assaults on women, including Aboriginal women, continue to be a clear and pressing problem in this country.[105]

This approach to s. 718.2(e) misapprehends the direction from the Supreme Court in *Gladue*. The point of the exercise is not to identify the aspects of the specific circumstances of the Aboriginal offender that might be different from the specific circumstances of the non-Aboriginal offender. For example, both Aboriginal and non-Aboriginal offenders may come from broken homes, may have addiction issues, and may have suffered abuse when they were younger. It is not necessary for the Aboriginal offender to set out an additional factor unique to them in order for *Gladue* to apply. The fact is that while the immediate circumstances of Aboriginal and non-Aboriginal offenders may be similar, the root causes of those circumstances will generally be different. As the Supreme Court said in *Gladue*:

> It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions.[106]

It is the reality of the systemic and direct discrimination faced by Aboriginal people that mandates a different approach to sentencing. Failing to recognize this important direction often reduces the application of *Gladue* to a checklist approach. In the checklist approach judges look for certain factors. Did the offender attend residential school? Were they subject to racist taunts in school? Did they live in a particularly poverty-stricken reserve? If the answer to one or more of these questions is yes, judges are alive to *Gladue*. If the answer is no, judges often do as the Court of Appeal did here: dismiss the relevance of *Gladue* on the basis that a particular non-Aboriginal offender faced these challenges too.

---

[105] *Arcand*, *supra* note 1 at para. 294 [footnote omitted].

[106] *Gladue*, *supra* note 61 at para. 68.

This simplistic approach to a complex set of issues misses the point of *Gladue*. In *Arcand*, there was evidence before the Court that Arcand grew up in a difficult home environment, struggled with addictions, and had specific, though unnamed, neurological difficulties. Given that he grew up on the Fort Alexander First Nation, it is reasonable to assume that the fact that he was an Aboriginal person had something to do with the fact that he experienced at least some of these factors. It is this inquiry that *Gladue* requires judges to enter into. It is an inquiry that places "an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victims and the community."[107]

The point of the exercise is that knowing what factors led to the offender's particular circumstances will lead to more appropriate sentences being crafted. Dismissing the application of s. 718.2(e) and *Gladue* because the immediate circumstances of Aboriginal offenders are similar to those of non-Aboriginal offenders misses the point.

D. General Deterrence and *Gladue*

In arriving at the appropriate sentence for this offence, the Alberta Court of Appeal relied on the concept of general deterrence. As noted above, the Court said that the fact that general deterrence was mentioned in s. 718 meant that the validity of general deterrence was now beyond question. In addition, the Court felt that general deterrence could be relied upon because, even if the sentence would not deter the offender, "it is equally important to stop ten others from starting."[108]

The rationale advanced for relying on general deterrence in the sentencing of this Aboriginal offender borders on the glib. While it is undoubtedly true that general deterrence is a factor that a judge can consider in sentencing, it is also true that courts have expressed concern about basing a sentence on a principle that is difficult to establish whether it is actually able to accomplish its goals. In *R. v. B.W.P.*,[109] the Supreme Court of Canada stated that "[w]hile general deterrence as a goal of sentencing is generally well understood, there is much controversy on whether it works or not."[110]

Sentencing based on the principle of general deterrence uses the offender as the vehicle through which a message is sent to others, regardless of the detriment that increased punishment may have on the offender's rehabilitation.[111] While it may be the case that there are some offences for which sentences can serve to deter the population at large, this is not true of all offences and all sentences.[112]

---

107 *Wells* (S.C.C.), *supra* note 83 at para. 41 .

108 *Arcand*, *supra* note 1 at para. 277 [footnote omitted].

109 2006 SCC 27, [2006] 1 S.C.R. 941.

110 *Ibid.* at para. 3.

111 Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford: Hart, 1999) at 6-7.

112 See e.g. *R. v. Wismayer* (1997), 33 O.R. (3d) 225 at 241 (C.A.), where, in a case of what was then referred to as sexual touching of a person under 14 years of age, the Court found that

> the enactment of the conditional sentence regime represents a concession to the view that the general deterrent effect of *incarceration* has been and continues to be somewhat speculative and that there are other ways to give effect to the objective of general deterrence.

[Emphasis in original.]

In *Gladue*, the Supreme Court expresses reservations about the extent to which general deterrence can be seen to have an impact on Aboriginal offending.[113] The fact that rates of Aboriginal overrepresentation in prison have increased in Canada over the past 20 years[114] in itself suggests a problem with general deterrence. Today, one-quarter of the inmates in custody in provincial jails are Aboriginal. If there is any group of people that knows that breaking the law leads to imprisonment, it is Aboriginal people — yet the statistics make clear that this reality is not having an impact on offending.

One might be able to argue that it is an appropriate trade-off to sentence a person to jail even though it will not be of any help to that person's rehabilitation if the sentence can deter ten others from committing a similar crime. However, it should be incumbent upon a court relying on that justification to provide some evidence for believing that this is a reasonable expectation. To jail someone for a purpose that is extremely unlikely to occur, or may even be unattainable, borders on cruelty.

E. HARM AND JAIL

The Alberta Court of Appeal spent some time discussing the harm caused by sexual assaults in *Arcand*. The Court is clearly correct that sexual assaults cause real harm to victims and that the psychological and emotional harm caused by these assaults can be more devastating than the physical harm.[115] The question that the decision does not address, however, is: How does the offender's sentence relate to the harm to the victim? Victims might understandably wish sentences imposed on their victimizers that equate to the harm they feel they have, and are, suffering. That quantum as they determine it, however, might be much greater than courts can or will dispense. The other problem with linking the harm and the sentence is that there is no reason to believe that the length of a sentence somehow reduces the harm experienced by the victim. What victims need most are opportunities to heal from the trauma of the crime. The criminal justice system, however, does not provide those important services, and sadly they are often not readily available elsewhere.

Resort is often made to the principle of denunciation when sentencing individuals who have harmed others. Unlike deterrence, denunciation does not serve utilitarian principles. As the Court of Appeal noted, denunciation reflects community values,[116] but how that factors into a sentence is complicated. In *Proulx*, the Supreme Court found that denunciation could be accomplished by way of a non-custodial measure, such as a conditional sentence.[117] In *Gladue*, the Supreme Court noted that "[a] significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional

[113] *Gladue*, *supra* note 61 at para. 57.
[114] In 1995-1996, Aboriginal people made up 12 percent of inmates in federal prisons and 16 percent in provincial prisons: Micheline Reed & Peter Morrison, "Adult correctional services in Canada, 1995-96" *Juristat* 17:4 (March 1997) at 6, online: Statistics Canada <http://www.statscan.gc.ca/pub/85-002-x/85-002-x1997004-eng.pdf>. In 2008-2009 the rates were 18 percent federally and 27 percent provincially: Donna Calverly, "Adult correctional services in Canada, 2008/2009" *Juristat* 30:3 (October 2010) at 5, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2010003/ article/11353-eng.pdf>.
[115] *Arcand*, *supra* note 1 at para. 177.
[116] *Ibid.* at para. 275.
[117] *Proulx*, *supra* note 62 at para. 22.

sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community."[118]

Even in cases where denunciation may be better accomplished through incarceration, *Proulx* did not state that an increase in the period of incarceration would have any impact on the level of denunciation.[119] In the context of *Arcand* then, it is not possible to say that a two-year less a day sentence provides more denunciation than a 90-day intermittent sentence. Looking at it from the perspective of the victim, we would not want victims to think that the degree to which society denounces the offence committed against them is measured against the sentence imposed on their offender. A victim of sexual assault where the offender receives an 18-month sentence might then feel that there is less societal disapproval as compared to another sexual assault where the offender receives a 26-month sentence.

IV. Conclusion

As Kent Roach has pointed out, there has been significant appellate court variation across the country regarding the interpretation of *Gladue*.[120] That variation often arises in cases of serious violent offences.[121] However, the problems with the decision of the Alberta Court of Appeal in *Arcand* go deeper than a dispute about whether sentences for Aboriginal and non-Aboriginal offenders need to be similar in cases of violence. In *Arcand*, the Court of Appeal essentially ignored the fact that the offender was an Aboriginal person, and thus never really turned their minds at all to the extent to which *Gladue* applied.

This is particularly problematic since the decision sets very lofty goals for itself. It seeks to speak the truth about sentencing. It purports to provide a clear-eyed assessment of the problems with sentencing in Canada since the passage of Bill C-41 and provide a way out of the morass of unprincipled sentencing decisions by trial court judges that have eroded Canadians' faith in the justice system. In order to do this, however, the Court of Appeal itself ignores the reality of Aboriginal overincarceration in Canada generally, and Alberta specifically. It also ignores the clear direction from the Supreme Court of Canada that judges are now required to specifically advert to the circumstances of Aboriginal offenders when passing sentence. Judges are required not only to consider non-custodial sentences; even where custody is inevitable they must consider the length of the sentence.

As noted above, Aboriginal people make up one-quarter of the inmates in Canada. In Alberta, 40 percent of the inmates in provincial jails are Aboriginal. The Court of Appeal turned a blind eye to this reality in *Arcand*. Failing to see what was right in front of them militates against the conclusions arrived at by the Court.

It is not the role of the courts to anticipate the direction that Parliament may or may not take. Section 718.2(e) remains part of the *Criminal Code* and the decision of the Supreme Court of Canada in *Gladue* has not been overruled. Where Parliament has created mandatory

---

118 *Gladue*, *supra* note 61 at para. 70.
119 *Proulx*, *supra* note 62 at para. 102.
120 Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 Crim. L.Q. 470.
121 *Ibid.* at 504.

minimums then, subject to the provisions passing *Charter* scrutiny, sentencing judges must follow them. But courts should not rush in to create new mandatory minimums where Parliament has not acted.

While the Court of Appeal decries judge shopping, why should sentences vary from province to province due to appellate court created starting points? A multiplicity of starting points, or the lack of such starting points in some provinces and their existence in others, is just as likely to bring about public concern about the operation of the judicial system.

In his comments about the *Arcand* decision on *The Current*, former Supreme Court Justice John Major described the judgment as "an essay." It is a long essay, one with many footnotes. At the end of the day however, by choosing to ignore the facts that did not support their thesis, and by acting as though the Supreme Court of Canada had not reached conclusions opposite to those they were advocating, it is not a persuasive essay at all.