

The Impact of ss. 718.04 and 718.201 on Sentencing Jurisprudence: Enhanced Safety for Indigenous Women and Girls?

C H R I S T I N A C R O T E A U *

ABSTRACT

The *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* highlights the severe harm faced by Indigenous women and girls in Canada, who endure horrific rates of violence rooted in the colonial legacies of a racist criminal justice system. In response to these findings, sections 718.04 and 718.201 were added to the *Criminal Code* in 2019 to address the recommendations outlined in the Inquiry's *Final Report* and the concerns expressed by the Supreme Court of Canada in *R v Barton*. This article examines whether these amendments have led to a difference in the judicial treatment of sentencing for violent offences against Indigenous women, compared to the treatment of existing aggravating factors enunciated in s. 718.2 of the *Criminal Code*, and whether any such changes accord with the concerns they were designed to address.

A survey of appellate decisions interpreting these provisions reveals that while some decisions view them as codifications of common law aggravating factors, the requirement in s. 718.04 for sentencing courts to give primary consideration to denunciation and deterrence when the victim of a crime is Aboriginal and female has resulted in a shift in the judicial treatment of these cases. The judicial treatment of s. 718.201 has been less clear, as it is cited less often and its application at sentencing is not clearly articulated. Overall, case law on these provisions shows that courts are increasingly

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prioritizing the impact of offences on these vulnerable victims in their sentencing analyses.

I. INTRODUCTION

Indigenous women and girls endure horrific rates of violence in Canada, influenced by factors such as the colonial legacies of a racist criminal justice system.¹ The *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*² outlined the extent of this massive harm and made recommendations to begin addressing the profound damage to Indigenous communities. In response, sections 718.04 and 718.201 were added to the *Criminal Code*³ in 2019. The Canadian Government indicated in the legislative summary to the amendments that these provisions were added to address recommendations from the *Final Report*⁴ and concerns expressed by the Supreme Court of Canada in *R v Barton*.⁵ This article examines whether these amendments have led to a difference in the judicial treatment of sentencing for offences of violence against Indigenous women, as compared to their treatment of the existing aggravating factors enunciated in s. 718.2 of the *Criminal Code*,⁶ and whether these changes, if any, accord with the concerns they were designed to address.

While s. 718.2 of the *Criminal Code*⁷ lists aggravating features that a court must consider when imposing a sentence, it does not go as far as s. 718.04, which directs that the court must give primary consideration to the objectives of denunciation and deterrence when imposing a sentence for an

¹ *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a* (29 May 2019), online (pdf): <www.mmiwg-ffada.ca/final-report/> [perma.cc/D55C-DM64] [MMIWG 1a].

² *Ibid.*

³ *Criminal Code*, RSC 1985, c C-46, s 718.04, 718.201.

⁴ MMIWG 1a, *supra* note 1.

⁵ *R v Barton*, 2019 SCC 33 [Barton]; Government of Canada, *Legislative Summary of Bill C-75* (25 July 2019), online: <lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C75E> [perma.cc/8M7N-4QLA].

⁶ *Criminal Code*, *supra* note 3, s 718.2.

⁷ *Ibid.*

offence involving the abuse of a person who is vulnerable because of personal circumstances, including where the person is Indigenous and female.⁸ The judicial treatment of s. 718.201⁹ has been less clear, as it is cited less frequently and its application at sentencing is not clearly articulated. A survey of appellate decisions interpreting these provisions reveals that while some decisions consider them as codifications of common law aggravating factors, the requirement in s. 718.04 that a sentencing court give primary consideration to denunciation and deterrence where the victim's personal circumstances include that they are Aboriginal and female¹⁰ has resulted in a concrete shift in the judicial treatment of these cases. Courts are increasingly prioritizing the impact of offences on these vulnerable victims, going beyond the previous common law approach.

This paper first surveys the historical context leading to the adoption of these provisions, including the findings of the *National Inquiry into Missing and Murdered Indigenous Women and Girls*.¹¹ It then examines the *Barton*¹² decision, in which the Supreme Court of Canada addressed the effects of racism against Indigenous people within the Canadian criminal justice system and its impact on the lives of Indigenous people in Canada. The paper next considers the provisions themselves and their judicial treatment to date. Two lines of cases have emerged in this respect. The first argues that these provisions are a mere codification of pre-existing common law principles. The second line of cases treats them as new requirements that go beyond what the common law previously mandated. After reviewing the jurisprudence on both sides, the paper concludes that the differences in analysis since these provisions were adopted signal that they go beyond mere codification of existing principles, requiring a new emphasis on the circumstances of Indigenous women.

A. Limitations and Directions for Further Study

This paper surveys judicial treatment at the appellate level. Quantum of sentence is not discussed due to the individualized nature of sentencing

⁸ *Ibid*, s 718.04.

⁹ *Ibid*, s 718.201.

¹⁰ *Ibid*, s 718.04.

¹¹ MMIWG 1a, *supra* note 1.

¹² *Barton*, *supra* note 5.

proceedings, which necessarily balance multiple factors related to the specific facts and circumstances in each case. Given the relatively recent enactment of these provisions, a review of their effect on sentence quantum may be better placed after more time has passed and additional reported decisions are available for empirical analysis. Similarly, although the *Gladue*¹³ and *Ipeelee*¹⁴ principles are discussed in relation to the judicial treatment of ss. 718.04 and 718.201 of the *Criminal Code*,¹⁵ a full examination of their application at sentencing is beyond the scope of this paper but merits further study.

II. HISTORICAL CONTEXT

Canadian jurisprudence has a history of not taking the protection of women and girls seriously. Historically, the fact that an offence took place in the context of domestic violence was sometimes treated as a mitigating factor at sentencing.¹⁶ Courts prioritized the “reconciliation of spouses,” even in the context of serious domestic violence.¹⁷ In some cases, a victim’s decision to forgive or remain with her abuser was treated as a mitigating factor.¹⁸ Lenient sentences were justified on the basis of avoiding negative impacts on the marriage between the victim and offender or preventing the accused from blaming his sentence on the victim, even where the victim was severely injured in front of their children.¹⁹ In extreme cases, domestic violence was trivialized entirely, such as in *R v Acorn*, where the accused received a suspended sentence for a violent assault on his spouse, with a condition that he buy her a \$50 present.²⁰ By 1996, courts had begun to recognize the pervasiveness of the problem of domestic violence. The

¹³ *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*].

¹⁴ *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

¹⁵ *Criminal Code*, *supra* note 3, s 718.04, 718.201.

¹⁶ Department of Justice Canada, *Sentencing for Intimate Partner Violence in Canada: Has s. 718.2(a)(ii) Made a Difference?*, by Isabel Grant (Ottawa: Department of Justice Canada, 2017) at 8, online: <canlii.ca/t/t8zq> [Grant].

¹⁷ *R v Deschamps*, 1989 CarswellOnt 2922 at para 24 (Ont Dist Ct); *R v Chaisson*, 1975 CanLII 2395 (NSCA).

¹⁸ *R v Butler*, 1984 CanLII 2542 (SKCA).

¹⁹ *R v Goose*, [1984] NWTR 56, 1983 CanLII 4794 (NWTTT).

²⁰ *R v Acorn*, 1986 CarswellPEI 42, 170 APR 270 (PEISC).

enactment of s. 718.2(a)(ii) represented a legislative acknowledgement of the extent of the problem and the need to address it.²¹ This was part of a larger movement to address family violence through changes to the *Criminal Code*.²²

Indigenous women are particularly vulnerable due to the legacy of colonialism and related policies, and both individual and systemic racism. This has resulted in higher rates of criminal victimization.²³ For example, statistics from 2019 indicate that 8.4% of Indigenous people were victims of sexual assault, robbery or physical assault, compared to 4.2% of non-Indigenous people. Nearly one in ten Indigenous people surveyed reported being the victim of a violent crime in 2019 alone, versus approximately one in twenty-five non-Indigenous people. Additionally, 26% of Indigenous women reported experiencing sexual violence during childhood, nearly three times the rate reported by non-Indigenous women.²⁴

A. Recommendations of the *National Inquiry into Missing and Murdered Indigenous Women and Girls*

In 2016, the *National Inquiry into Missing and Murdered Indigenous Women and Girls* was launched with a mandate to investigate the “disproportionately high levels of violence faced by Indigenous women and girls.”²⁵ The inquiry was designed to be a “platform and a starting point for developing a more comprehensive, person- and community-centred understanding of the crisis of violence [...] and a new and unique framework for approaching lived experience, as described in the testimonies [...] heard, as a starting point for

²¹ Grant, *supra* note 16 at 9.

²² Canada, Parliament, *House of Commons Debates*, 36th Parl, 2nd Sess, Vol 136, No 57 (25 February 2000), online (pdf): <www.ourcommons.ca/Content/House/362/Debates/057/han057-e.pdf>.

²³ Statistics Canada, *Victimization of First Nations people, Métis and Inuit in Canada*, by Samuel Perreault, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2022), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00012-eng.htm>.

²⁴ *Ibid* at 3.

²⁵ Women & Gender Equality Canada, *Backgrounder - National Inquiry into Missing and Murdered Indigenous Women and Girls* (last modified 26 November 2020), online: <www.canada.ca/en/women-gender-equality/news/2019/06/backgrounder-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls.html> [Gender Equality Canada].

change and transformation.”²⁶ By 2018, its final report found that the Canadian government had not sufficiently addressed the endemic rates of violence against this population.²⁷

The report made extensive findings about the ongoing genocide of Indigenous people perpetrated by the Canadian government and called for a National Action Plan to address violence against Indigenous women, girls, and 2SLGBTQQIA people.²⁸ In particular, it highlighted the failure of the criminal justice system to protect Indigenous women and girls by holding those who commit violence against them accountable.²⁹ The inquiry found that “sentencing, as it is currently carried out, is not resulting in creating safer communities or reducing the rates of violence against Indigenous women, girls, and 2SLGBTQQIA people”.³⁰ The report also cited a lack of research on the effect of s. 718.2(e) of the *Criminal Code*³¹ on the safety of Indigenous women, girls, 2SLGBTQQIA people, and Indigenous communities, stating that the current sentencing practices in Canada are not enhancing the safety of these groups or their communities.³² Among their recommendations were:

5.17 We call upon federal, provincial, and territorial governments to thoroughly evaluate the impacts of Gladue principles and section 718.2(e) of the Criminal Code on sentencing equity as it relates to violence against Indigenous women, girls, and 2SLGBTQQIA people.³³

5.18 We call upon the federal government to consider violence against Indigenous women, girls, and 2SLGBTQQIA people as an aggravating factor at sentencing, and to amend the Criminal Code accordingly, with the passage and enactment of Bill S-215.³⁴

²⁶ MMIWG 1a, *supra* note 1 at 91.

²⁷ *Ibid* at 176.

²⁸ *Reclaiming Power and Place: The Final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b* (29 May 2019), online: <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf> at 176 [MMIWG 1b].

²⁹ MMIWG 1a, *supra* note 1 at 717.

³⁰ *Ibid* at 718.

³¹ *Criminal Code*, *supra* note 3, s 718.2(e).

³² MMIWG 1a, *supra* note 1 at 718.

³³ MMIWG 1b, *supra* note 28 at 185.

³⁴ *Ibid*.

These recommendations were identified by the Canadian federal government for legislative action.³⁵

B. *R v Barton*

In 2019, the prevalence of violence against Indigenous women was considered by the Supreme Court of Canada in *R v Barton*.³⁶ This case concerned the death of Cindy Gladue, an Indigenous woman who was a sex worker, from vaginal injuries sustained during a sexual assault. The trial was criticized for multiple failures in the way the law of sexual assault was applied, the treatment of the dignity of the victim and her family, the instructions to the jury, and the way the evidence was handled during the trial.³⁷ Mr. Barton was acquitted of first-degree murder. The Alberta Court of Appeal allowed the Crown's appeal, set aside the acquittal and ordered a new trial. This decision was appealed to the Supreme Court of Canada, which allowed the appeal and ordered a new trial on the lesser included charge of manslaughter.³⁸ Mr. Barton, who is not Indigenous, was later convicted of manslaughter and sentenced to 12½ years in prison. A Crown appeal of this sentence was dismissed.³⁹

In *Barton*, the Supreme Court of Canada made a strong statement about the detrimental effect that widespread racism against Indigenous people has had on the criminal justice system and on Indigenous people in Canada. Justice Moldaver, writing for the majority, referred to the recommendations of the *National Inquiry into Missing and Murdered Indigenous Women and Girls*⁴⁰ and stated:

³⁵ *Legislative Summary of Bill C-75*, *supra* note 5.

³⁶ *Barton*, *supra* note 5.

³⁷ Lisa Kerr & Matt Shepherd, "Sexual Assault Defined: the Supreme Court and the Barton case" (9 July 2019) at 6:12-11:00, online (podcast): <certificate.queenslaw.ca/podcast/sexual-assault-defined-the-supreme-court-and-the-barton-case> [perma.cc/7JC3-Y9W6].

³⁸ *Barton*, *supra* note 5.

³⁹ "Crown's appeal of prison term for trucker convicted in Cindy Gladue killing dismissed", *CBC News* (1 November 2024), online: <www.cbc.ca/news/canada/edmonton/barton-sentence-upheld-1.7371219> [perma.cc/HK55-FULG].

⁴⁰ *MMIWG 1a*, *supra* note 1.

Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people – and in particular Indigenous women, girls, and sex workers – have endured serious injustices, including high rates of sexual violence against women.⁴¹

Among its recommendations, the court emphasized the need for jury instructions designed to dispel harmful assumptions about Indigenous women who perform sex work. The decision also calls on the criminal justice system and all justice system participants “to address systemic biases, prejudices and stereotypes against indigenous persons – and in particular Indigenous women and sex workers – head on.”⁴²

III. BILL C-75

In response to the attention brought to this longstanding failure of the criminal justice system to address the safety of Indigenous women and girls, the Canadian government introduced Bill C-75. The Legislative Summary of the Bill states:

Section 718.04 requires courts to give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence when the offence involves “the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female.” Section 718.201 provides that a court imposing a sentence for an offence involving the abuse of an intimate partner must now consider “the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.”⁴³

These two amendments are described as addressing recommendations 5.17 and 5.18 of the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, as well as some of the concerns noted by the Supreme Court in *R. v Barton*.⁴⁴ The *Criminal Code* provisions, as enacted, read:

718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall give primary

⁴¹ *Barton*, *supra* note 5 at para 198.

⁴² *Ibid* at para 200.

⁴³ *Legislative Summary of Bill C-75*, *supra* note 5.

⁴⁴ *Gender Equality Canada*, *supra* note 25; *MMIWG 1b*, *supra* note 28 at 185; *Barton*, *supra* note 5.

consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.⁴⁵

718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.⁴⁶

Sentencing is an individualized process that requires the trial judge to balance a myriad of complex factors in order to arrive at an appropriate sentence. Among these factors, the judge must balance the nature of the offence, the personal characteristics of the offender, and the normative principles set out by Parliament in the *Criminal Code*.⁴⁷ The addition of these provisions focuses the court's attention on the specific harm caused to the victims of the offence by virtue of who they are, in addition to the circumstances of the offender.

Both the stated government intent in passing this legislation and the wording of the sections themselves indicate that the government is seeking to make the protection of Indigenous women a higher priority than it had been prior to their enactment. The background summary also explicitly states that this is to be a new sentencing requirement. Despite this, some courts have interpreted these provisions as codifying existing sentencing principles rather than departing from them.

IV. RELATED *CRIMINAL CODE* PROVISIONS

As discussed above, sentencing is a highly individualized process. The circumstances of the offence, the offender, and the complainant must all be considered in every case to arrive at a fit sentence. This is set out in s. 718.1 of the *Criminal Code*, which directs that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."⁴⁸ Within this proportionality analysis, there are several considerations enumerated in ss. 718 to 718.21.⁴⁹

⁴⁵ *Criminal Code*, *supra* note 3, s 718.04.

⁴⁶ *Ibid*, s 718.201.

⁴⁷ *R v LM*, 2 SCR 163 at para 17.

⁴⁸ *Ibid*, s 718.1.

⁴⁹ *Ibid*, ss 718-718.21.

Prior to the 2019 additions of ss. 718.04 and 718.201,⁵⁰ the *Criminal Code* already contained a provision aimed at addressing violence against women. Section 718.2(a)(ii), enacted in 1996, provided that “evidence that the offender, in committing the offence, abused the offender’s intimate partner or a member of the victim or the offender’s family” is an aggravating factor at sentencing.⁵¹ Where the offender is an Indigenous person, the sentencing court must also apply the *Gladue*⁵² and *Ipeelee*⁵³ principles, as well as s. 718.2(e), which directs that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”⁵⁴

It is difficult to assess the impact of these provisions. The individualized nature of sentencing makes comparisons challenging, and as Isabel Grant observes, there has been limited work on sentencing for offences of violence against women in Canada because such violence has historically “been seen as less serious than violence against strangers and characterized as something that is private within the family and therefore not the legitimate source of public, or judicial, concern”,⁵⁵ particularly as it concerns violence against Indigenous women.⁵⁶ The overrepresentation of Indigenous people in Canadian prisons continues, particularly among Indigenous women.⁵⁷

⁵⁰ *Ibid*, s 718.04, 718.201.

⁵¹ *Ibid*, s 718.2(a)(ii).

⁵² *Gladue*, *supra* note 14.

⁵³ *Ipeelee*, *supra* note 15.

⁵⁴ *Criminal Code*, *supra* note 3, s 718.2(e).

⁵⁵ *Grant*, *supra* note 16 at 8.

⁵⁶ *MMIWG 1b*, *supra* note 28.

⁵⁷ Department of Justice Canada, *Overrepresentation: The Nature and Extent of the Problem - Research and Statistics Division - Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (last modified 20 January 2023), online: <www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html> [perma.cc/DCU8-U8VD].

V. JUDICIAL TREATMENT OF S.718.04 AND 718.201

A significant portion of the jurisprudence in this area concerns the difficulty of balancing this new requirement with *Gladue*⁵⁸ and *Ipeelee*⁵⁹ principles. Some decisions treat these provisions as a codification of existing principles already required to be considered at sentencing, while another line of cases interprets them as reflecting a new requirement for sentencing proceedings.

A. Balancing s.718.04 and 718.201 with s.718.2(e)(ii)

Many of the crimes committed against Indigenous women are perpetrated by Indigenous men. A significant portion of the jurisprudence in these cases concentrates on how to arrive at a fit sentence while balancing consideration of the accused as an Indigenous offender with the need to protect Indigenous women and girls.

Section 718.2(e) of the *Criminal Code*⁶⁰ creates a statutory duty that the court consider the particular circumstances of Aboriginal offenders. As articulated in *R v Ipeelee*:

Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, [...] and a failure to do so constitutes an error justifying appellate intervention.⁶¹

Sections 718.04 and 718.201⁶² create similar statutory obligations that require courts to consider the circumstances of the victim and the community. This creates a tension, as these requirements must be balanced with existing sentencing principles. The complexity of this task is illustrated by the Court of Appeal of Nunavut in the *Kolola*⁶³ and *Kownirk*⁶⁴ decisions.

⁵⁸ *Gladue*, *supra* note 14.

⁵⁹ *Ipeelee*, *supra* note 15.

⁶⁰ *Criminal Code*, *supra* note 3, s 718.2(e).

⁶¹ *Ipeelee*, *supra* note 15 at para 87.

⁶² *Criminal Code*, *supra* note 3, s 718.04, 718.201.

⁶³ *R v Kolola*, 2021 NUCA 11 [*Kolola*].

⁶⁴ *R v Kownirk*, 2023 NUCA 2.

In *Kownirk*, the accused argued that s. 718.04 had been allowed to “trump other sentencing principles, in particular s 718.2(e)”.⁶⁵ In upholding the sentence, the court stated:

Both these provisions are designed to promote recognition of the harms caused to Canada’s Indigenous peoples by colonialism. As the Crown notes in its factum, however, “they serve different social objectives, with s. 718.04 addressing the over representation of violence against Indigenous women and girls, and with s. 718(2)(e) addressing the over-incarceration of Indigenous offenders.” While Indigenous men and women may bear the burdens of colonialism equally, the harms of sexual violence are overwhelmingly borne by women, and in particular, Indigenous women.⁶⁶

The court then referred to a similar articulation of this need for balance from *Kolola*:

The prevalence of sexual violence against women in Nunavut has been known for many years and trial judges are in the best position to assess and observe the magnitude of the problem in their jurisdiction [...] Similarly, it falls within the sentencing judge’s role to assess the gravity of an offence with a contemporary and informed understanding of the harm experienced by victims.⁶⁷

The Ontario Court of Appeal follows a similar approach in *R v Wawatie*, affirming that the trial judge was correct to consider both s. 718.04 and *Gladue* in arriving at a fit sentence.⁶⁸

The tension between these statutory requirements is most recently illustrated in *R v Cope*. This sentence appeal concerned a five-year sentence imposed on an Indigenous offender for aggravated assault on his intimate partner, who is also Indigenous. Derrick J.A., writing for the majority, found that the sentence was excessive. Although the sentencing judge referred to *Gladue*⁶⁹ and *Ipeelee*,⁷⁰ the offender’s circumstances as an Indigenous person of Mi’kmaq ancestry, and the recommendations of a sentencing circle, the court found that the trial judge:

⁶⁵ *Ibid* at para 58.

⁶⁶ *Ibid* at paras 59–61.

⁶⁷ *Kolola*, *supra* note 63 at para 28; citing *R v Lacasse*, 2015 SCC 64 at para 95; and *R v Friesen*, 2020 SCC 9 at paras 76–94.

⁶⁸ *R v Wawatie*, 2021 ONCA 609 at paras 6–7.

⁶⁹ *Gladue*, *supra* note 14.

⁷⁰ *Ipeelee*, *supra* note 15.

was required to give effect to the appellant's *Gladue* factors and craft a sentence that reflected Ms. Sack's vulnerability as an Indigenous woman and an intimate partner of the appellant. In cases of serious violence, this will be challenging for any sentencing judge.⁷¹

The court further found that the trial judge placed insufficient emphasis on the accused's drug abuse, mental illness and *Gladue* factors, resulting in a sentence that was disproportionate to Mr. Cope's level of moral culpability.⁷² In dissent, Scanlan J.A. disagreed, stating that the majority decision:

fails to give sufficient weight to the statutory amendments directed at protecting Indigenous intimate partners. Those provisions are interrelated to other sentencing considerations, and it is wrong for an appeal court to reweigh those factors to simply come up with a different sentence.⁷³

A Crown application for leave to appeal this decision to the Supreme Court of Canada has been granted.⁷⁴

Lower court decisions citing *Cope* articulate this need for balance and consideration of all factors, but place their emphasis on different sides of this debate. The decisions of *R v ZZ*⁷⁵ in Nova Scotia and *R v Angus*⁷⁶ in Saskatchewan emphasize that consideration of ss. 718.04 and 718.201 must not overshadow or exclude the consideration of *Gladue* factors. In contrast, *R v King*⁷⁷ in Ontario, and *R v Ikkidluak*⁷⁸ and *R v BQ*⁷⁹ in Nunavut highlight that the vulnerability of Indigenous women and girls must be a primary consideration pursuant to the *Criminal Code*.⁸⁰

⁷¹ *R v Cope*, 2024 NSCA 59 at para 116 [*Cope*].

⁷² *Ibid* at para 162.

⁷³ *Ibid* at para 181.

⁷⁴ *His Majesty the King v Harry Arthur Cope*, 2025 CanLII 20248 (SCC).

⁷⁵ *R v ZZ*, 2024 NSPC 42 at paras 75–76.

⁷⁶ *R v Angus*, 2024 SKCA 80 at paras 108–115.

⁷⁷ *R v King*, 2024 ONCJ 354 at para 23.

⁷⁸ *R v Ikkidluak*, 2024 NUCJ 20 at paras 16–17.

⁷⁹ *R v BQ*, 2024 NUCA 12 at para 27; *Cope*, *supra* note 71 at paras 211–16; *Criminal Code*, *supra* note 3, s 718.04.

⁸⁰ See also *R v CRM*, 2024 NSPC 43 at para 77; The victims in this case were non-Indigenous males. The court cites *Cope* for the proposition that restraint must be exercised when sentencing racialized offenders.

This discussion of the need for balance pre-dates the Bill C-75 amendments. The court's treatment of this issue in *R v AD*, a decision of the Alberta Court of Appeal heard before the enactment of ss.718.04 and 718.201,⁸¹ for example, uses language similar to the post-Bill C-75 decisions:

Considering the circumstances of the victim and the effects of the offence on the community does not mean that the circumstances of the offender, in particular the circumstances of Aboriginal offenders, are disregarded or, as was argued by the appellant in *R v Johnny*, 2016 BCCA 61, that consideration of the victim's circumstances effectively disentitles the offender from a meaningful *Gladue* analysis under s. 718.2(e). What it does mean is that, in arriving at a fit sentence, judges must take into account the circumstances of the offender, the circumstances of the victim and the effect of the crime on the community in which it took place. The fact that a sentencing judge is required to consider one set of circumstances does not mean other circumstances are ignored.⁸²

A later Alberta Court of Appeal case, also named *AD* but decided after the amendments, echoes this position in finding that a failure to refer to s. 718.04 or the equivalent common law factors constituted an error of law.⁸³ The court emphasized the need to balance all factors, stating:

The imbalance in the sentencing judge's discussion of the circumstances of the respondent and the victims is irreconcilable with a consideration of the objectives of sections 718.04 and 718.201. In particular, it appears the sentencing judge was deeply concerned about the respondent's own past victimization – rightly so – but was not equally concerned that in committing these offences the respondent extended that victimization to another generation.⁸⁴

This line of cases indicates that although the consideration of the victim's circumstances at sentencing has long been recognized at common law, the treatment of the circumstances of Indigenous women in particular has evolved. There is now an elevation of the impact of these offences on Indigenous women who are victims of crime to a place of "primary consideration".⁸⁵

⁸¹ *R v AD*, 2019 ABCA 396 at para 32.

⁸² *Ibid* at paras 27–29.

⁸³ *R v AD*, 2024 ABCA 178 at para 35.

⁸⁴ *Ibid* at para 41.

⁸⁵ *Criminal Code*, *supra* note 3, s 718.04.

B. Are these provisions a codification of existing common law principles?

In the 2020 decision of *R v LP*, the Quebec Court of Appeal considers these new provisions in light of the existing s. 718.2 aggravating factors and *Gladue* principles. The court finds that s. 718.2(a)(ii) of the *Criminal Code*⁸⁶ already identified intimate partner violence as an aggravating factor which invokes the principles of general denunciation and individual deterrence. In discussing the more recent provisions, the court writes:

Therefore, even before the enactment of sections 718.04 and 718.201 of the *Criminal Code*, the protection of vulnerable Indigenous women who were victims of abuse, whether or not in the domestic context, and the recognition of the suffering endured by these victims, were key considerations in sentencing offenders. Systemic factors have affected and are continuing to affect Indigenous offenders facing the criminal justice system. These factors have resulted in overrepresentation of Indigenous offenders in penitentiary institutions, a problem that Parliament sought to address by encouraging judges to use restorative approaches to sentencing when possible and appropriate.⁸⁷

This position is echoed by other courts. Justice Ker of the Supreme Court of British Columbia similarly finds that these provisions codify the common law in *R v Milne*.⁸⁸ In *R v Wood*, a 2022 decision of the Manitoba Court of Appeal concerning offences committed before the enactment of ss. 718.04 and 718.201, the court cites *LP* for the proposition that “‘attention to Aboriginal female victims, as a sentencing factor, was well set in common law before’ the enactment of those sections.”⁸⁹

R v Cope, discussed above, is a recent decision of the Nova Scotia Court of Appeal. This was an appeal from the sentencing of an Indigenous man for an aggravated assault on his partner, an Indigenous woman. At sentencing at first instance, the Crown referred to s. 718.04 and s. 718.201 of the *Criminal Code*⁹⁰ in her written submissions. The sentencing judge’s reasons did not specifically refer to these provisions but did identify intimate partner violence against an Indigenous woman as an aggravating

⁸⁶ *Ibid*, s 718.2(a)(ii).

⁸⁷ *R v LP*, 2020 QCCA 1239 at paras 91–92.

⁸⁸ *R v Milne*, 2020 BCSC 2101 at paras 104–106; see also *R v CCC*, 2021 BCSC 599 at para 28.

⁸⁹ *R v Wood*, 2022 MBCA 46 at para 21.

⁹⁰ *Criminal Code*, *supra* note 3, s 718.04, 718.201.

factor. In its discussion on the sentence appeal, the Nova Scotia Court of Appeal states:

Although the sentencing judge did not specifically cite the *Code* provisions, she identified “intimate partner violence on an Indigenous woman” as aggravating, which she likely would have done in any event. Intimate partner violence is statutorily aggravating under s. 718.2(a)(ii) of the *Criminal Code* and the common law has treated the victimization of Indigenous women as aggravating.⁹¹

The Court of Appeal of Nunavut makes comments similar to the *Cope* majority decision in *R v Kolola*, a sentence appeal from a 30-month sentence following a guilty plea to sexual assault.⁹² Smallwood J.A., in discussing s. 718.04 of the *Criminal Code*,⁹³ which was enacted after Mr. Kolola committed the offence but before sentencing, describes the provision as the codification of “the long standing and well-established common law principle where Courts have considered denunciation and deterrence the primary sentencing considerations in cases involving the abuse of a victim who is vulnerable because of their personal circumstances”.⁹⁴ A further decision in 2022, *R v CD*, does not take a position as to whether this is a codification of existing common law principles, but refers to the use of the term “aggravating” in the context of s. 718.04 as “referring to the ‘indicia of gravity’ surrounding this offence. When denunciation and deterrence are specified as the primary objectives of sentencing, that is an indication that a higher or sterner sentence is called for”.⁹⁵

In *R v Bear*, the Saskatchewan Court of Appeal cites the first instance sentencing judge as noting that although s. 718.04 was not in force at the time of the offence, “the vulnerability of Indigenous women is a ‘well-established aggravating factor on sentencing and one which emphasizes denunciation and deterrence’”.⁹⁶ There is no further discussion of the provision.

This treatment of the new *Criminal Code* provisions as a codification of the common law rather than a new requirement suggests that the legislation

⁹¹ *Cope*, *supra* note 71 at para 112.

⁹² *Kolola*, *supra* note 63.

⁹³ *Criminal Code*, *supra* note 3, s 718.04.

⁹⁴ *Kolola*, *supra* note 63 at para 34.

⁹⁵ *R v CD*, 2021 NUCA 21 at para 39.

⁹⁶ *R v Bear*, 2022 SKCA 69 at para 16 [*Bear*].

has failed in its stated purpose. If these sections do not create a new obligation, there is no additional consideration of the circumstances of Indigenous women who are victims of crime. Another line of cases, however, places greater importance on the legislative intent behind these amendments.

C. A Departure from Existing Common Law

A second line of cases takes the position that these provisions constitute a departure from previous sentencing principles. *R v Merasty*, a decision by Justice Leurer of the Saskatchewan Court of Appeal, discusses these provisions in the context of sentencing for sexual assault. Wade Merasty was convicted of sexual assault on a sleeping acquaintance. The complainant, an Indigenous woman, woke up as the offender attempted vaginal penetration. In his decision, the sentencing judge found that this was not a major sexual assault because “there was no violence, no force, no threat of any kind”, in the offender’s attempted penetration of his sleeping victim, and because he did not persist in assaulting her once she woke up.⁹⁷ The accused was sentenced to six months’ jail. He appealed this sentence, and the appeal was dismissed. The Crown then appealed the sentence in a separate proceeding. The Crown appeal was granted, and the sentence was varied to 20 months’ jail.⁹⁸

In its analysis, the appeal court found that it was an error of law for the sentencing judge not to refer to s. 718.04 or its principles.⁹⁹ Although the sentencing judge referred to the fact that the complainant is an Indigenous person and that she had experienced trauma as a result of the sexual assault,¹⁰⁰ the court disagrees that this is sufficient. The court does not find that s.718.04 is the codification of common law principles. Instead, Leurer J.A. writes:

It has been said that s. 718.04 has “codified the long standing and well-established common law principle where Courts have considered denunciation and deterrence the primary sentencing considerations in cases involving the abuse of a victim who is vulnerable because of their personal circumstances” (*Kolola* at para 34. See also: *R c L.P.*, 2020 QCCA 1239 at para 80, 393 CCC (3d) 1).

⁹⁷ *R v Merasty*, 2023 SKCA 33 at para 9 [Merasty].

⁹⁸ *Ibid.*

⁹⁹ *Ibid* at para 30.

¹⁰⁰ *Ibid* at para 8.

However, the fact that Parliament considered it necessary to mandate that, when a sentence is imposed for an offence that involves the abuse of a person who is vulnerable because of personal circumstances, “the court shall give *primary consideration* to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence” (s. 718.04, emphasis added), must at the very least mean that some courts had failed to properly situate this consideration.¹⁰¹

An application for leave to appeal this decision to the Supreme Court of Canada was dismissed.¹⁰² In its discussion, the court refers to the decision in *Bear*,¹⁰³ written by Justice Kalamakoff of the Saskatchewan Court of Appeal and discussed above but does not address the difference in treatment of s. 718.04. This may be because the provision was not in force when the offence in *Bear* was committed, and in that case, the decision simply made reference to a finding made by the original sentencing judge.

In *R v Bunn*, the Manitoba Court of Appeal takes a similar approach. In its decision, the court cites the comments of a team lead at the Department of Justice Canada to the effect that s. 718.04 is a “direction to sentencing courts to ‘treat this more seriously, and obviously for sentences imposed to reflect the gravity of what the crime is.’”¹⁰⁴

One of the most powerful statements supporting this interpretation is found in *R v McDonald*, in which the Alberta Court of Appeal states:

As an Indigenous woman and an intimate partner of Mr. McDonald, ss. 718.04 and 718.201 of the *Criminal Code*¹⁰⁵ mandate that the court give primary consideration to the objectives of denunciation and deterrence as well as consider the complainant’s increased vulnerability. As poignantly argued by the Crown, these statutory amendments serve to remind courts that acts of terror and violence should not be minimized because they occurred on the backroads of Janvier to a vulnerable Indigenous woman, rather than in an urban setting to a more privileged victim.¹⁰⁶

These decisions signal that some appellate courts attach more importance to these provisions than simply viewing them as a formalization of the

¹⁰¹ *Ibid* at para 64.

¹⁰² *Wade Merasty v His Majesty the King*, 2023 CanLII 92316 (SCC) [*Merasty Leave*].

¹⁰³ *Bear*, *supra* note 96.

¹⁰⁴ *R v Bunn*, 2022 MBCA 34 at para 103, citing Senate of Canada Evidence, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No 62 (16 May 2019) online: <sencanada.ca/en/committees/lcjc/> [perma.cc/9AWD-XJJU].

¹⁰⁵ *Criminal Code*, *supra* note 3, s 718.04, 718.201.

¹⁰⁶ *R v McDonald*, 2021 ABCA 262 at para 28.

common law. From this perspective, it is not that these factors did not exist or were not considered by the courts before these provisions were enacted, but rather that Parliament is directing the courts to place greater emphasis on this factor within the complex balancing exercise required to arrive at a fit sentence.

VI. CONCLUSION: HAVE THESE PROVISIONS CHANGED THE LAW OF SENTENCING?

On their face, ss. 718.04 and 718.201 create a mandatory directive that primary consideration be given to denunciation and deterrence at sentencing where the factors they identify are present.¹⁰⁷ While these principles are not new, they do create a renewed emphasis on the need to balance consideration of the circumstances of the accused person with the need to protect vulnerable victims, particularly Indigenous women. These principles have been used to justify the imposition of a higher sentence where comparator cases with lower sentences involved victims who were not Indigenous women.¹⁰⁸

Sentencing is an individualized process, and these new provisions must be considered alongside existing requirements regarding the accused person's personal circumstances. Where the offender is an Indigenous person, their personal circumstances must be taken into account pursuant to s. 718.2(e)¹⁰⁹ and the principles established in *Gladue*¹¹⁰ and *Ipeelee*.¹¹¹ The judicial treatment of cases where both the offender and the victim are Indigenous reflects the importance of balancing these factors, but makes it clear that Parliament's emphasis on the protection of victims and society does not take away from the sentencing judge's responsibilities to Indigenous offenders.

The divergence in the judicial treatment of these provisions as to whether they represent a new requirement at sentencing or simply a codification of existing common law principles illustrates that they do not

¹⁰⁷ *R v Alcorn*, 2021 MBCA 101 at para 60.

¹⁰⁸ *R v Nakashook*, 2024 NUCJ 7 at paras 107–108.

¹⁰⁹ *Criminal Code*, *supra* note 3, s 718.2(e).

¹¹⁰ *Gladue*, *supra* note 14.

¹¹¹ *Ipeelee*, *supra* note 15.

constitute an extreme departure from previous sentencing principles. The vulnerability of victims was already a factor at common law prior to their enactment.

In enacting these provisions, Parliament has signalled that the sentencing process must consider the circumstances of the victim, the offender and the community, and must balance all of these factors to arrive at a fit sentence. Although leave to appeal was denied in *Merasty*,¹¹² the Supreme Court's decision to grant leave in *Cope* offers the prospect of clarification of this issue.¹¹³

What can be said is that the enactment of s. 718.04, and to a lesser extent s. 718.201, has resulted in an increased focus at sentencing on the circumstances of vulnerable Indigenous women. This development goes beyond codification of the common law, as it requires mandatory consideration of the particular vulnerabilities of this specific group of victims at sentencing. The judicial discussion of these provisions demonstrates that Parliament's intent to emphasize the protection of Indigenous women and girls has had some impact and represents a positive step toward implementing the recommendations of the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.¹¹⁴

¹¹² *Merasty*, *supra* note 97; *Merasty Leave*, *supra* note 102.

¹¹³ *Cope*, *supra* note 71.

¹¹⁴ *MMIWG 1a*, *supra* note 1.

