Sentencing Aboriginal Offenders:
The Honour of the Crown, Reconciliation and Rehabilitation of the Rule of Law

By

Michelle Marie Mann

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Abstract

This thesis argues that the honour of the Crown and the reconciliation agenda are engaged in the sentencing of Aboriginal offenders, given grossly disproportionate Aboriginal incarceration rates and their underlying causes, including socio-economic problems, community breakdown and cultural dislocation that arise at least partly from the history of Crown-Aboriginal interaction. Such an interpretation facilitates a new relationship between the Crown and Aboriginal peoples and will contribute to the rehabilitation of the rule of law. I address not only the underlying legal questions pertaining to the engagement of the honour of the Crown and the reconciliation agenda in sentencing Aboriginal offenders, but also interrogatories relating to the role of morality in the law and the rule of law for Aboriginal peoples in the sentencing context. Fundamentally, the honour of the Crown and reconciliation principles are interpreted and applied such that the sentencing of Aboriginal offenders can accommodate and attempt to ameliorate colonialist history. This distinctive history produces a legal requirement of reconciliation and honour-based governance if the rule of law is to be a reality for Aboriginal peoples in Canada.

Section 718.2(e) of the Criminal Code and Gladue analysis provide a vehicle for the courts to inject the honour of the Crown into the sentencing of Aboriginal offenders, albeit at one remove. However, the honour of the Crown requires a vigorous Gladue type analysis by judges sentencing Aboriginal offenders regardless of the existence of section 718.2(e). Canada must be prepared to accept responsibility and directly address some of the fallout in the criminal justice system from the history of Crown / Aboriginal relations. The honour of the Crown requires a different sentencing approach for Aboriginal offenders independent of section 718.2(e) and reconciliation is an interpretive normative principle underlying the sentencing of Aboriginal
offenders, shaping the honour of the Crown and infusing the rule of law for Aboriginal peoples. Aboriginal offender rehabilitation needs to go hand in hand with the rehabilitation of the rule of law for Aboriginal peoples as a pivotal component of reconciliation.
I am indebted to my advisor, Dr. Mark Walters, for his guidance and support without which I would not have been able to produce this thesis. I thank him in particular for believing that behind my incoherent ramblings in his office there was indeed the basis for a meritorious thesis.

I also thank Justice Stephen O’Neill both for providing the substantial fodder for my thesis in the form of *Gladue* sentencing cases and for his mentorship and support throughout the last decade.

Most importantly, I would like to thank my husband Roy who encouraged me to start my LL.M. two weeks after our wedding and who provided unconditional support. Without it, I might never have undertaken this project at the outset and might well not have finished.
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Chapter 1. Introduction

Aboriginal people are drastically over-represented as those charged and convicted of criminal offences and in Canada’s correctional facilities, both provincial and federal. As of April 10, 2011, Aboriginal offenders represented 18.5% of the total federal offender population while Aboriginal adults represented approximately 3% of the Canadian adult population.\(^1\) With the Aboriginal population much younger than the overall Canadian population and experiencing a higher growth rate\(^2\), the problem of Aboriginal over-representation in the justice system continues to worsen rather than improve. The offending circumstances of Aboriginal offenders are often related to substance abuse, inter-generational abuse, residential schools and the sixties scoop\(^3\), low levels of education, employment, and income and family issues, among other factors. For many of these criminogenic factors, community breakdown related to the impacts of colonialism and assimilation attempts may also play a pivotal role. To some degree, this was recognized by the Canadian government in the enactment of section 718.2(e) of the *Criminal Code*\(^4\) effective in 1996, and by the Supreme Court of Canada in the seminal *R. v. Gladue*\(^5\) decision, both seeking to address Aboriginal over-representation in the criminal justice system via sentencing reform. Nonetheless, demographic projections suggest that the disproportionate

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3. Refers to a period during the 1960s during which government social service workers were particularly aggressive in removing Aboriginal children from their families and communities and taking them into care. Unfamiliar with extended family child-rearing practices, communal values and cultural practices, social service workers often removed children on the basis of neglect, devastating children’s lives and furthering family and community breakdown. The best interests of the child with respect to culture and ethnicity were generally not taken into consideration as it was assumed that the child would assimilate via foster/adoptive parents.
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rates of Aboriginal peoples’ involvement in the criminal justice and corrections systems will continue well into the next decade.6

Simultaneously, legal and policy developments pertaining to Aboriginal peoples have increasingly focused on the notion of the honour of the Crown and the reconciliation agenda between the federal Crown and Aboriginal peoples. The notion of the honour of the Crown was emphasized by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*7 and the related case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*8. In both cases, the Court recognized that the duty of governments to consult with, and where appropriate, to accommodate the interests of Aboriginal peoples, can arise before claims of Aboriginal rights and title are determined. The source of this duty, the Court noted, is the “honour of the Crown”. Indeed the Court in *Haida Nation* observed that given the historical roots of the principle of the honour of the Crown, it must be understood generously, reflecting its underlying realities. In all its dealings with Aboriginal peoples, from the assertion of sovereignty onwards, the Crown must act honourably.9 This is required if we are to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”10 The Supreme Court of Canada has stated that the basic purpose of section 35 of *The Constitution Act, 1982*,11 is the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. Thus, the federal government has increasingly been focused

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7 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].
9 The honour of the crown and the associated duty to consult and accommodate in the spirit of reconciliation has been found to apply even where there are modern comprehensive land claim treaties. See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon*].
on the notion of the reconciliation of the federal Crown and Aboriginal peoples and on forging a new relationship. Reconciliation is said to be the cornerstone of the government’s new approach to Aboriginal relations. Reconciliation is the fulcrum around which policy is developed and renewed and the context within which programs are developed and implemented.\(^\text{12}\)

In the fall of 2009, I was simultaneously engaged on two different reports: one pertaining to Aboriginal incarceration rates\(^\text{13}\) and the other, the honour of the Crown in the context of the duty to consult and accommodate.\(^\text{14}\) Given grossly disproportionate Aboriginal incarceration rates and their underlying causes, including socio-economic problems, community breakdown and cultural dislocation that arise at least partly from the history of Crown-Aboriginal interaction, I began to question how the honour of the Crown and the reconciliation agenda could not be engaged in the sentencing of Aboriginal offenders. Accordingly, this thesis seeks to address not only the underlying legal questions pertaining to the engagement of the honour of the Crown and the reconciliation agenda in sentencing Aboriginal offenders, but also interrogatories relating to the role of morality in the law and the rule of law for Aboriginal peoples in the sentencing context. Fundamentally, I interpret and apply the honour of the Crown and reconciliation principles such that the sentencing of Aboriginal offenders can accommodate and attempt to ameliorate colonialist history. Adopting a similar approach, Australian Richard Edney has undertaken a

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\(^{10}\) *Haida Nation*, *supra* note 7 at para 17.


\(^{13}\) Michelle Mann, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* (Ottawa: Office of the Correctional Investigator, 2009).

\(^{14}\) Michelle Mann, *Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation* (Ottawa: Indian and Northern Affairs Canada, 2010).
legal analysis intermingled with a sense of what was “right” in relation to Australian indigenous peoples, the *Mabo v Queensland (No 2)*\(^{15}\) decision and criminal justice observing:

The decision in Mabo is perhaps a classic example of the power of the common law to not only create new legal interests, and to transform what may be considered settled understandings, but to also offer a vision of a good and moral society.\(^{16}\)

I will not venture so far as to offer a vision of a good and moral society. If, however, the honour of the Crown is nothing short of being the “conscience of the country”, as noted by then Saskatchewan Treaty Commissioner David Arnot,\(^{17}\) it must be considered in relation to the drastic over-incarceration of Canada’s Aboriginal peoples. This argument ultimately concludes that the concept of the honour of the Crown and the accompanying reconciliation agenda are underlying principles in the sentencing of Aboriginal offenders. The honour of the Crown requires a vigorous *Gladue* type analysis by judges sentencing Aboriginal offenders regardless of the existence of section 718.2(e) in the *Criminal Code*. Indeed, section 718.2(e) *de jure* reflects, but does not establish, an approach to sentencing Aboriginal offenders rooted in the principle of the honour of the Crown. Incorporating the honour of the Crown into Aboriginal sentencing is fundamental to Crown/Aboriginal reconciliation and to the rehabilitation of the rule of law for Aboriginal offenders and is an independent principle of Canadian constitutional law.

This thesis begins by establishing the framework for the ensuing discussion with an overview of Aboriginal peoples in the criminal justice system and the different theories that seek to explain their drastic over-representation. It then goes on to consider the general principles of sentencing in relation to Aboriginal people. This is followed by a general discussion of the honour of the

Crown, the accompanying reconciliation agenda and their holistic and constitutional connection to the rule of law for Aboriginal peoples. I then engage in a more specific discussion of the honour of the Crown, reconciliation and the rule of law in the context of Aboriginal peoples in the criminal justice system. This segues into the central discussion of the honour of the Crown, reconciliation and the rule of law in the sentencing of Aboriginal offenders. Finally, there is a concluding chapter.
Chapter 2. Aboriginal Peoples in the Criminal Justice System

As noted in Chapter One, in 2011 Aboriginal offenders represented 18.5% of the total federal offender population while Aboriginal adults represented approximately 3% of the Canadian adult population. As of April 10, 2011, Aboriginal women represented 31.9% of all incarcerated women while Aboriginal men represented 21.1% of incarcerated men.\(^\text{18}\) Approximately one in three federally incarcerated women is Aboriginal, and one in five federally incarcerated men is Aboriginal, despite representing only approximately 3% of the adult population of Canada. As noted by the Canadian Human Rights Commission, Aboriginal women are vulnerable not only because they lack power in the prison context, but also because of the economic, social and political realities of their lives. The disadvantage they experience is multi-layered both in society and the correctional system.\(^\text{19}\) Over the last ten years the federal non-Aboriginal offender population has declined slightly whereas the Aboriginal offender population has increased. From 2001-02 to 2010-11, the Aboriginal incarcerated population under federal jurisdiction increased by 37.3%. The number of incarcerated Aboriginal women increased steadily from 98 in 2001-02 to 182 in 2010-11, an increase of 85.7% in the last ten years. The increase for incarcerated Aboriginal men was 35% for the same period, increasing from 2,129 to 2,875.\(^\text{20}\) As noted by the Supreme Court of Canada as far back as 1998,

...The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic over-representation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.\(^\text{21}\)

\(^{18}\) Public Safety Canada, supra note 1 at 51.
\(^{20}\) Public Safety Canada, supra note 1 at 61.
\(^{21}\) Gladue, supra note 5 at para 64.
Of particular relevance is the projection that for Aboriginal people, the 20-29 age group (the group with the greatest potential for criminal activity) will increase by over 40%, more than four times the projected growth rate of 9% for non-Aboriginal people. Finally, compared to non-Aboriginal offenders, the gap in positive results for Aboriginal offenders across the spectrum of correctional outcomes also remains significant throughout sentence.

The Aboriginal offender population differs markedly from non-Aboriginal offenders in a number of ways. They tend to be younger; are more likely to have served previous youth and/or adult sentences; to be incarcerated more often for a violent offence; to have higher risk ratings; to have higher need ratings (particularly in the areas of substance abuse and employment); to be more inclined to have gang affiliations and to have more health problems, including Fetal Alcohol Spectrum Disorder and mental health issues. The offending circumstances of Aboriginal offenders are often related to substance abuse, inter-generational abuse, involvement in the child welfare system, being adopted, spending time in foster care or a group home, low levels of education, employment and income, substandard housing and health care, among other factors. These causal factors include the history of attempts at colonization and assimilation, via such tools as residential schools and the sixties scoop, often resulting in disenfranchisement,

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23 Mann, supra note 13.
24 Fetal Alcohol Spectrum Disorder is a medical condition characterized by physical and behavioural disabilities resulting from heavy exposure to alcohol before birth.
25 Mann, supra note 13 at 6.
26 Ibid.
community fragmentation and breakdown. For Aboriginal offenders, the intergenerational effects of colonization are a unique risk factor for the development of Fetal Alcohol Spectrum Disorder. There are higher rates of poverty and homelessness in the Aboriginal community and lower rates of education and employment, among other socio-economic factors, reflecting the intergenerational effects of colonization. Problematic substance abuse is linked to high rates of poverty, family breakdown, unemployment, and poor social and economic structures among First Nations, Métis and Inuit. This negative history continues to have an effect on many Aboriginal families and communities; spiritual, traditional and cultural practices may be lacking due to these assimilationist attempts. For the Royal Commission on Aboriginal Peoples (RCAP), the impact of colonialism was the primary reason underlying Aboriginal over-representation in the justice and correctional systems. The failure of Canada’s justice system in its interaction with Aboriginal peoples has for decades now been well documented, yet Aboriginal over-representation continues to grow.

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27 See Gladue, supra note 5; R v Niganobe, [2008] OJ No. 4181, 72 MVR (5th) 280 (ON SC); R v Dantimo, [2009] OJ No. 655 (ON SC) [Dantimo]; R v Paibomsai, [2006] OJ No. 5096 (ON SC) [Paibomsai]; R v Quash, 2009 YKTC 54, [2009] YJ No. 72 [Quash].
29 Colleen Anne Dell & Tara Lyons, Harm Reduction Policies and Programs for Persons of Aboriginal Descent (Ottawa: Canadian Centre on Substance Abuse, 2007) at 6.
31 Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide (Ottawa: Canada Communications Group, 1995) at 52–53 [RCAP]. While the gendered impacts of colonialism on Aboriginal women are beyond the scope of this thesis, it includes the loss of Indian status and band membership resulting from disenfranchisement provisions of previous Indian Acts due to marrying out, forced sterilization, exposure to family violence, high rates of victimization, and grossly disproportionate representation within the justice and correctional systems.
Aboriginal Alienation

There is an abundant body of literature and government reports spanning several decades that document Aboriginal over-representation in the criminal justice system and posit explanatory theories.\(^{32}\) The RCAP, in its seminal report on criminal justice in Canada, *Bridging the Cultural Divide*, found that:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada – First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural – in all territorial and governmental jurisdictions.\(^{33}\)

Numerous theories have emerged that attempt to explain this injustice including: cultural difference theory; socio-economic theory; colonialism theory; racism and discrimination and a collapse in the rule of law for Aboriginal peoples. This list is by no means exhaustive and the different causal factors must be understood holistically, in relation to one another. At the outset, it should also be noted that there is great diversity among Aboriginal peoples; thus there is no one “Aboriginal” view on criminal justice issues, but rather a diversity of values and viewpoints.

Cultural difference theory explains Aboriginal over-representation in the justice system by examining the differences in Aboriginal and non-Aboriginal normative orders and cultural values with respect to crime; these differences are closely linked to different approaches to restorative

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\(^{33}\) RCAP, *supra* note 31 at 309.
justice.\textsuperscript{34} For Aboriginal peoples, restoration of the offender, the victim and the community may be of primary importance in dealing with crime, rather than deterrence, denunciation or retribution.\textsuperscript{35} This can take place via victim offender reconciliation programmes, in Aboriginal healing or sentencing circles and via Aboriginal community programs as an attempt to restore the balance that has been disturbed by the commission of a crime and to take a holistic\textsuperscript{36} approach to the experiences of both offending and victimization.\textsuperscript{37} Punitive models of justice focus on the actions of an offender and on what will be the appropriate punishment for those actions. The theoretical offender underlying the mainstream criminal justice system is individualist, autonomous, accountable for their actions and an agent of free will.\textsuperscript{38} In contrast, restorative justice emphasizes exploring the underlying reasons for an offender's behaviour, whether it is alcoholism, a troubled childhood, or community dysfunction. Discovering the underlying causes of the criminal behaviour, and then searching for ways to deal with it, will form the basis for many of the discussions that occur between participants in a restorative process.\textsuperscript{39} The RCAP noted the dichotomy of Western punitive justice versus Aboriginal restorative justice, particularly given that retribution is meaningless in an Aboriginal value system that emphasizes reconciliation.\textsuperscript{40} The mainstream Canadian justice system often emphasizes punitive measures such as fines and incarceration, while restorative justice often envisions non-custodial resolutions

\begin{itemize}
  \item \textsuperscript{34} \textit{Ibid} at 39–53.
  \item \textsuperscript{36} The concept of holism is linked with emotions (relational), the mind (intellectual), the body (physical), and the spirit (spiritual).
  \item \textsuperscript{37} Roach & Rudin, \textit{supra} note 35.
  \item \textsuperscript{38} Alan Norrie, \textit{Punishment Responsibility and Justice} (Oxford: Oxford University Press, 2000) at 2.
  \item \textsuperscript{39} David Milward, “Making the Circle Stronger: an Effort to Buttress Aboriginal Use of Restorative Justice in Canada against Recent Criticisms” (2008) 4.3 IJPS 124 at 127.
  \item \textsuperscript{40} RCAP, \textit{supra} note 31 at 60-63.
\end{itemize}
as an alternative to incarceration. In *Gladue*, the Court recognized restorative justice as a legitimate approach to Aboriginal sentencing, noting:

Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often removed from the understanding of sentencing held by these offenders and their community. …However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice.

For Aboriginal offenders, imprisonment is often culturally inappropriate and ineffective in rehabilitation.

The Court in *Gladue* also recognized socio-economics as a cause of Aboriginal over-representation in the criminal justice system, concluding that the unbalanced ratio of imprisonment for Aboriginal offenders flows from a number of sources including poverty, substance abuse, lack of education, and lack of employment opportunities. Socio-economic theory may well be the most contentious as it explains the over-representation of Aboriginal peoples in the justice system as a result of the bleak socio-economic conditions in which

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41 Such resolutions often include performing community service, making restitution to the victim, and participating in counseling programs to address offender problems such as substance abuse or anger management. Milward, *supra* note 39.

42 *Gladue*, *supra* note 5 at para 70. The Court also defined restorative justice: “In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.” *Gladue*, *supra* note 5 at para 71. *Gladue* was closely followed by the same Court’s decision in *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 at para 18 defining restorative justice as including concerns about “rehabilitation, reparation to victims and the community and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the victim and the community”. Again, shortly after *Gladue*, the Court indicated in *R v Wells* 2000 SCC 10, [2000] 1 SCR 207 at para 36 that section 718.2(e) “has a remedial purpose for all offenders, focussing as it does on the concept of restorative justice, a sentencing approach which seeks to restore the harmony that existed prior to the accused’s actions. Again, the appropriateness of the sentence will take into account the needs of the victims, the offender and the community as a whole.”
Aboriginal peoples all too frequently live. One critique is that socio-economic conditions for Aboriginal peoples are more effect than cause – that they are the effects of colonialism and systemic discrimination and thus, while a factor in Aboriginal offending, are misconstrued as a true cause.\textsuperscript{44} For the cause, other authors posit, we must look to colonialism theory which explains that it is the colonial history and structural elements of the current situation, particularly the history of subjugation and the lack of Aboriginal democratic will reflected in the current system that is responsible for Aboriginal over-representation.\textsuperscript{45} Colonialism theory includes as a cause of Aboriginal over-representation the legacy of dislocation arising out of treatment in residential schools and the widespread adopting-out of Aboriginal children by non-Aboriginal families.\textsuperscript{46} For the RCAP, while socio-economic conditions are an important aspect of understanding Aboriginal criminality, colonialism is the most complete explanation.\textsuperscript{47}

Systemic racism and discrimination are other factors that are closely connected to the history of colonialism, and help to explain Aboriginal over-representation in the justice and corrections systems. In \textit{R. v. Williams}, the Supreme Court of Canada recognized that racism and systemic discrimination towards Aboriginal people had an adverse impact on the way they were dealt with in the criminal justice system, including stereotypes that relate to credibility, worthiness and criminal propensity.\textsuperscript{48} The Court quoted the Canadian Bar Association report \textit{Locking up Natives}

\begin{itemize}
\item \textsuperscript{43} \textit{Supra} note 5 at para 65.
\item \textsuperscript{44} See for example, Jonathan Rudin, \textit{Aboriginal Peoples and the Criminal Justice System}, Ipperwash Inquiry online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/pperwash/policy_part/research/index.html at 25.
\item \textsuperscript{46} Rudin, \textit{supra} note 44 at 26.
\item \textsuperscript{47} \textit{Supra} note 31 at 47.
\item \textsuperscript{48} \textit{R v Williams}, [1998] 1 SCR 1128, 159 DLR (4th) 493 at para 58 [\textit{Williams} cited to SCR].
\end{itemize}
in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release for its statement that:

Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.\(^{49}\)

The Royal Commission on the Donald Marshall Jr. Prosecution concluded on this point that:

Donald Marshall Jr.’s status as a Native contributed to the miscarriage of justice that has plagued him since 1971. We believe that persons within the system would have been more rigorous in their duties, more careful, or more conscious of fairness if Marshall had been white.\(^{50}\)

The factors of cultural difference, impacts of colonialism, socio-economic disparities and racism and discrimination must be understood as indivisibly intertwined, none stands alone as “the” factor explicating Aboriginal over-representation in the criminal justice system. As succinctly stated by the Supreme Court in *Gladue*, while systemic and background factors also partly explain criminality and recidivism for non-Aboriginals, Aboriginal offenders differ from the broader population because many Aboriginal people: are victims of systemic and direct discrimination; suffer the legacy of dislocation; and are affected by poor social and economic conditions. Aboriginal offenders are also more likely to be adversely affected by incarceration and less likely to be rehabilitated because it is often culturally inappropriate and discrimination towards Aboriginal peoples is rampant in penal institutions.\(^{51}\)

Interconnected with these theories is the idea that the alienation of Aboriginal peoples from the criminal justice system and their disproportionate representation within it can be explained by a

\(^{49}\) *Ibid.*

\(^{50}\) Royal Commission on the Donald Marshall, Jr., Prosecution, *supra* note 32 at162.

\(^{51}\) *Gladue*, *supra* note 5 at para 68.
collapse or vacuum in the rule of law for Aboriginal peoples. Hadley Friedland proposes analyzing the current justice system’s relationship with Aboriginal peoples based on a fundamental tenet of all law: the maintenance of social order, which necessarily encompasses discussion of cultural differences, socio-economic conditions and colonialism, but focuses on order rather than any one of these specifically.\textsuperscript{52} Put simply, she says,

\begin{quote}
I argue that the system is a failure because it creates disorder, rather than order, for Aboriginal people. This makes it absurd to expect Aboriginal people to accept this system as a legitimate source of law. Because order is a fundamental aspect of the rule of law, this failure also challenges the rule of law in Canada. If disorder is the problem, the solution is to seek a legitimate and effective source of order. I argue that the best route to order is committing to renewing the historical experience of a "mediated justice" between communities, where justice is seen as an ongoing normative conversation between communities, rather than a comprehensive (and unilateral) theory.\textsuperscript{53}
\end{quote}

As noted in the recent Alberta Court of Appeal decision of \textit{R. v. Arcand}, “Without public confidence in the criminal justice system, respect for the rule of law is imperilled.”\textsuperscript{54} This raises questions pertaining to exactly which “public” must maintain confidence in the criminal justice system – Aboriginal peoples for the many reasons discussed above and more may well lack such confidence. The criminal justice system is part of a greater legal system that has not always honoured treaties, Aboriginal title and rights, or upheld fiduciary obligations. The criminal justice system is indeed a foreign imposition, one that does not reflect Aboriginal normative and cultural values and that disproportionately incarcerates their members. It can be validly asked whether the criminal justice system is not yet another tool of colonialism, facilitating Aboriginal community fragmentation as it does and suppressing Aboriginal cultural values. In the report of the Royal Commission on the Donald Marshall Jr., Prosecution, it was stated:

\textsuperscript{52} \textit{Supra} note 45 at 108.
\textsuperscript{53} \textit{Ibid.}
\textsuperscript{54} \textit{R v Arcand}, 2010 ABCA 363, 264 CCC (3d) 134 at para 1 [\textit{Arcand}].
In our view, Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.\textsuperscript{55}

Given the history of Crown / Aboriginal relations in Canada, including colonialism, racism and discrimination, attempts at forced assimilation and the imposition of a foreign justice system, along with the accompanying outcomes as reflected in socio-economics and disproportionate Aboriginal representation within the justice system, it can be argued that sentencing law which isolates Aboriginal criminality from the greater context does not recognize the interconnectivity of individual culpability and social context and is not moral law. A criminal justice approach rooted in the idea of the abstract individual subject, as noted by Alan Norrie, denies the relationality of the individual and their society, creating false dichotomies in the criminal law.\textsuperscript{56}

Blameworthiness and responsibility are issues that must integrate falsely dichotomizing tendencies such as seeing either the individual or society as being to blame.\textsuperscript{57} A moral criminal justice system is relational says Norrie:

> Where the community seeks to address the wrongdoer and to explain why she was morally wrong, dialogue, unlike a straightforward blaming of the individual, involves a two-way process. It permits the presumptively guilty party to raise questions about the community, just as the community does about her…Where punishment is to provide moral education in a context that is itself deeply immoral, the individual is being educated only in the value of hypocrisy.\textsuperscript{58}

Christopher Nowlin recognized the significance of Norrie’s "relational" approach to assessing individual blameworthiness as being “entirely consonant with some Aboriginal customs.”\textsuperscript{59}

He cites the Alberta Task Force on the Criminal Justice System, for the principle that a

\textsuperscript{55} Royal Commission on the Donald Marshall, Jr., Prosecution, \textit{supra} note 32 at 11.
\textsuperscript{56} \textit{Supra} note 38 at 117.
\textsuperscript{57} \textit{Ibid} at 115.
\textsuperscript{58} \textit{Ibid} at 121.
restorative model of justice in traditional Aboriginal societies typically sees dialogue and negotiation as normative, and looks at the context of an offence holistically. In the words of Norrie, “A communitarian approach to criminal justice thus opens up the moral issues about social justice that the individualist approach seeks to marginalize.” Norrie accepts that many individuals likely understand, for example, the illegality of theft, but where those individuals steal because their interests have been effectively ignored in the course of social policy implementation, the test for culpability becomes:

Whether the thief belongs to a genuine moral community, in which matters of reciprocity or special privilege could be raised, but where the primary moral question would concern the justness of the community.

This argument may be said to invoke a natural law theory of the rule of law, and the question of whether a community must have some sort of moral engagement with the justice system in order for the rule of law to be maintained. I develop this discussion further in Chapter Four. Looking beyond positivist rule of law theory, it is this question that leads observers to conclude that there is a breakdown or void in the rule of law for Aboriginal peoples in Canada, as evidenced by the imposition of a criminal justice system which reflects neither their norms nor values. This is manifest in the over-representation of Aboriginal people within the criminal justice and corrections systems. Arguably, given all the considerations discussed above, Aboriginal peoples do not belong to a moral and just community responsible for the imposition of criminal justice. As noted by Nowlin,

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60 Ibid at 64–65.
61 Supra note 38 at 121.
62 Ibid at 121.
For example, when impecunious, substance-addicted Aboriginal persons steal food or alcohol in order to satisfy their hunger or addictive craving, convictions for such offences will not typically deter them from repeating such behaviour in similar circumstances, and does not enable restitution…To apply Norrie's analysis, the only value that might be instilled in such persons at their sentencing hearing is "the value of hypocrisy," just because such individuals will not likely feel that the judge is in any valid moral position to be, indeed, judging them.\(^63\)

Restorative and Aboriginal justice approaches are generally more holistic than punitive and retributive approaches, which consciously attempt to examine crime in isolation from the larger social, political, economic, and cultural context. A robust system of Aboriginal or restorative justice allows for contextual analysis of the crime and the offender and has the potential to at least partially address several of the causal factors underlying Aboriginal over-representation in the justice system. The vigorous involvement of Aboriginal communities in criminal justice approaches has the potential to bridge cultural difference and ameliorate the history of colonialist imposition of the system as well as the ensuing racism and discrimination that devolved. In the process, the rehabilitation of the Aboriginal offender will over time extend to a rehabilitation of the rule of law for Aboriginal peoples, as the criminal justice system builds a moral foundation in its dealings with them.

\(^{63}\textit{Supra} \text{ note 59 at 87.}\)
Chapter 3. General Principles of Aboriginal Sentencing

In 1996, Parliament underscored how vital public confidence is to the authority of law by enacting section 718 of the *Criminal Code*, which provides that the fundamental purpose of sentencing is “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society”.64 Bill C-41 clarified the purpose and principles of sentencing that courts must follow in imposing sanctions on offenders: the purpose of sentencing is achieved by imposing “just sanctions” as mandated in section 718. A just sanction or sentence must be proportionate to two things: the gravity of the offence and the degree of responsibility of the offender (section 718.1). Together, these determine the offender’s overall culpability. The object of the sentencing exercise is to fashion a just and appropriate sentence that meets both aspects of the proportionality principle in section 718.1. It has been said that proportionality was chosen as the governing principle of sentencing because it accords with principles of fundamental justice and with the purpose of sentencing – to maintain respect for the law and a safe society by imposing just sanctions.65 Other sentencing principles, including section 718.2(e), are to be considered in determining a just and appropriate sentence which reflects the gravity of the offence committed and the blameworthiness of the offender. Section 718.2(e) provides for restraint in the use of imprisonment for all offenders, but specifically for those who are Aboriginal and has facilitated the use of conditional sentencing, often involving restorative justice principles:

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64 *Supra* note 4.
65 *Arcand, supra* note 54 at para 52.
718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions or options other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.\(^{66}\) (emphasis added)

Section 718.2(e) of the Criminal Code arose from concerns about the overuse of incarceration as a means of addressing crime, particularly as it applied to Aboriginal peoples. In passing Bill C-41, Parliament recognized that the over-representation of Aboriginal offenders in correctional institutions was systemic, related to cultural norms and values and that the mainstream justice system was contributing to the problem. Then Minister of Justice Alan Rock explained 718.2 (e) before the Standing Committee on Justice:

...the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12\% of the population of Manitoba, they comprise over 50\% of the prison inmates. Nationally aboriginal persons represent about 2\% of Canada's population, but they represent 10.6\% of persons in prison. Obviously there's a problem here.

What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public -- alternatives to jail --and not simply resort to that easy answer in every case.\(^{67}\)

Since the enactment of section 718.2(e) in 1996, courts across Canada have been mandated to exercise restraint in imprisonment for all offenders, but particularly for Aboriginal people.

Recently, the Supreme Court of Canada had the opportunity to reiterate and elaborate on the Aboriginal sentencing principles it had elucidated in Gladue in 1999. In R. v. Ipeelee, the Court

\(^{66}\) The Youth Criminal Justice Act SC 2002, c 1 sections 3 and 38 similarly directs youth courts to consider sentencing alternatives that are reasonable in the circumstances, particularly for Aboriginal youth.

\(^{67}\) House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence no. 62 (Nov. 17, 1994) at 62.
reinforced the role of sentencing judges in addressing the over-representation of Aboriginal peoples within the justice system:

First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities…

Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing.68

In the seminal _Gladue_ case, the Supreme Court of Canada concluded that the provision is designed to ameliorate the serious problem of over-representation of Aboriginal people in prisons. Aboriginal offenders are as a result of unique systemic and background factors, more adversely affected by incarceration and less likely to be rehabilitated by it.69 Aboriginal over-representation arises from bias and discrimination against Aboriginal people that translates institutionally into a significantly greater likelihood of refusal of bail, and more and longer jail terms for Aboriginal offenders.70 _Gladue_ duly notes that racism against Aboriginal peoples is part of the Canadian experience. The Court further stated that the unbalanced ratio of imprisonment for Aboriginal offenders flows from a number of sources including "low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation."71 These among others that have since been added, have come to be known as Aboriginal specific “_Gladue_” factors. The Court considered traditional Aboriginal conceptions of justice and their contrariness to many of the

68 _R v Ipeelee_, 2012 SCC 13. [Ipeelee] Both _R v Ipeelee_ and _R v Ladue_ (decided together) deal with the determination of a fit sentence for breach of a long term supervision order for an Aboriginal offender, particularly whether _Gladue_ principles apply to these sentencing decisions. The Court ultimately concluded that _Gladue_ principles fully apply.
69 _Gladue_, supra note 5 at para 68.
70 _Ibid_ at para 65.
sentencing goals of the mainstream justice system, emphasizing that the ideals of restorative justice are extremely important to analysis under section 718.2(e).\textsuperscript{72} The Court concluded that “Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large.”\textsuperscript{73} The duty of Gladue analysis is triggered by the legal, historical and social phenomena often accompanying Canadian Aboriginal status. Arising from section 718.2(e) and the Gladue decision, judges must take into account the systemic and individual background dynamics (Gladue factors) of Aboriginal offenders in the sentencing process. They must also consider culturally appropriate (restorative) alternatives to incarceration where possible.

For example, in \textit{R. v. Gregoire}\textsuperscript{74} the court sentenced an Aboriginal woman from Sheshatshui, convicted of two counts each of impaired driving causing death and impaired driving causing bodily harm. The accused caused a car accident while intoxicated which resulted in the death of two people and injuries to three others. Ms. Gregoire, age 25, was an alcoholic who grew up in a home where multi-generational alcoholism existed. In addition, she suffered frequent acts of violence, neglect, physical, emotional and sexual abuse. She had two children, only the youngest of which remained in her care. She had only a grade seven education, minimal ability to speak English and had only been employed eight months since leaving school. She suffered from depression. The court observed:

\begin{quote}
The pre-sentence report, prepared by adult probation officer Annette Michelin, touches indirectly on the wave of profound changes, some for the better, some for the worse, that have overtaken the Innu culture. Gone are many of the traditional pursuits which kept
\end{quote}

\textsuperscript{71} \textit{Ibid} at para 67.
\textsuperscript{72} \textit{Ibid} at para 70.
\textsuperscript{73} \textit{Ibid} at para 81.
\textsuperscript{74} \textit{R v Gregoire}, 2009 NLTD 21; 284 Nfld & PEIR 290.
people active and in the country in small camps much of the year. Many of the traditional forms of self government which worked well in the past have been displaced. The traditional institution of the family has deteriorated. While this cultural adjustment does not justify tolerance of criminal activity, it does help me to understand the circumstances which led Ms. Gregoire to a pattern of alcohol abuse.75

Pivotal to the sentencing decision in this case was the report from a healing circle conducted within the Innu First Nation. The circle was convened as part of a reconciliation process, an Innu tradition to assist healing for those affected by the crimes. Victim representatives and elders spoke about the harm that alcohol caused within the community and the harm it caused in this particular case. However, all were forgiving and even sympathetic towards Ms. Gregoire. The consensus view of the circle was that the victims' families did not hold any ill will towards the offender and preferred that a conditional sentence be imposed. Accordingly, given that her upbringing and Aboriginal systemic factors were not only connected to the crime but played a substantial role, and given the views of the Aboriginal community, Ms. Gregoire was sentenced to a conditional sentence of two years less a day, plus probation and a driving prohibition. The court concluded that a conditional sentence would achieve the objectives of denunciation and deterrence as well as rehabilitation of the offender and promote a sense of responsibility.

In R. v. Collins, the Ontario Court of Appeal, in reducing the sentence imposed on an Aboriginal offender by the trial court, concluded the court had misinterpreted section 718.2(e) and the Gladue approach, which is:

not about shifting blame or failing to take responsibility; it is recognition of the devastating impact that Canada’s treatment of its Aboriginal population has wreaked on members of that society.76

75 Ibid at para 34.
The fifty-one year old Aboriginal accused appealed a sentence of 16 months' imprisonment for fraud over $5,000, committed against her First Nation. The money the accused received went to feed her gambling addiction. The accused argued that the sentencing judge failed to consider her Aboriginal heritage sufficiently and that the sentence imposed was excessive. The Court agreed, observing:

It seems to me that the systemic and background factors affecting the FWFN generally, and the appellant in particular, must have played a part in bringing her before the courts. Her earliest years were shaped by abject poverty. She grew up in an atmosphere of dislocation, discrimination, and alienation as a result of government policies that subjected her father to the ravages of residential schooling and deprived her mother, father and siblings of their rights as Aboriginals. Her mother's upbringing was riddled with substance abuse and violence. The appellant herself suffers from a severe gambling addiction.77

The Court accordingly reduced her sentence to 10 months' imprisonment followed by two years' probation. R. v. Collins and R. v. Gregoire highlight the two key impacts of Gladue in sentencing Aboriginal offenders: the imposition of conditional (culturally appropriate) sentences and the imposition of reduced sentences (restraint in imprisonment) even where incarceration is imposed. Subsequent case law has indicated that Gladue principles are engaged whenever a decision-maker is dealing with the liberty of an Aboriginal person at any stage of the justice system. Gladue principles have been extended beyond the sentencing context to bail78, the Ontario Review Board79, parole ineligibility80 and long term/dangerous offender hearings81.

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77 Ibid at para 34.
78 For example, in R v Pitawanakwat, [2003] OJ No. 5029, [2003] OTC 1049 (ON SC) at para 35, the court in granting bail to an Aboriginal offender after conducting Gladue analysis stated that it was in everyone’s interests to address the root causes, and not merely the symptoms, of an offender’s actions at all stages in the criminal justice process. See also R v Neshawabin, [2008] OJ No. 5606 (ON SC); R v Bain, [2004] OJ No. 6147 (ON SC).
79 See for example, R v Sim, [2005] OJ No. 4432, 78 OR (3d) 183 (CA).
80 See for example, R v Jensen, [2005] OJ No. 1052, 74 OR (3d) 561 (CA).
It is noteworthy that prior to the enactment of section 718.2(e) there existed common law sentencing principles that were sometimes engaged when the offender being sentenced was Aboriginal. Thus, special consideration for the Aboriginal background and unique cultural factors of these offenders does not arise entirely as a product of section 718.2(e); indeed it could be said that in enacting this section Parliament was responding to and endorsing what judges were already doing to varying degrees. In 1991, the Law Reform Commission of Canada took note of these common law developments.\(^{82}\) For example, in 1992 in *R. v. Moses*,\(^ {83}\) a Yukon court convened a sentencing circle to sentence a very troubled Aboriginal man for carrying a weapon for the purpose of assaulting a police officer and for theft. The court concluded that the criminal justice system had failed both Mr. Moses and his community, continually spewing back into the community a person whose prospects, hopes and abilities were dramatically worse than when the system first encountered him. The court observed:

> Much of the systemic discrimination against Aboriginal people within the justice system stems from a failure to recognize the fundamental differences between Aboriginal and western cultures. Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process. Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict.\(^ {84}\)

The court concluded that mainstream society has assumed wrongly that after extensive exposure to the justice system, Aboriginal people have adjusted to our adversarial process with its focus on individual rights and individual responsibility. We have similarly erroneously

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\(^{83}\) *R v Moses*, [1992] 3 CNLR 116 (YK Terr Ct.).

\(^{84}\) *Ibid* at para xii.
assumed that Aboriginal peoples are willing and eager participants in our justice system. The court concluded that “If we genuinely seek their partnership in resolving crime, a process that fairly accommodates both value systems must emerge.”

As noted by Larry Chartrand, the common law principle that the Aboriginality of an offender was a relevant sentencing factor required a more nuanced consideration of the offender’s lifestyle and culture and the impact of the criminal justice system and sentence on the offender. The reasoning behind taking the Aboriginality of the offender into account stemmed from an understanding of the socio-economic conditions of Aboriginal communities and how this reflects the impacts of colonization and recognition of the cultural conflict between non-Aboriginal and Aboriginal conceptions of justice. According to the Aboriginal Justice Inquiry of Manitoba:

This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination. It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself. Past injustices cannot be ignored or built upon.

That the common law previously recognized the need to take Aboriginality into account in sentencing an offender can be seen as a unique sentencing obligation, justified in part due to the recognition of the negative impact of an imposed and culturally foreign criminal justice system on Aboriginal peoples who have been oppressed and discriminated against by that system. This

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85 Ibid.
87 Ibid at 3.
88 Report of the Aboriginal Justice Inquiry of Manitoba, supra note 32 at ch. 4 “Conclusion”.
89 Chartrand, supra note 86 at 4.
common law approach to Aboriginal sentencing served as the precursor to section 718.2(e) with many of its underlying principles carried forward to the Court’s decision in *Gladue* and subsequent Aboriginal sentencing cases.
Chapter 4. The Honour of the Crown, Reconciliation and the Rule of Law

This thesis posits that the concept of the honour of the Crown and Crown/Aboriginal reconciliation applies to the sentencing of Aboriginal offenders and that such an interpretation is necessary for the rehabilitation of the rule of law for Aboriginal peoples. The notion of the honour of the Crown has been developed by the courts to direct government interaction with Aboriginal peoples within the fiduciary context; where treaties and documents are being interpreted; and where Aboriginal rights proven or unproven are involved and may be infringed. However, there is no exhaustive definition of the meaning of the honour of the Crown or the limits to its interpretation. The Supreme Court of Canada’s decisions in *Haida Nation*, *Taku Tlingit* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, represent significant legal developments in Aboriginal law, both with respect to fiduciary law and the honour of the Crown.

It is by now well established that Aboriginal peoples are in an overarching fiduciary relationship with the Crown; what remains to be determined on a case by case basis is the content of that relationship, for fiduciary duties do not ensue in every arena simply by virtue of the overarching relationship. A fiduciary duty has been described as a duty of utmost good faith, trust, confidence and candour owed by a fiduciary to the beneficiary; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other.

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90 *Stoney Band v Canada*, 2005 FCA 15, 249 DLR (4th) 274, leave to appeal to SCC refused, [2005] SCCA No. 122 [*Stoney Band*].

91 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].
person. The Crown’s fiduciary duty towards Aboriginal peoples was first recognized in *Guerin v. Canada*, wherein the Supreme Court of Canada held that when a First Nation surrenders its interest in land to the Crown, "a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf." In *R. v. Sparrow*, the same Court held that section 35(1) of *The Constitution Act, 1982*, extended the Crown’s fiduciary obligation to the protection of Aboriginal and treaty rights, holding that infringements of those rights are only lawful if justified in a manner consistent with the Crown's fiduciary duty to Aboriginal peoples. The fiduciary relationship between the Crown and Aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of section 35(1), such doubt or ambiguity must be resolved in the favour of Aboriginal peoples. However, despite the overarching fiduciary relationship between the Crown and Aboriginal peoples, the scope of when fiduciary duties attach is not clear, and the law remains uncertain.

Post *Guerin*, the Supreme Court of Canada retreated from the possibility of the entrenchment of an all encompassing fiduciary relationship between the Crown and Aboriginal peoples, embracing established (but not closed) categories of the relationship to which fiduciary duties attach. In *Wewaykum Indian Band v. Canada* a unanimous Court, after canvassing when fiduciary duties are found to attach, observed:

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93 *Guerin v Canada*, [1984] 2 SCR 335, 13 DLR (4th) 321 at para 105 [*Guerin*].
94 Subsection 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
95 *Supra* note 11.
But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.\(^98\)

Justice William Ian Corneil Binnie, referring to “a flood of ‘fiduciary duty’ claims by Indian bands across a whole spectrum of possible complaints,”\(^99\) restated that not all obligations existing between the Crown and Aboriginal peoples are themselves fiduciary in nature despite the existence of a fiduciary relationship. It is necessary to focus on the particular interest at stake and whether or not the Crown had assumed sufficient discretionary control in relation thereto to ground a fiduciary obligation.\(^100\) Speaking for a unanimous nine-member panel, Binnie J. held that even where a fiduciary obligation does arise, "the content of the Crown’s fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected."\(^101\) Thus even prior to \textit{Haida Nation}, the Supreme Court was moving away from the imposition of fiduciary duties writ large, and reinforcing that such obligations attach based on a factual analysis of Crown discretionary control pertaining to the subject matter in dispute.

In \textit{Haida Nation}, the First Nation respondents at the Supreme Court of Canada claimed a Crown fiduciary obligation to consult with Aboriginal peoples where proposed development might impact claimed Aboriginal rights. The Crown’s fiduciary relationship with Aboriginal people was argued by the Haida as grounding a Crown duty to consult with them pertaining to development. The Supreme Court rejected this argument, instead concluding that the source for


\(^{99}\) \textit{Ibid} at para 82.

\(^{100}\) \textit{Ibid} at para 83.

\(^{101}\) \textit{Ibid} at para 86.
this obligation was the honour of the Crown. In rejecting the fiduciary characterization as a source of the duty to consult, the Court reaffirmed its statements in Wewaykum, that the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples. However, the Court concluded, there are Aboriginal interests that even when not meriting protection under fiduciary law, deserve safeguarding. In Haida Nation the Supreme Court outlined a new approach to achieve this goal, employing the notion of the honour of the Crown, an approach subsequently followed in both Taku Tlingit and Mikisew Cree. In these cases, the honour of the Crown is engaged whenever the Crown is considering development that may affect Aboriginal rights proven or unproven. The honour of the Crown appears to be an umbrella concept, though its application and requirements will vary depending on the circumstances. So, for example, the obligations of consultation and accommodation appear to fall on an as yet not fully defined honour of the Crown spectrum. At the high end of the spectrum are proven Aboriginal rights protected by section 35 which invoke a fiduciary duty to consult and accommodate prior to acting in order to justify any infringement of rights as in Sparrow. Also ostensibly “higher” on the honour of the Crown spectrum are traditional fiduciary duty cases such as Guerin, where there is some established legal interest enjoyed by an Aboriginal community, not constitutional in nature, but where the government owes a fiduciary duty towards the community in respect of that right or interest. In a case such as Haida Nation, there is a duty to consult and perhaps accommodate because government action affects Aboriginal rights or treaty claims that have not yet been

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102 Haida Nation, supra note 7.
103 Ibid at para 18.
104 Even then, consultation may not be enough. See Delgamuukw v British Columbia, [1997] 3 SCR 1010, 153 DLR (4th) 193 where at para 168 Lamer C.J. says “Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands”.
determined; this duty derives from the honour of the crown and is not fiduciary in nature. At the lower end of the spectrum are cases like Little Salmon\textsuperscript{105} and Mikisew Cree where an established treaty provides for on-going Aboriginal rights to access and use resources but subject to curtailment by government decisions to take up the resources for other purposes. In these cases, the honour of the Crown requires that before the government can exercise this right it must engage in consultation and perhaps accommodation; however, Little Salmon indicates that the consultation bar may not be set very high, given the joint prior contemplation of just such an event and consultation processes identified in the treaty. The honour of the Crown then is a broader relationship umbrella governing Crown - Aboriginal relations; it is the source of fiduciary duties that arise when the Crown has assumed discretionary control over specific Aboriginal interests, but is not limited to that context.

The Court in Haida Nation explained that it is the honour of the Crown that is always at stake in its dealings with Aboriginal peoples; the honour of the Crown is “not a mere incantation, but rather a core precept that finds its application in concrete practices.”\textsuperscript{106} Further,

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. “Nothing less is required if we are to achieve ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’.”\textsuperscript{107}

Chief Justice Beverley McLachlin commented on the reconciliation process mandated by section 35 of the Constitution Act, 1982, observing that Canada’s Aboriginal peoples were here when the

\textsuperscript{105} Supra note 9.  
\textsuperscript{106} Supra note 7 at para 16.  
\textsuperscript{107} Ibid at para 17.
Europeans came, and were never conquered, though the Crown asserted sovereignty. As noted by John Hunter, *Haida Nation* represents the first time that the honour of the Crown has been relied upon as the source of a positive duty to act (the duty to consult). Previously the Court had referenced the honour of the Crown primarily in relation to treaty interpretation and application. Post *Haida Nation*, the honour of the Crown is always at stake in its dealings with Aboriginal peoples, including from the assertion of sovereignty and it must be understood generously, given its historical roots and underlying realities. This is to be expected if we are to achieve the reconciliation of the Crown with Aboriginal peoples. For Evan Fox-Decent, “The honour of the Crown penetrates every facet of the Crown-Native relationship”. However, the substantive scope of the honour of the Crown remains undetermined. As observed by Hunter, of *Haida Nation*:

There is no real analysis of the scope of the honour of the Crown in the judgment, but it is clear that the Court will not countenance Government acting towards Aboriginal people in a way that the Court regards as dishonourable.

In the subsequent *Taku River* case, the Supreme Court of Canada observed that the duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in section 35(1) of the *Constitution Act, 1982*:

In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

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110 *Supra* note 7 at para 17.
111 *Ibid*.
114 *Supra* note 8 at para 24.
The Supreme Court in *Mikisew Cree* determined that the Crown must inform itself on any project that may potentially interfere with the constitutional rights of Aboriginal peoples and must deal with the affected Aboriginal peoples in good faith.\(^{115}\) The honour of the Crown obligates the Crown to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation.\(^{116}\)

Subsequently, the Federal Court of Appeal in *Stoney Band* summarized the scope of the honour of the Crown, concluding that the concrete practices required of the Crown so far identified by the Supreme Court of Canada in the Aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed. However, the Court clarified that this is not an exhaustive list of the ways in which the honour of the Crown may be manifest.\(^{117}\) Significantly, however, the Federal Court of Appeal rejected an extension of the principle of the honour of the Crown to the conduct of ordinary litigation by the Crown. In *Stoney Band* the court canvassed whether the honour of the Crown might be engaged in its general conduct towards an Aboriginal adversary in civil litigation, concluding that it is not.\(^{118}\) The Court concluded that the Band’s argument that Crown

\(^{115}\) [Supra note 91 at para 55.](#)


\(^{117}\) [Supra note 90 at para 18.](#)

\(^{118}\) In *Stoney Band* the court also canvassed whether the Crown might have fiduciary obligations in its general conduct towards an Aboriginal adversary in civil litigation, concluding that it does not, given that the Crown does not exercise discretionary control over its Aboriginal adversary. Even where an aspect of the claim is based on an allegation of breach of fiduciary duty with respect to the surrender and disposition of reserve land, such a fiduciary duty if in existence, did not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation. The Court was confounded as to how the conduct of one party to litigation could be
invocation of procedural defences was inconsistent with the honour of the Crown was contrary to the Supreme Court of Canada’s decision in Wewaykum. Where equitable duties and remedies are claimed against the Crown by Indian bands, enforcement is subject to the usual equitable defences of laches and acquiescence and also to statutory limitation periods.\(^{119}\)

While the content of the honour of the Crown remains undetermined, with a non-exhaustive list of applications developed, some scholars posit that the honour of the Crown has broad application. For James [Sa'ke'j] Youngblood Henderson, the honour of the Crown reorients the role and responsibility of the Crown, creating the constitutional obligation of "honourable governance" toward Aboriginal peoples, and displacing the previous history of dishonourable governance as well as the familiar concept of "good governance."\(^{120}\) For Henderson, the honour of the Crown goes beyond legitimating governmental action, forming the bedrock of British constitutional theory and history for sovereignty, shielding the rights of Aboriginal peoples from negative government action.\(^{121}\) The honour of the Crown then has an expansive rationale:

The purpose of this doctrine is a constitutional therapy for the ill of colonization on Aboriginal peoples, the inclusion of Aboriginal peoples in Canadian governance, and the moderation of historical disadvantage and exclusion by addressing the sources of these arrangements. It creates a method for courts to identify and resolve the unstable relationship between assumptions about governmental power and their policy and practices, and the constitutional rights of Aboriginal peoples. It allows for an imaginative

\(^{119}\) Stoney Band, supra note 90 at paras 25-27.


\(^{121}\) Ibid at 31.
and noble effort to construct and reconstruct power into honourable governance. It operates in detail to generate decent and just action to improve governance.\(^\text{122}\)

Arnot addressed the concept of the honour of the Crown as no empty slogan, but rather absolutely central to the historical relationship between Canada and Aboriginal nations:

The "honour of the Crown" then, in historical light, is far more than a pretty idea or a principle of statutory construction. It is, in essence, the conscience of the country. Once, its measure was the personal status and dignity of the sovereign. Whose conscience is the conscience of Canada today? This, I perceive, is the root of the frustration that many aboriginal people have with our institutions.\(^\text{123}\) (emphasis added)

For Arnot, the concept of the honour of the Crown refers to the same essential commitment that First Nations recall when they use the word justice.\(^\text{124}\)

**Reconciliation**

The Supreme Court of Canada has made clear that closely connected to the honour of the Crown is the reconciliation of the rights and interests of the Crown and Aboriginal peoples as mandated by section 35(1) of the *Constitution Act, 1982*. Indeed, such reconciliation has been defined as the “fundamental objective” of the modern law of Aboriginal and treaty rights.\(^\text{125}\) The stated purpose of section 35(1) is:

the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs, and traditions.\(^\text{126}\)

As noted by the Supreme Court, the management of Crown / Aboriginal relationships takes place in the shadow of a long history of grievances and misunderstandings of varying magnitudes,

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\(^{122}\) *Ibid* at 51.

\(^{123}\) Arnot, supra note 17 at 345.

\(^{124}\) *Ibid* at 342.

\(^{125}\) *Mikisew Cree,* supra note 91 at para 1.
accompanied by government indifference and lack of respect, with destructive impacts on the process of reconciliation.\textsuperscript{127} Section 35, the Supreme Court has observed, “renounces the old rules of the game” calling “for a just settlement for Aboriginal peoples”.\textsuperscript{128} Indeed, reconciliation provides the cornerstone of Canadian Aboriginal rights law.\textsuperscript{129} John Borrows has argued for reconciliation as a constitutional standard for the implementation of Aboriginal rights.\textsuperscript{130} One might even posit that Crown - Aboriginal reconciliation has become an unwritten constitutional principle that extends beyond section 35, its spirit infusing the whole constitutional text.

In the Supreme Court of Canada's 1998 decision in \textit{Reference re Secession of Quebec (Quebec Secession Reference)}, the Court affirmed the existence of unwritten constitutional rules not expressly dealt with by the Constitutional text, but which nonetheless have normative force, instrumental to our constitutional order.\textsuperscript{131} The unwritten principles it examined in its ruling are federalism, democracy, constitutionalism and the rule of law and protection of minorities. These principles, said the Court, "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."\textsuperscript{132} The Court held that the unwritten principles represent “major elements” of the Constitution's architecture and as such are its “lifeblood”.\textsuperscript{133} The Constitution consists of more than its written text, embodying a global system of rules and principles which govern the exercise of constitutional authority. Reading selected provisions

\begin{itemize}
  \item\textsuperscript{126} \textit{Van der Peet, supra} note 97 at para 44.
  \item\textsuperscript{127} \textit{Mikisew Cree, supra} note 91 at para 1.
  \item\textsuperscript{128} \textit{Sparrow, supra} note 96 at para 54, citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall LJ 95 at 100.
  \item\textsuperscript{129} See for example \textit{Van der Peet, supra} note 97 at para 31.
  \item\textsuperscript{130} John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) at 191.
  \item\textsuperscript{131} \textit{Reference re Secession of Quebec (Quebec Secession Reference)}, [1998] 2 SCR 217, [1998] SCJ No. 61 at para 54 [\textit{Quebec Secession Reference} cited to SCR].
  \item\textsuperscript{132} \textit{Ibid} at para 49.
  \item\textsuperscript{133} \textit{Ibid} at para 51.
\end{itemize}
may be misleading absent an understanding of the underlying principles animating the whole of
the Constitution.\textsuperscript{134} In \textit{Lalonde v. Ontario (Commission de restructuration des services de santé)},
the Ontario Court of Appeal reiterated the Canadian Constitution's unwritten principles as
recognized by the Court in the \textit{Quebec Secession Reference}.\textsuperscript{135} The principle of respect for and
protection of minorities is a foundational feature of the Canadian Constitution that both explains
and transcends the minority rights specifically guaranteed in the text. This structural feature of
the Constitution infuses the entire text and plays a vital role in shaping the Constitution's other
structural features of federalism, constitutionalism and the rule of law, and democracy.\textsuperscript{136} In
\textit{Lalonde}, the unwritten constitutional principle of respect for and protection of minorities had
direct bearing on the interpretation of the \textit{French Languages Services Act}\textsuperscript{137} of Ontario and on
delegated government powers.\textsuperscript{138}

In this chapter I argue that reconciliation of the Crown with Aboriginal peoples is an emergent
unwritten constitutional principle, not only underlying sections 25\textsuperscript{139} of the \textit{Charter of Rights and
 Freedoms}\textsuperscript{140} and 35 of the \textit{Constitution Act, 1982}, but also transcending what is specifically
guaranteed in the text, much like the protection of minorities. This is evidenced by the legal
reasoning in \textit{Haida Nation} that the honour of the Crown and the duty to consult is engaged even
where section 35 Aboriginal rights are claimed but not proven. In the end result, there may

\begin{footnotesize}
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\item \textsuperscript{134} \textit{Ibid} at para 148.
\item \textsuperscript{135} \textit{Lalonde v Ontario (Commission de restructuration des services de santé)}, 56 OR (3d) 505, [2001] OJ No. 4767
(ON CA) at para 103 [\textit{Lalonde} cited to OR].
\item \textsuperscript{136} \textit{Ibid} at para 114.
\item \textsuperscript{137} \textit{French Languages Services Act}, RSO 1990, c F-32.
\item \textsuperscript{138} \textit{Supra} note 135 at para 125.
\item \textsuperscript{139} Section 25 states “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to
abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of
Canada including: (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7,
1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
\end{itemize}
\end{footnotesize}
indeed be no actual section 35 Aboriginal right at stake, yet the honour of the Crown and reconciliatory principles have been invoked. This suggests that the duty must therefore exist independently and be respected irrespective of the existence of an actual section 35 right. The basis of this duty then exists elsewhere in constitutional law, in some source other than section 35. I suggest the duty flows from the honour of the crown, which is an aspect of the unwritten constitutional principle of reconciliation, or perhaps a closely related unwritten constitutional principle in its own right. Reconciliation as an unwritten constitutional principle would infuse the text of the Constitution in addition to sections 25 and 35, and would also be influential in shaping the other unwritten principles, including respect for minorities and the rule of law. Indeed, the unwritten constitutional principles of respect for minorities and the rule of law would be complementary to Crown / Aboriginal reconciliation as an unwritten constitutional principle. As the Supreme Court of Canada explained in the Quebec Secession Reference, the explicit protection of Aboriginal rights in section 35 and the non-derogation clause in favour of Aboriginal peoples contained in section 25 of the Constitution Act, 1982, are consistent with the long constitutional tradition of respect for minorities. The Court concluded respecting Aboriginal rights:

The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.  

Thus the courts may be moving towards embracing Crown / Aboriginal reconciliation as an underlying or unwritten constitutional principle.

\[140\] Supra note 11.
\[141\] Quebec Secession Reference, supra note 131 at para 82.
Reconciliation is enshrined in the Canadian *Constitution Act, 1982*, via sections 25 and 35 and arguably more foundationally as an unwritten constitutional principle; it is far more than a political or policy response by the federal government to the plight of Aboriginal peoples. As noted by Mark Walters, good relations between two peoples with differing cultures necessitate an ongoing quest for reconciliation, such that reconciliation is not merely a fact, but rather a normative principle that guides decision-making.\(^{142}\) However, precisely what reconciliation between the Crown and Aboriginal peoples entails as a legal principle is in evolution. How is the law to deal with a concept that is not fundamentally legal in nature, and is much more emotive? As observed by Walters:

> It is usually assumed that reconciliation offers to political discourse something that the liberal concepts of democracy, justice, equality, and the rule of law cannot – in particular, ideas of repentance, forgiveness, healing, and harmony.\(^{143}\)

It is apt that the concept of reconciliation between the Crown and Aboriginal peoples be given a holistic interpretation; that the understanding of reconciliation in law evolve in a way that is meaningful to Aboriginal peoples, and thus facilitates that very reconciliation. Reconciliation is a two way street or two row wampum belt\(^{144}\); it must reflect the intentions and cultural values of

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143 *Ibid* at 165.

144 The Kaswentha or Two Row Wampum Belt is said to embody the principles of peace, friendship and mutual respect. These principles formed the basis of the numerous treaties and agreements between Haudenosaunee and non-Haudenosaunee nations. The Two Row Wampum Belt is a visual instrument that was made with two parallel rows of purple wampum on a bed of white beads. The background of white beads was meant to symbolize the purity of the agreement and some say that it represents the "river of life". The two separate rows of purple beads were made to symbolize and encompass the two separate peoples who were incorporated in the agreement. Between the two rows of purple beads, are three rows of white beads. These were made to stand for the friendship, peace and respect between the two nations. As much as the three rows keep the two nations separate, they also bind them together. Some say that the two rows of purple beads represent two separate vessels traveling parallel to each other down the "river of life". The Haudenosaunee are in their canoes. This symbolizes their culture, laws, traditions, customs and life-ways. The non Haudenosaunee are said to be in their ship, which symbolizes everything that they carry in their culture, laws, traditions, customs and life-ways. It is said that each nation shall stay in their own vessels, and travel
both parties. As noted by Walters, if judges took seriously the reconciliation of Aboriginal and non-Aboriginal legal traditions, they might view the jurisprudence of reconciliation as an intersocietal legal concept, informed by Aboriginal conceptions of reconciliation. For Walters, “reconciliation as relationship” is about re-establishing relationships of trust, honour, respect and tolerance between vastly different people at all levels, from individuals to local communities to governments. It is about peace between communities divided by conflict, but also about harmony within communities. As noted by Walters, on the inherent dialectic challenges of reconciliation as an unwritten principle of legality or constitutionality,

Even if reconciliation as relationship cannot be enforceable directly by the courts, it can still operate as normative value that informs the interpretation of law. If so, there seems to be no reason why a commitment to reconciling legal traditions could not lead to the integration of Aboriginal approaches to reconciliation into our understanding of that norm.

…The Court cannot tell Aboriginal or non-Aboriginal individuals to adopt a particular moral position for the purposes of furthering the chances of reconciliation, nor can it tell Aboriginal or non-Aboriginal governments to adopt the decision to reconcile. But, the Court can order the Crown – that is, the government of Canada- to adopt the attitude of honour that is essential for the reconciliation of peoples to flourish.

Accordingly, the principle of Crown / Aboriginal reconciliation is an interpretive normative principle that shapes the interpretation of law and Crown obligations, including the honour of the Crown. In order for meaningful reconciliation to occur, the law of reconciliation must be understood and evolve in a way that is meaningful to Aboriginal peoples. As a normative


143 Walters, supra note 142 at 190.
144 Ibid at 175.
145 Ibid at 168.
146 Ibid at 185.
147 Ibid at 185.
148 Ibid at 186.
principle, reconciliation also infuses our understanding of the rule of law for Aboriginal peoples; indeed, it has the potential to rehabilitate it.

**Rule of Law**

Reconciliation is indeed a normative value that infuses Crown / Aboriginal relations and is influential in shaping the honour of the Crown. The honour of the Crown and reconciliation are interconnected with the rule of law for Aboriginal peoples, and the question of whether it has substantively broken down. The *Quebec Secession Reference* affirms that the rule of law is one of the underlying or unwritten principles of the Canadian constitution, a point also reflected in Justice Ivan Rand’s famous assertion that the rule of law is a “fundamental postulate of our constitutional structure” in *Roncarelli v. Duplessis*.\(^{150}\) The Court in the *Quebec Secession Reference* observed that the rule of law provides first, that the law is supreme over the acts of both government and private persons. There is one law for all. Second, said the Court, “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”. A third aspect of the rule of law is that "the exercise of all public power must find its ultimate source in a legal rule". The relationship between the state and the individual must be regulated by law. “Taken together” said the Court, “these three considerations make up a principle of profound constitutional and political significance.”\(^{151}\) In *Lalonde*, the Ontario Court of Appeal concluded that:

Constitutionalism and the rule of law are cornerstones of the Constitution and reflect our country’s commitment to an orderly and civil society in which all are bound by the

\(^{150}\) *Roncarelli v Duplessis*, [1959] SCR 121 at paras 141-42.

\(^{151}\) *Quebec Secession Reference*, supra note 131 at para 71.
enduring rules, principles, and values of our Constitution as the supreme source of law and authority.\textsuperscript{152}

As expressed by Evan Fox-Decent,

The common intuition is that without the rule of law we are left with the mere rule of the rulers, unfettered by the constraints of legality.\textsuperscript{153}

The idea of the rule of law, however, is complex. It includes asking what makes a law legal and binding upon those it governs? There is active debate about whether the rule of law is only about law’s form, or whether it is also about law’s legitimacy. This engages the debate of positivism versus natural law.\textsuperscript{154} Is a law valid because it is passed by a recognized government or does it require popular “buy in” or concordance with the morality or values of the people it governs? Adherents of legal positivism say it is about form only; the rule of law may be honoured even when the content of law is unjust.\textsuperscript{155} Positivism sees law as duly constructed and enacted societal rules whereas natural law sees law as arising from a moral order held internally by citizens.\textsuperscript{156} Positivism ensures that law is clear, consistent, certain, accessible and understandable, whereas a natural law theorist might ask whether there was an internal component, whether people voluntarily complied with the law - did they conceive of themselves as morally bound? Without these features of inner morality natural law posits that the citizen is not bound by law, does not owe fidelity to law.\textsuperscript{157} Indeed, for Fox-Decent,

The second way the state can fail to secure legal order is by not living up to the moral demands of sovereignty, demands which crystallize in the rule of law.\textsuperscript{158}

\textsuperscript{152} Supra note 135 at para 108.
\textsuperscript{153} Supra note 112 at 26.
\textsuperscript{157} Ibid.
\textsuperscript{158} Supra note 112 at 55.
Equally, for Fox-Decent, the state can demand fidelity to law by virtue of the legitimacy of its legal authority. The challenge of positivism is that it may result in situations in which law operates not as *law* for people, but only as power. Natural law theorists therefore argue that the rule of law, in order to have substantive meaning, must have some connection to ideals of justice, that there must be some subtle manifestation of moral substance in the law. For these theorists, for the rule of law to exist, law must be more than merely power for the people it purports to govern. For natural law theorists, the rule of law is more than form. Even where the law has the support of the majority (as we may presume the criminal law does in Canada) natural law theorists might still question its validity for a minority, particularly in a colonial context. Many colonized peoples, including Aboriginal peoples in Canada, subsequently form a minority in society and may not have their values factored into laws which they are nonetheless required to follow. In this way, the morality of the majority defence of law is more in accordance with the view that law can be an instrument of domination so long as a sufficient number of human beings cooperate and support the underlying morality/values.

Legal scholars have posited that the rule of law is in chaos for Aboriginal peoples, who do not see their values represented in a legal system imposed by colonial powers. As noted by Borrows, the lack of respect for Aboriginal laws creates chaos and renders the mainstream legal system ineffectual for Aboriginal peoples:

As a result, there is a mounting crisis in the rule of law within Indigenous communities. The crisis does not exist because Indigenous peoples lack legal rules; Canadian law rests on shaky foundations within Indigenous communities because it pays so little attention to their values and participation. If Indigenous peoples could start to see themselves and their

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159 Ibid at 39.
normative values reflected in how they conduct their day to day affairs, some of the legal challenges within Indigenous communities would diminish.\textsuperscript{160}

Many of the major public inquiries undertaken have identified a causal relationship between the specific injustices suffered by Aboriginal people within the mainstream criminal justice system and the general subordination of Aboriginal peoples' legal authority that occurred via colonialism and continues to be definitive. The suppression of Aboriginal law and the denial of Aboriginal self-determination, underpin contemporary problems of Aboriginal recidivism and over-representation in the criminal justice system.\textsuperscript{161} In other words, says Friedland, the present state of disorder and oppression is deeply connected to a long history of disorder and oppression:

There are two aspects of this unique history that are most likely to have become part of the fundamental cultural conversations in Aboriginal communities. The first is the years of legislation and court decisions that actively destabilized and displaced Aboriginal communities. The second is the basis of the Canadian justice system's jurisdiction over Aboriginal peoples in the first place, which rests on the assertion of Crown sovereignty over Aboriginal lands and people.\textsuperscript{162}

For some, the rule of law requires a Canadian multi-juridicalism, with Aboriginal institutions responsible for holding members accountable for criminal actions, pursuant to a section 35 right to self-government or to sovereignty that has never been extinguished.\textsuperscript{163} For the RCAP, the establishment of Aboriginal justice systems is a necessary part of throwing off the oppression of a legal system imposed through colonialism.\textsuperscript{164} However, as stated by now Justice Mary Ellen Turpel-Lafond, the either/or nature of the general debate over whether Aboriginal justice reform involves separate justice systems or reforming the mainstream system is a false dichotomy; the

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\textsuperscript{160} Supra note 130 at 209.
\textsuperscript{162} Supra note 45 at 120-121.
\textsuperscript{163} For example, Borrows posits that under section 35 of the Constitution Act, 1982, Indigenous peoples have the right to sit in judgment of their own citizens. Supra note 130 at 209.
\textsuperscript{164} Supra note 31.
\end{flushleft}
impetus for change, she says, can be better described as getting away from colonialism and domination.\footnote{Mary Ellen Turpel, “Reflections on Thinking Concretely About Criminal Justice Reform,” in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, Continuing Poundmaker and Riel’s Quest (Saskatoon: Purich Publishing, 1994) 206 at 215.} Regardless, restoring the rule of law for Aboriginal peoples will only come about via upholding the honour of the Crown and fostering Crown / Aboriginal reconciliation, since a positivist approach to the rule of law does not possess the necessary integrity with respect to Crown / Aboriginal relations in Canada. As noted by Walters, for post-colonial states that seek to establish relations of justice and harmony with indigenous minorities who have suffered and continue to suffer injustice, the integrity or consistency that normally secures legality is insufficient:

> The integrity that legality demands will involve demonstrations of equal respect for entire peoples for whom the authority of law will only materialize as the process of political reconciliation does.\footnote{Supra note 142 at 189.}

In the context of colonialism, it is arguable that the criminal law and criminal courts of Canada are fundamentally not only a foreign imposition but so contrary to the worldview/values of many Aboriginal peoples, that they would not be bound by them, at least under natural law theory. In the case of First Nations, says Fox-Decent:

> Because many First Nations never consented to become subjects of the Crown and continue to resist its authority today, only the presumption of a fiduciary relationship has the potential to save the Crown’s authority over First Nations from suffering a wholesale failure in legality.\footnote{Supra note 112 at 56.}

This fiducicary analysis could apply equally to the honour of the Crown, which we have seen is an overarching umbrella, including fiduciary duties. The constitutional principles of the honour of the Crown and reconciliation are interconnected with the rule of law for Aboriginal peoples;
possessing the potential to rehabilitate the rule of law should the Crown conduct itself honourably and in the spirit of reconciliation. Here I advance a thick, natural law conception of the rule of law, one that advocates that law must be more than power for the people it affects, all the more so for minority, colonized groups, such as Aboriginal peoples. This is why the rule of law is so closely connected to reconciliation and the honour of the crown. The “dimensions of the rule of law” noted the Ontario Court of Appeal in *Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council*, include “respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations”.168 Fox-Decent argues for a general relationship between the rule of law and the trust-like, or honour-based, conception of the state captured by the labels ‘fiduciary’ and ‘honour of the Crown’.169 With respect to Aboriginal peoples in Canada, I submit that these strands of constitutional principle – the rule of law and the honour of the Crown - are inseparable, alongside reconciliation, yet another constitutional principle. For the rule of law to exist for Aboriginal peoples in Canada today, they must have reason to give their allegiance to the law rather than merely complying with law as ‘power’. The honour of the Crown and reconciliation might provide just such a reason. In Chapter Six I attempt to address what is required of the Crown, the Canadian state, before criminal sentencing law is really ‘law’ for Aboriginal peoples. Crown / Aboriginal reconciliation can be seen to require a much broader reckoning than that explicitly provided for in section 35 or those specific situations currently enumerated as governed by the honour of the Crown. The courts have made clear that reconciliation is mandated by the history of Crown / Aboriginal relations and colonialism. As such, the honour of the Crown and reconciliation may require addressing the ills that are the

168 *Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council*, 82 O.R. (3d) 721 (ON CA) at para 142.
169 Supra note 112.
outcomes of the assertion of Crown sovereignty and assimilation attempts, the denigration of Aboriginal laws and culture and the socio-economic duress that followed. From this perspective, the honour of the Crown and the reconciliation agenda have the capacity to facilitate the restoration of the rule of law for Aboriginal peoples.
Chapter 5. Aboriginal Peoples in the Criminal Justice System – Honour of the Crown, Reconciliation and the Rule of Law

In this chapter I explore how fiduciary duties, the honour of the Crown and reconciliation have been interpreted by the courts in dealing with Aboriginal offenders in the criminal justice system generally. I will then turn, in the next chapter, to address the specific topic of the honour of the Crown and sentencing Aboriginal offenders. Aboriginal people have tried to argue that their fiduciary relationship with the Crown extends to fiduciary duties towards Aboriginal people in the criminal justice system, but have not been very successful in this regard. In *R. v. Commanda*\(^\text{170}\) the Quebec Court of Appeal concluded that the Crown's fiduciary duty towards Aboriginal peoples does not go so far as to create an obligation on the Crown, when acting in its capacity as prosecutor, to adopt rules of criminal procedural conduct regarding Aboriginal people that differ from those it applies in cases involving all other accused. The Aboriginal accused in this case had successfully argued at trial that the Crown’s fiduciary duty with respect to Aboriginal people obliged the Crown to disclose documentation that would help them better prepare their constitutional grounds of defence and protect their rights. The Aboriginal defendants faced a number of charges for hunting and fishing violations in proceedings brought under the *Criminal Code*, to which they raised in their defence Aboriginal rights protected by section 35. They sought disclosure from the Crown of evidence relating to the constitutional issues, while the Crown maintained its duty to disclose did not extend beyond evidence relating strictly to the offences. The Court of Appeal concluded that there is no "Aboriginal procedural right" that provides greater disclosure rights than those of all other Canadians as there cannot be
two criminal justice systems, with one for Aboriginal people in which the prosecutor must disclose evidence likely to help them prepare their defence and another for other Canadians in which the prosecutor has no such obligation. The Court rejected the argument that the prosecution has an obligation to disclose in criminal matters in light of the Crown's fiduciary duty towards Aboriginal peoples. Accordingly, the Crown has no duty towards Aboriginal people to disclose documentation at the beginning of the criminal process in order to help them better prepare their defence based on their Aboriginal status. The Court referred to Wewaykum where the Supreme Court noted that the Crown's fiduciary duty towards Aboriginal peoples is limited; not a source of plenary Crown liability covering all aspects of the Crown / Aboriginal relationship. Indeed, this case is in line with the trend discussed earlier towards limiting the coverage the fiduciary umbrella will provide to Aboriginal peoples in the form of fiduciary duties.

In contrast, a Newfoundland trial court had much earlier considered the fiduciary relationship between Aboriginal people and the Crown in the context of criminal proceedings in R. v. Ashini. Four accused appeared for trial on separate informations, all criminally charged with an offence alleging that they wilfully interfered with the lawful operation of the Canadian Forces Base Goose Bay. Thirty-four informations, both under the Criminal Code and under the then Young Offenders Act had been laid against more than sixty people over a dozen

171 Ibid.
172 Ibid at para 109.
173 Ibid at para 110.
174 Interestingly, no argument pertaining to a duty to disclose material relevant to establishing an Aboriginal rights claim arising from the honour of the Crown was tendered.
different dates. Protest activities evolved in response to a visit by a North Atlantic Treaty Organization survey team, considering the establishment of a training base at Goose Bay. This would vastly increase the number of flights in the area and also result in the construction of eleven bombing ranges nearby. The Innu feared that such a development would result in their having little claim to the land and further destruction of their already impacted traditional activities in the area, such as hunting. The four accused before the court were part of a larger group who collectively walked beyond a checkpoint gate leading onto the Goose Bay Runway as part of a demonstration that lead to their arrest. Their counsel put forward the defence of "colour of right" arguing that they satisfied the definition of "an honest belief in a state of facts, which if it existed, would be a legal justification or excuse." The judge was convinced that the defendants believed they owned this territory on reasonable grounds – the land had not been the subject of divestiture through treaties. They testified to and introduced evidence of their ancestry and kinship, showing that none of their people ever gave away rights to the land to Canada, establishing an honestly held belief in ownership. The judge was satisfied that the four believed their ancestors predated any Canadian claims to this land, regardless of the present occupation by Canada. The judge took an expansive view of “colour of right” and what would constitute a reasonable belief, since the concept of land as property is foreign to Aboriginal people; therefore the court must not assume that a "reasonable" belief be founded on Canadian law standards. The court challenged established legal reasoning based on

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177 Section 429 (2) of the Criminal Code, supra note 4 provides: “No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.”
the premise that somehow the Crown acquired “magically” by its own declaration of title a consequent fiduciary obligation to the Aboriginal people.\textsuperscript{178}

While \textit{Ashini} does not speak directly to fiduciary duties or the honour of the Crown, the judge clearly has matters of honourable governance in mind, noting that Canada must show its maturity not only to the segment of Canadian society that wields great power and authority, but also to its most desperate people. The court more directly references the rule of law and the rights of minorities:

\begin{quote}
The 40 year history of the Innu people is a glaring reminder that integration or assimilation alone will not make them a healthy community. By declaring these Innu as criminals for crying enough! the Court will have been unable to recognize the fundamental right to all persons to be treated equally before the law.\textsuperscript{179}
\end{quote}

The trial court accordingly acquitted the four and suggested that the parties would have to negotiate answers to their problems, since “the Court is unable to answer these problems for them,”\textsuperscript{180} suggestive of a reconciliation process. Interestingly, this case dates to 1989, prior to the more recent honour of the Crown cases with their emphasis on reconciliation. The trial judge also appears to have been sending a message to the Crown in this case pertaining to proceeding with the morass of other charges. However, the trial court judge was overturned by the Newfoundland Court of Appeal,\textsuperscript{181} on a point of law and new trials were ordered.\textsuperscript{182}

Subsequent trial level decisions rejected the colour of right defence for the defendants,

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\textsuperscript{178} \textit{Ashini, supra} note 175 at 3.
\textsuperscript{179} \textit{Ibid.}
\textsuperscript{180} \textit{Ibid.}
\textsuperscript{182} The accused had been tried jointly on informations which charged them separately, without jurisdiction, rendering the acquittals a nullity.
\end{flushright}
primarily on the basis of lack of evidence tendered\textsuperscript{183} and a lack of the requisite honest belief in the lawfulness of the defendant’s actions.\textsuperscript{184}

In another case, an Aboriginal accused argued that the Crown owed him a fiduciary duty to be fair and that accordingly, he should have state funded counsel appointed to represent him on two charges contrary to the \textit{Fisheries Act}\textsuperscript{185} (obstructing a Fisheries officer), one charge contrary to the \textit{Criminal Code} (dangerous operation of a motor vessel), and one charge of breach of an undertaking.\textsuperscript{186} The charges arose from the ongoing disputes on the East Coast about the government’s right to regulate the fishery after the Supreme Court of Canada’s decisions in \textit{R. v. Marshall}\textsuperscript{187} recognizing an Aboriginal right to fish in a limited commercial enterprise. The defendant could not afford to hire counsel, was unaware of counsel working pro bono, and had been turned down for legal aid. The accused referred to the Treaty of 1752 and argued that the Crown must deal with him honourably and fairly. The Crown was not living up to this obligation, he argued, because it was pursuing him through the criminal courts, and had two fully qualified members of the Bar to oppose his application, which he had to argue alone, without legal training. He

\textsuperscript{183} See for example, \textit{R v Roche}, [1990] NJ No. 395, 90 Nfld. & PEIR 199 (NL PC).

\textsuperscript{184} See for example, \textit{R v Penashue}, [1991] NJ No. 356, 90 Nfld. & PEIR 207 (NL PC). See however \textit{R v Potts}, [1990] OJ No. 2567 (ON Prov. Div.), in which the accused First Nations chief was acquitted of charges of mischief for obstructing the construction of a road extension on the defence of colour of right. The proposed extension cut across land to which the accused and his people claimed Aboriginal title. The land claim issue had been decided against his community in several court rulings, but leave to appeal to the Supreme Court of Canada had been granted. The accused testified that although he was aware of the court rulings, he and his people disagreed with the rulings and knew that they were at least morally right in their assertions to title. The blockade of the construction site was organized after they unsuccessfully applied for an injunction to stop the construction until the Supreme Court could hear the appeal. The accused was acquitted because the court was not satisfied that the accused had no colour of right. The court held that the accused believed he was not breaking the law as he felt that the state of the law was not settled.

\textsuperscript{185} \textit{Fisheries Act}, RSC 1985, c F-14.

\textsuperscript{186} \textit{R v McDonald}, 2001 NSPC 7, 193 NSR (2d) 256 [\textit{McDonald}].

submitted that it was unconscionable to force him to defend himself from the substantive charges, fraught as they were with consequences adverse to his people and himself. The case involved complex issues pertaining to his and his people’s rights to access fish without hindrance from the Department of Fisheries. The main issue in respect of the obstruction charges was the clash between the federal government and the Mi'kmaqs over the government's right to regulate those involved in Aboriginal fisheries. The accused also expressed to the court that the system of regulating the fishery was at odds with his conception of the honour of the Crown.\textsuperscript{188} The Crown, while recognizing the fiduciary duty owed by the Crown to Aboriginal peoples, argued that the concept of the honour of the Crown is a principle used by governments and the courts when interpreting treaties, and does not extend to procedural matters such as prosecutions or providing legal counsel. The Crown argued that the federal government has a fiduciary obligation to Aboriginal people not to use sharp practice, but it does not extend to cover legal fees when an Aboriginal person faces charges brought under a statute of general application.\textsuperscript{189}

The court concluded that in light of the serious issues of Aboriginal rights raised by the defence, the accused had discharged the onus placed on him, satisfying the court that a trial judge could not provide him with sufficient help for him to conduct his own defence. Absent this help, given the very special circumstances of this case, the court was satisfied he would not be able to make full answer and defence, and therefore could not get a fair trial. In this instance, the defence to the obstruction charge was complex, with the accused alleging that he had a right to do what he

\textsuperscript{188} \textit{McDonald, supra} note 186.
\textsuperscript{189} The Crown was not seeking incarceration on the criminal charges, and legal aid did not handle fishery cases.
was doing. Accordingly, the court ordered a stay under section 24 (1) of the Charter, until state-funded counsel was provided to the accused. The trial on the straightforward charge of breach of undertaking, unrelated to the defence proposed for the other offences, would proceed.\textsuperscript{190} The court did not engage with either the fiduciary argument or the honour of the Crown, preferring to decide on the basis of whether or not the accused would get a fair trial. However, one could certainly read a concept of honourable governance into this decision, given the power of the state over this individual and the serious ramifications not only for the accused but also for his Aboriginal community.

As recently as 2010, a court in British Columbia was asked to determine whether the Crown owed a fiduciary duty to Aboriginal criminal accused in the context of a Rowbotham application\textsuperscript{191} in \textit{R. v. Williams}.\textsuperscript{192} The court denied motions by three accused for state funded counsel in conjunction with criminal charges which primarily related to breaches of recognizance or breaches of probation terms on the grounds that the charges were not sufficiently complex to qualify for the extraordinary remedy of a Rowbotham order. Two of the three accused were Aboriginal, and were assisted in their court presentations by a Native courtworker. On behalf of one of the Aboriginal accused, the Native courtworker argued that:

\begin{quote}
…the Crown had a fiduciary duty to aboriginal people because they are wards of the Crown and that the Crown has a duty to ensure that aboriginal people get a fair trial. He stated that s. 35 of the Constitution Act requires such a duty by the Crown. He noted that First Nations people are intimidated by the court system and processes and all the
\end{quote}

\textsuperscript{190} \textit{McDonald, supra} note 186.
\textsuperscript{191} The applicants applied for conditional stays of proceedings concerning the charges they were facing until such time as the Attorney General for British Columbia provided state funded counsel for them. Their applications are "Rowbotham" applications named after the test set out in \textit{R v Rowbotham}, [1988] O.J. No. 271, (1988) 41 CCC (3d) 1 (ON CA), the leading case on such applications.
details required to receive L.S.S. [Legal Service Society] coverage including applications, refusals and appeals.\textsuperscript{193}

However, the court found that the accused’s failure to give a notice of constitutional question was fatal to this argument, though the court commented that the possibility that the Federal Government owes a fiduciary duty to First Nations’ accused was an interesting issue, one possibly bearing further investigation.\textsuperscript{194} The court concluded that the two Aboriginal accused had satisfied the requirements of indigence, jeopardy and denial of assistance from other sources, but could not meet the requirement of exceptional complexity to qualify for state-funded counsel. Accordingly, their applications were denied.

With respect to the honour of the Crown, the criminal justice system is a part of the Canadian State. The jurisdiction of the mainstream criminal justice system over Aboriginal peoples, as much as that of the government, is a product of the Crown assertion of sovereignty to which the honour of the Crown attaches as mandated in \textit{Haida Nation}. For Fox-Decent,

The fact of sovereignty consists in the sovereign powers the state claims and exercises, most notably, powers of legislation, administration, and adjudication.\textsuperscript{195}

While in the leading cases pertaining to consultation it seems clear that the Crown in question is the government of the day, the executive branch, the Crown is undeniably the personification of the Canadian state.\textsuperscript{196} The state is therefore referred to as \textit{Her Majesty The Queen in Right of Canada}, or \textit{The Crown in Right of Canada}. The Crown in the

\textsuperscript{193} \textit{Ibid} at para 60.
\textsuperscript{194} \textit{Ibid} at para 175.
\textsuperscript{195} \textit{Supra} note 112 at 29.
\textsuperscript{196} Robert Marleau & Camille Monpetit, eds. \textit{House of Commons Procedure and Practice} (Ottawa, House of Commons, 2000) at ch. 1.
‘honour of the Crown’ should be understood to be a metaphor for the Canadian State, of which the justice system and judiciary are a part. Indeed, in times past, the Crown was the fountain of justice and courts were an extension of the Crown, thus the historical genesis of the Courts of King’s and Queen’s Bench. The monarchy of Canada is the foundation of the executive, legislative, and judicial branches of the Canadian state. As noted by the Department of Canadian Heritage:

As an institution, the Crown is a cohesive force for the three functions of government: legislative, executive and judicial. The legislative function (Parliament/Legislature) is “The Queen in Parliament” and enacts the laws. The executive (cabinet/governments) is “The Queen in Council” and executes the laws. The judicial (courts) is “The Queen on the Bench” and interprets the laws.

As noted by Australian Nick Sneddon:

The Crown was the government occupying a role not dissimilar to the Holy Trinity, being the executive, judicial and legislative arms of government in one.

The sovereign is traditionally responsible for rendering justice for all her subjects, with her position in the Canadian courts formally known as The Queen on the Bench.

Further, much as the Crown has been held to be unequivocally indivisible in terms of its fiduciary relationship with Aboriginal peoples as between the federal and provincial governments, the honour of the Crown should also be understood indivisibly as infusing all three key elements of the Canadian state: the executive, the legislature and the courts. As noted in Taku River:

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198 Department of Canadian Heritage, A Crown of Maples (Ottawa: Department of Canadian Heritage, 2008) at 17.
200 Taku River, supra note 8 at para 14.
Both Canada and British Columbia owe fiduciary obligations to First Nations insofar as each emanation of the Crown, acting within its sphere, has the ability to affect First Nations’ interests. This is consistent with the fact that the fiduciary relationship long predates Confederation. The structure of Canadian federalism was of little consequence to First Nations, as from their perspective, they were dealing with the Crown as a single entity.201

Certainly the criminal justice system and the judiciary have the ability to affect Aboriginal interests. The honour of the Crown also predates Confederation. It seems fair to say that Aboriginal peoples generally understand the Crown as a single entity, representing the continuance of their relationship with the Queen in the form of the Canadian state writ large, the continuous Crown of Canada. In the spirit of reconciliation, the Crown and the honour of the Crown should be given a broad and generous interpretation, reflecting the understanding of Aboriginal peoples that they were and are, dealing with the Crown as a single entity.

Arguably, the involvement of Aboriginal offenders within the criminal justice system is a Crown dealing with Aboriginal peoples, rather than just an Aboriginal individual, given the often underlying shared criminogenic factors of colonialism, attempts at forced assimilation, cultural difference, racism and socio-economic disadvantage that attach to Aboriginal peoples collectively, as well as the crisis in the rule of law for Aboriginal peoples. The honour of the Crown requires that notice be taken of the systemic discrimination existing against Aboriginal peoples as a result of the acts of the Crown. These impacts are particularly felt in the criminal justice system which has failed Aboriginal peoples, as noted by the Supreme Court of Canada in Williams and Gladue. This references the collapse in the rule of law for Aboriginal peoples given

201 Ibid at para 15.
historical and ongoing discrimination and their resulting lack of trust in the criminal justice system to deliver justice, particularly in a way culturally meaningful to them.

One case where the honour of the Crown was clearly argued and interpreted in a manner that indicated its role as the conscience of the country was that of the inquiry into the death of Frank Paul. On December 5, 1998, Frank Paul, an Aboriginal man, was taken into custody by Vancouver police for being intoxicated in a public place and transported to a police station where it was decided not to accept him (he had been in police custody “hundreds of times”) and he was deposited by police in an alleyway. The next day his body was found there, where he had died from hypothermia due to acute alcohol intoxication. Disciplinary proceedings were taken against two officers for their part in the events that led to Mr. Paul's death, but no inquest or hearing was undertaken. After a new Police Complaints Commissioner reopened the matter, the Inquiry into the Death of Frank Paul was convened to investigate the death. At a hearing of the Commission of Inquiry – otherwise known as the Davies Commission - Inquiry Commissioner, William H. Davies, Q.C., decided that the Criminal Justice Branch (CJB) of the Ministry of the Attorney General was compellable to provide documentary and viva voce evidence as to its response to the death of Mr. Paul. He rejected the Branch's claim that it and its employees were protected from disclosing such information, relying on the principles of Crown immunity and solicitor and client privilege. This decision was appealed by the Branch. In *British Columbia (Ministry of Attorney General, Criminal Justice Branch) v.*

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202 The conclusion was that there was insufficient evidence to meet the criminal standard of proof to charge anyone in his death.
Sentencing Aboriginal Offenders:  
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*British Columbia (Commission of Inquiry into the Death of Frank Paul -Davies Commission)* the appeal was dismissed.

The trial court concluded that if the written expression of the will of the Lieutenant Governor in Council and of the Attorney General in the Terms of Reference had not been effective in waiving both Crown immunity and solicitor-client privilege, the result would be manifestly unfair to the public and particularly to the Aboriginal population and the Paul family who had placed their trust in the Crown to provide them with the truth about the events surrounding the death of Mr. Paul. The court asked:

Is there an honourable way out of this impasse for everyone? I have concluded that the answer lies in the concept of the honour of the Crown.

In further explanation, the court rejected the arguments of counsel for the CJB that the concept of honour of the Crown has no application whatsoever to the criminal justice system:

I agree that the concept of honour of the Crown arose in the context of the treaty negotiation process (R. v. Badger), which was, by the way, a quasi-criminal case respecting charges under the Alberta Wildlife Act, and the Aboriginal land claims process (Haida Nation v. British Columbia (Minister of Forests); and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director). But I do not agree that the concept is necessarily restricted to those contexts.

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203 *British Columbia (Ministry of Attorney General, Criminal Justice Branch) v British Columbia (Commission of Inquiry into the Death of Frank Paul -Davies Commission)*, 2008 BCSC 817, 84 Admin LR (4th) 297 [*Davies Commission*].

204 While the Commissioner could not inquire into the exercise of core prosecutorial discretion, there was no principled reason why a prosecutor from the Branch who received a notice to appear before the Commissioner should be treated differently from any other participant in the Inquiry. Such participants would be entitled to rely on such immunities that they had if they had to appear before a court. Solicitor and client privilege was waived by the Terms of Reference that established the Inquiry.

205 The court canvassed the convoluted role of the Crown – noting that most members of the public including the Aboriginal community and the Paul family, would have difficulty understanding the two distinct roles of the Attorney General: one political, the other legal.

206 *Davies Commission, supra* note 203 at para 62.

207 *Ibid* at para 63.
The court referred to the Supreme Court of Canada statement in *R. v. Badger*\(^{208}\) that the honour of the Crown is always at stake in its dealings with Aboriginal people. The court concluded that while in this case, there had been no "sharp dealing" by the Crown, and different branches of the Crown had done what each was entitled to do at law, the result nonetheless appeared unjust.\(^{209}\) In all its dealings with Aboriginal peoples the Crown must act honourably, this is required in order to facilitate the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.\(^{210}\) The court concluded that this case did not deal with the assertion of sovereignty, nor with the resolution of land claims, nor the implementation of treaties:

> But the circumstances do concern what has been demonstrated time and again, namely the distrust by Canada's Aboriginal population of the justice system because of the way they have been treated historically.\(^ {211}\)

This was not a situation where the requisite level of trust could be established, and the honour of the Crown upheld, by the CJB delivering a "clear statement" to the Commissioner. Because of the Lieutenant Governor in Council's decision to waive Crown immunity, the honour of the Crown demanded that the CJB waive solicitor-client privilege to enable the Commissioner to review the documents and, if necessary, require those individuals who were participants in the response of the CJB to the death of Mr. Paul, to give evidence.\(^ {212}\)

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\(^{209}\) *Davies Commission, supra* note 203 at para 65.

\(^{210}\) *Ibid* at para 66.

\(^{211}\) *Ibid* at para 67.

\(^{212}\) *Ibid* at para 67.
The Crown appealed and was dismissed by the British Columbia Court of Appeal.\textsuperscript{213} Of interest are the arguments of intervenor Aboriginal Legal Services Toronto (ALST) pertaining to the honour of the Crown. At the Appeal Court ALST argued that:

The fact that Frank Paul was an Aboriginal person dictates that the Inquiry called to examine the circumstances relating to his death must give heed to the honour of the Crown when assessing whether the CJB can be insulated from the mandate of the Inquiry. Relying on the honour of the Crown as a guiding principle requires that notice be taken of the findings of courts and commissions of inquiry that systemic discrimination exists against Aboriginal people and that the criminal justice system has failed them.\textsuperscript{214}

ALST submitted that the honour of the Crown in this case was engaged when the Government of British Columbia, after government-to-government negotiations with the First Nations Leadership Council, announced expansive terms of reference for the Inquiry, including specifically inquiring into the actions of the Criminal Justice Branch.\textsuperscript{215} They referred to \textit{Taku River}, that the honour of the Crown cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation. \textit{Taku River} emphasizes that while the process of reconciliation is mandated by the existence of section 35(1), it has application to all of the Crown’s dealings with Aboriginal peoples, argued ALST.\textsuperscript{216} They submitted that the approach that the honour of the Crown is linked exclusively to cases of Aboriginal or treaty rights adopts too narrow a view. As \textit{Mikisew Cree} makes clear, argued ALST, the honour of the Crown arises out of the need for reconciliation between Aboriginal and non-Aboriginal people in a number of different contexts.\textsuperscript{217} ALST further indicated the

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\item\textsuperscript{213} \textit{British Columbia (Ministry of Attorney General, Criminal Justice Branch) v British Columbia (Commission of Inquiry into the Death of Frank Paul - Davies Commission)}, 2009 BCCA 337, 308 D.L.R. (4th) 577 [\textit{British Columbia v British Columbia}].
\item\textsuperscript{214} \textit{Ibid} at para 16.
\item\textsuperscript{215} \textit{Ibid} at paras 18-19.
\item\textsuperscript{216} \textit{Ibid} at para 21.
\end{itemize}
importance of reconciliation referring to the New Relationship with Aboriginal people announced by the government of British Columbia in April 2005, with its emphasis on respect and reconciliation.\textsuperscript{218} One of the desired outcomes of the Davies Commission was reconciliation between the Aboriginal community and the various actors in the criminal justice system, but ALST submitted this could not come to fruition without all relevant information being provided to the Inquiry. If the CJB was successful in withholding, further damage would be caused to the already fragile relationship between the criminal justice system and Aboriginal people. It would do nothing to dispel the cloud that Commissioner Davies had noted hangs over the CJB.\textsuperscript{219}

In addition, ALST argued that it was important that the honour of the Crown in this case be interpreted in the context of the systemic discrimination faced by Aboriginal people as a result of the acts of the Crown. In particular, the impact of the discriminatory application and effects of the criminal justice system should be considered:

The role of the CJB in determining whether criminal charges should be laid in response to the death of Frank Paul has been and continues to be a concern to the Aboriginal community. The community questions whether charges would have been laid in this case if Frank Paul was not an Aboriginal person.\textsuperscript{220}

ALST added:

As Grand Chief Stewart Phillip said in his opening remarks to the Commissioner: …we know that this particular case is not an isolated incident. There are many, many, many similar cases across this country. When one considers Dudley George, J.J. Harper, Neil Stonechild, all of who died at the hands of the police, that we have a broader concern

\textsuperscript{218} The New Relationship states: “We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.” \textit{Ibid} at para 5.
\textsuperscript{219} \textit{Ibid} at para 25.
\textsuperscript{220} \textit{Ibid} at para 31.
with what the death of Frank Paul represents in terms of the systemic and fundamental flaws in the policing, the judicial system and also the provincial government.\footnote{\emph{Ibid} at para 32.}

These statements resonate with the Supreme Court of Canada decision in \emph{Williams} recognizing that systemic discrimination towards Aboriginal people has had an adverse impact on the way they are dealt with in the criminal justice system, a principle also enshrined in \emph{Gladue} and many subsequent cases. They also inadvertently refer to the breakdown in the rule of law for Aboriginal peoples given the systemic discrimination experienced by Aboriginal peoples within the criminal justice system and their lack of confidence and trust in its ability to deliver justice, particularly in a way culturally meaningful to Aboriginal peoples.

The Court of Appeal in dismissing the Crown’s appeal, held that the Commission's mandate did not violate the principle of prosecutorial independence and that charging decisions were not subject to solicitor-client privilege.\footnote{\emph{Ibid} at para 32.} The Court concluded that given its conclusions on these issues, it was not necessary to address the issue of whether the honour of the Crown could be invoked in order to compel the Crown to conduct a review of the exercise of prosecutorial discretion in the circumstances of Mr. Paul's death. However, the Court continued, it found it doubtful that the concept of the honour of the Crown would apply to compel the Crown to proceed with a public inquiry in the current case. The honour of the Crown has been used almost exclusively to buttress Aboriginal rights described in section 35 and to apply the concept in this case would require a substantial expansion of the duties previously described.
contemplated by the honour of the Crown. Leave to appeal to the Supreme Court of Canada was dismissed.

As discussed earlier, the honour of the Crown is a concept developed in the context of fiduciary duties, treaties and Aboriginal rights and title, particularly, the duty to consult where development might impact those rights. However the Federal Court of Appeal has concluded that the list of concrete practices required by the honour of the Crown and identified by the Supreme Court of Canada to date are not exhaustive. The Supreme Court of Canada observed that “In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.” Indeed, that Court has stated that “The honour of the Crown is always at stake in its dealings with Aboriginal peoples”. Further, the Crown's honour cannot be interpreted narrowly but must be given full effect in order to promote the process of reconciliation mandated by section 35(1). In this light, the honour of the Crown can be seen to be applicable to at least some of the Crown’s dealings with Aboriginal peoples in the criminal justice system. Such a generous interpretation would facilitate Crown / Aboriginal reconciliation as directed by the Supreme Court in *Haida Nation, Taku Tlingit* and *Mikisew Cree*. Henderson has also argued for an expansive interpretation of the honour of the Crown, suggesting that “the honour of the Crown has revisionary power to

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223 *Ibid* at para 114.
225 *Stoney Band*, supra note 90.
226 *Taku River*, supra note 8 at para 24.
227 *Haida Nation*, supra note 7 at para 16.
reorient large portions of existing law and coercive state power”.

Henderson’s Crown / Aboriginal “dialogical relationship” can be seen as an avenue to reconciliation. In this context, he says, reconciliation can be seen as requiring radical transformation, seeking consensual agreements that address the Aboriginal experience of oppression, exclusion, and voicelessness in Canadian governance. These agreements, says Henderson, will need to reconstruct Canadian political, economic, and social institutions, focusing attention on the institutional structure of society to which the exclusion of Aboriginal peoples’ interests, ideals, and group identities remain fixed. Prejudice, he observes, becomes immensely more potent when bound up with institutional or structural realities of economic and educational disadvantage, or social disorganization and political demobilization. There may be no law more coercive that the criminal law, given the broad powers of the state to incarcerate offenders. The justice system may be seen as a societal institutional structure, which has in the past and in the present denied and excluded Aboriginal peoples' interests, values and identities. The realities of socio-economic disadvantage, cultural dislocation and community fragmentation for Aboriginal peoples are arguably no where more visible then in the criminal justice system and Canada’s correctional institutions. An expansive interpretation of the honour of the Crown that reorients the criminal justice system to be dialogical, with full participation by Aboriginal peoples and their cultural values represented, would be an avenue to Crown / Aboriginal reconciliation and the rehabilitation of the rule of law in the criminal justice context for Aboriginal peoples.

228 Taku River, supra note 8 at para 24.
229 Supra note 120 at 56.
230 Ibid at 63.
Numerous court decisions have made it clear that courts will not countenance government acting towards Aboriginal people in a way that the court regards as dishonourable. While the fairly narrow legal scope of the government’s fiduciary obligations towards Aboriginal people suggests restraint, it is nonetheless clear that there is a Crown obligation not to act dishonourably.\(^{232}\) Given that the Supreme Court of Canada has repeatedly taken judicial notice of discrimination against Aboriginal peoples within the criminal justice system, is this not dishonourable conduct on behalf of Canada? It is difficult to conceptualize more dishonourable conduct at least within the current Canadian context, than systemic, institutionalized discrimination in the criminal context against a socio-economically disadvantaged group whose situation is at least partially the result of colonialism, attempts at forced assimilation and cultural difference. In this context, the grossly disproportionate numbers of Aboriginal peoples within the criminal justice and corrections systems become self-explanatory and the rule of law can be seen to be in jeopardy.

The “honour of the Crown” is, at a general level, a constitutional doctrine that is much broader than just the “honour of the government/executive”. The honour of the Crown may only produce a duty of consultation that is binding on the executive branch, but the honour of the Crown is far broader than only encompassing the duty of consultation and accommodation and it may impose other duties on other branches of the state, including the judiciary. The honour of the Crown is not just about the honour of governments or executives; rather it is the honour of the Canadian state, including its courts. The honour of the Crown, as a constitutional value, informs

\(^{231}\) *Ibid.*
\(^{232}\) Hunter, *supra* note 109 at para 17.
legal interpretation, particularly the criminal law, consistent with the associated constitutional values of reconciliation, rule of law and respect for minorities.
Chapter 6. Aboriginal Peoples and Sentencing - Honour of the Crown, Reconciliation and the Rule of Law

In this chapter I submit that the honour of the Crown is already a factor at play in the sentencing of Aboriginal offenders pursuant to section 718.2(e) of the Criminal Code. The principles underlying section 718.2(e) have been canvassed earlier; in conjunction with the case law interpreting it, it can be said to *dejure* reflect the honour of the Crown. The honour of the Crown mandates courts to give a generous and liberal interpretation to section 718.2(e). It is, after all, a statutory provision that directs courts to protect the interests of Aboriginal peoples in sentencing. The analysis of Lamer C.J. in *Van der Peet* confirms that the historic relationship between the Crown and Aboriginal peoples, coupled with the fact that the honour of the Crown is at stake, requires that statutory and constitutional provisions protecting the interests of Aboriginal peoples be given a generous and liberal interpretation. Tragic dysfunction was noted by the Supreme Court of Canada in *Gladue*:

> 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 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”.

A liberal construction of 718.2(e) is not only in accordance with the honour of the Crown, but can also assist in rehabilitating the rule of law for Aboriginal peoples. Certainly as discussed

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233 *Supra* note 97 at para 24.
234 *Supra* note 5 at para 61.
elsewhere, the rule of law can be seen to be in dire straits as it pertains to Aboriginal peoples in the justice and corrections systems.

However, I also argue that the honour of the Crown is a factor in Aboriginal sentencing regardless of section 718.2(e); indeed, such an interpretation is fundamental to Crown / Aboriginal reconciliation and rehabilitation of the rule of law for Aboriginal peoples. The honour of the Crown requires an expanded *Gladue* type analysis by judges sentencing Aboriginal offenders regardless of the existence of section 718.2(e). The honour of the Crown is always at stake in its dealings with Aboriginal peoples, in accordance with its historical and future relationship with them. It must be understood generously given its history and underlying realities and if we are to achieve Crown / Aboriginal reconciliation. As discussed in this section, some courts have taken an expansive view of an Aboriginal offender’s circumstances, including the role of Crown policies and actions as criminogenic factors in Aboriginal offending. Such an expansive view of Aboriginal offending was described by Patricia Monture:

> And often, what they experience in the city (from shoplifting to prostitution, drug abuse to violence) as a result of poverty and racism, leads them into contact with the criminal justice system. Yet, a criminal court is not interested in hearing about this long trail of individualized and systemic colonialism which leads to conflict with the law. Courts are only interested in whether you committed a wrong act with a guilty mind. This is a clear example of how the individualized nature of law obscures systemic and structural factors.²³⁵

This chapter discusses Aboriginal sentencing cases decided pursuant to section 718.2(e) of the *Criminal Code* and *Gladue* principles. As discussed earlier, Aboriginal sentencing principles were emerging in the common law of sentencing prior to the enactment of 718.2(e) in 1996, however, given the more recent evolution of the honour of the Crown it is in these more recent
cases following *Gladue* that the honour of the Crown can be seen to emerge as an influential principle in sentencing Aboriginal offenders. Courts in specific cases have interpreted 718.2(e) through the lens of an independent concept of the honour of the Crown. Reconciliation principles and the rule of law can also be seen to infuse some sentencing decisions pursuant to 718.2(e).

In *R. v. Amitook* an Inuk offender who had entered a plea of guilty on three charges under the *Criminal Code* (conspiracy to traffic in marijuana, trafficking for the benefit of a criminal organization, and conspiracy to launder the proceeds of crime) was sentenced. The accused trafficked marijuana in his community as part of an organization controlled from Montreal. The defence pleaded that the court must consider as mitigating the historic and systemic factors which contributed to the presence of the accused before the court. Further, the court must consider sentences other than imprisonment which are appropriate in the circumstances as per section 718.2(e) and the fiduciary relationship which exists between the Crown and the accused. The court must avoid practicing systemic bias against Aboriginal persons and must not contribute to the over-representation of Aboriginal people in the carceral population of Canada, submitted the defence. In imposing sentence, the court adverted to the *Charter of Rights and Freedoms* as the most important guarantee of the rule of law and to the courts’ role as guardians of the *Charter*, observing:

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For many Canadians, however, the search for equality before the law, equality under the law, equal benefit of the law, and equal protection of the law is an on-going quest. The search for equality is the search for justice.\footnote{Ibid at para 15.}

To respect equality rights, awareness of the reality of Aboriginal peoples in Canada must inform decisions affecting Aboriginal offenders. A growing body of case law has affirmed this principle.\footnote{Ibid at para 17.}

This clearly speaks to the rule of law for Aboriginal peoples in the sentencing context, while also connecting the rule of law to equality rights and the protection of minorities. The Court concluded that systemic and historic factors of social exclusion played a part in the commission of these crimes and imposed sentence accordingly.\footnote{Sentence imposed was twenty-four months, minus credit for time spent in provisional detention; accused sentenced to an additional six weeks, followed by probation for one year.} There was however, no discussion of the offender’s fiduciary argument.

In another Aboriginal protest case, \textit{Frontenac Ventures Corporation v. Ardoch Algonquin First Nation}, the two Aboriginal defendants appealed their sentences for civil contempt of court due to their violation of an injunction by continuing their protest activities.\footnote{Ibid at para 17.} They and other members of their First Nation erected a blockade to prevent Frontenac, a private uranium exploration company, from conducting exploratory drilling on certain lands subject to an Algonquin land claim. That claim was accepted for negotiation by the Governments of Canada and Ontario, and negotiations had been ongoing since 1991. Mr. Lovelace and Ms. Sherman engaged in a peaceful protest and blockade which prevented Frontenac's employees from engaging in any drilling on the lands. Frontenac commenced an action against the First Nation and obtained interim injunctions restraining the community and anyone associated with it from hindering Frontenac's
activities on the lands. Nonetheless the blockade continued. Mr. Lovelace, a former chief of the First Nation who was spokesman and chief negotiator, and Ms. Sherman a co-chief of the First Nation, were each sentenced to six months' imprisonment and hefty fines by a motions judge. They successfully appealed the sentence, with the the Ontario Court of Appeal concluding that the motions judge erred in not considering *Gladue* factors when fashioning appropriate sanctions for their acts of contempt. Justice James C. Macpherson, for a unanimous court, concluded that the sentencing principles articulated by the Supreme Court of Canada in *R. v. Gladue* are applicable when fashioning a sentence for civil or criminal contempt on the part of Aboriginal contemnors. The court concluded that *Gladue* principles should be extended beyond the criminal context, noting the extension of these principles already to to a variety of other contexts in the criminal justice system, including bail, parole eligibility, dangerous offender applications, and disposition hearings of the Ontario Review Board.

Macpherson J. observed that although *Gladue* was focused primarily on the serious problem of excessive imprisonment of Aboriginal peoples, this case in a broader sense draws attention to the state of the justice system’s engagement with Canada’s First Nations. The Court referred to three key factors as highlighted in *Gladue*: the estrangement of Aboriginal peoples from the Canadian justice system; the impact of years of dislocation; and whether imprisonment would be meaningful to the community of which the offender is a member. All three factors were at stake in this case:

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240 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 OR (3d), leave to appeal to SCC refused, [2008] SCCA No. 357 [*Frontenac Ventures Corporation*].

241 *Ibid* at para 54.

242 *Ibid* at para 56.

…the enforcement of the injunctions by imprisonment could not help but emphasize the
estrangement of this community and aboriginal peoples generally from the justice system.
The use of incarceration as the first response to breach of the injunction dramatically
marginalizes the significance of aboriginal law and aboriginal rights. Second, imposing a
lengthy term of imprisonment on a first offender fails to recognize the impact of years of
dislocation. The fact that persons of the stature of Mr. Lovelace and Chief Sherman saw no
meaningful avenues of redress within the justice system and felt driven to take these drastic
measures demonstrates the impact of years of dislocation and the other problems discussed
in Gladue, at paras. 67-69. Finally, imprisonment, far from being a meaningful sanction for
the community, had the effect of pitting the community against the justice system. That the
court found it necessary to imprison the leaders of the AAFN simply serves to emphasize
the gulf between the dominant culture's sense of justice and this First Nation's sense of
justice.  

Accordingly, the Court concluded that it must undertake a Gladue analysis, looking at the unique
systemic or background factors at play in this case which included an existing land claim
negotiation between the Algonquin Nation and Ontario. Haida Nation and Taku River together
instruct that the existing, and as yet unresolved, Algonquin land claim – the basis for the First
Nation’s protest and blockade – cannot simply be dismissed as illusory, flawed or weak. The
second background factor is Ontario’s Mining Act which establishes a “free entry” system
whereby all Crown lands, including those subject to Aboriginal land claims, are open for
prospecting and staking, without any consultation or permitting required. What Frontenac
wanted to do on Crown land – staking and exploration – was legal under the Mining Act.
However, the appellants’ response, although in contempt, was grounded in a respectable
interpretation of section 35 and several recent Supreme Court of Canada decisions. The
appellants’ character and circumstances, their actual conduct, and the difficult legal context
should have counted as significant mitigation in sentencing. The circumstances of the offences
and these Aboriginal offenders were such that, in accordance with Gladue principles, sentences

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244 Ibid.
245 Ibid at para 60.
of incarceration were inappropriate.  

By the time of the sentencing hearing, only the defendants, Mr. Lovelace and Chief Sherman, remained at the blockade in protest. A process initiated by the motion judge among the parties appeared to be bearing fruit, which in the Court’s opinion encouraged continued adherence to the conciliatory values driving the process, suggesting a more moderate sentence for the only two contemnors still not complying with earlier court orders. Neither appellant was fined nor received a custodial sentence: 

…it would be wrong to cross this bridge now for these first offenders in a situation that cries out for dedicated negotiation among Ontario, the AAFN and Frontenac with a view to reconciliation of the competing interests.

The appeal was allowed and the sentences set aside.

While the Court does not directly reference the honour of the Crown, its statement that incarceration as the first response to the breach of the injunction “dramatically marginalizes the significance of aboriginal law and aboriginal rights” can be regarded as a reference to the honour of the Crown in the context of the unproven land claim, but which in practice, impacted sentence. An outstanding land claim and flawed provincial legislation impacting Aboriginal rights were considered Gladue factors in sentencing the Aboriginal contemnors. Arguably, Gladue analysis provided the vehicle for the court to inject the honour of the Crown into sentencing. Further, the Court’s statement that imposing a lengthy term of imprisonment on a first offender fails to recognize the impact of years of dislocation can also been seen as a reference to the impact of Crown policies and actions on individuals in the sentencing process. Reconciliation between the
Crown and Aboriginal peoples was seen as influential in sentencing these Aboriginal offenders for contempt. Here, “reconciliation as relationship” was facilitated by the Court in sentencing individuals where the interests of the community were involved and reconciliation in the individual sentencing context was seen to further reconciliation between the First Nation and the government. The Court also references the rule of law, in its statements regarding the estrangement of Aboriginal peoples from the justice system, the perception at least by the offenders that there were no meaningful avenues of redress within the justice system symptomatic of years of dislocation and the effect of imprisonment in “pitting” the Aboriginal community against the justice system. The reference to the gulf between the mainstream and Aboriginal sense of justice is another lightly veiled reference to the breakdown in the rule of law for Aboriginal peoples.

In *R. v. Dantimo* the court takes up this analysis, incorporating the honour of the Crown and reconciliation principles, including the treaty context, into the criminal sentencing of an Aboriginal offender. Mr. Dantimo had suffered the effects of racism and discrimination based on his ancestry on a daily basis, had grown up in poverty and suffered intergenerational effects of the residential school system. In conducting a *Gladue* analysis, Justice J. Stephen O’Neill referred to the *Report of the Royal Commission on Aboriginal Peoples* extensively, particularly with respect to the injustices suffered by Canada’s Aboriginal peoples as root problems and causes of Aboriginal criminality and the recommendations for addressing these injustices. The court noted that a theme throughout the RCAP Report was the restoration of lands and greater control over resources to Aboriginal peoples via a treaty review process with a view to
implementing the true spirit and original intent of the treaties.\(^{251}\) O’Neill J. observed that these larger issues cannot be resolved or even carefully analyzed at the sentencing of an Aboriginal offender, as noted by the Supreme Court in *Gladue*.\(^{252}\) However, he continued:

> In addressing aboriginal alienation from, and a lack of respect for, the justice system, the Supreme Court of Canada may also have had in mind the broader Canadian public’s longstanding failure to recognize aboriginal rights, if not the justice system itself.\(^{253}\)

The court cites *Haida Nation*, for the principle that the reconciliation process mandated by section 35 arises from reconciling Crown sovereignty with prior Aboriginal occupation. The honour of the Crown requires that section 35 rights be determined, recognized and respected, which in turn, requires the Crown, acting honourably, to participate in processes of negotiation.\(^{254}\) The court also references the Supreme Court of Canada’s 1990 decision in *R. v. Sparrow* for its statements that the legal rights of Aboriginal peoples to their lands were virtually ignored for many years. In that case, the Supreme Court observed that the treaties entered into with the Crown were “often honoured in the breach.”\(^{255}\) O’Neill J. then asks:

> If important land rights and solemn treaties can be ignored and breached, what does this say about how members of impoverished First Nation communities and aboriginal urban communities can continue to have respect for the justice system and the upholding of the rule of law?\(^{256}\)

He continues:

> If aboriginal constitutional rights can be determined, recognized and respected, this process of reconciliation may be the very key to turning around, or reversing, aboriginal alienation from the justice system, and the over-incarceration of aboriginal people in this country’s jails, correctional institutes and prisons. With the determination, recognition and implementation of s. 35 constitutional rights may well come to aboriginal peoples a more

\(^{250}\) *Dantimo, supra* note 27.

\(^{251}\) *Ibid* at para 22.

\(^{252}\) *Ibid* at para 24.

\(^{253}\) *Ibid* at para 25.

\(^{254}\) *Ibid* at paras 28-29.

\(^{255}\) *Ibid* at para 26 citing *Sparrow, supra* note 96 at para 49.

\(^{256}\) *Ibid* at para 27.
just share of the wealth and resources of these Canadian lands on which aboriginal peoples have been settled for hundreds, if not thousands of years, more economic opportunities and options and more opportunities to become gainfully and respectably employed.\textsuperscript{257}

The court surrepticiously suggests there may be a Crown conflict of interest given that the same Crown that prosecutes and seeks sentencing of an Aboriginal person may also be involved in addressing issues relating to Aboriginal peoples’ dislocation, loss of economic opportunity, and loss of lands and resources, all of which figure prominently as background factors in Aboriginal crime.\textsuperscript{258} Accordingly, responsibility for addressing many of the root causes (rather than symptoms) of Aboriginal crime may, as a matter of justice and social responsibility, primarily rest with the Crown and not with a sentencing judge. So long as sentencing judges can only deal with the symptoms of the problem through the limited scope of 718.2(e), and not with the causes, questions are raised as to whether important changes on an individual and community basis, as well as a reduction in the rate of recidivism, can be achieved in the sentencing process.\textsuperscript{259}

O’Neill J. concludes with a call to action:

Is it not time that our justice system, fine-tuned as it is to deal with Aboriginal (and all) crime effectively and efficiently, addresses the resolution of long outstanding constitutional legal issues involving aboriginal rights and development opportunities on traditional lands and waters? A remedy or cure to aboriginal crime is not possible in the sentencing process, despite a thorough Gladue analysis. But is it not time, in the interest of reducing crime and the recidivism rate, for Federal Crowns, Provincial Crowns, defence lawyers and judges, as well as the police, to call out and demand that processes that may lead to the restoration of lands and greater control over resources to the aboriginal peoples be created and entered into in the spirit of reconciliation, without any more delay and the long passage of time?\textsuperscript{260}

In an earlier sentencing decision also rendered by O’Neill J., \textit{R. v. Paibomsai},\textsuperscript{261} the reasons are almost identical. The court took judicial notice of the broad systemic and background factors

\textsuperscript{257} \textit{Ibid} at para 29.
\textsuperscript{258} \textit{Ibid} at para 30.
\textsuperscript{259} \textit{Ibid} at para 31.
\textsuperscript{260} \textit{Ibid} at para 42.
which figure prominently in the causation of crime by Aboriginal offenders, and of the primary emphasis in Aboriginal cultures to a restorative approach to sentencing.\textsuperscript{262} In conducting a \textit{Gladue} analysis, O’Neill J. emphasized as mitigating Mr. Paibomsai’s introduction to alcohol at an extremely early age, his continued struggles with alcohol and drugs, his childhood physical abuse, foster care and lack of parenting that he experienced during his formative years on reserve and his limited work experience and skills. The court cited the RCAP Report and the consistent theme of restoration of lands and greater control over resources to Aboriginal peoples as changes required to address injustices and problems relating to Aboriginal crime.\textsuperscript{263} O’Neill J., similar to his decision in \textit{Dantimo}, observes that longstanding Aboriginal rights issues must be resolved in order to address Aboriginal alienation from, and a lack of respect for, the justice system and to encourage respect for the rule of law.\textsuperscript{264} He references the breakdown in the rule of law for Aboriginal peoples in that the same Crown and justice system that for years failed them with respect to treaties and Aboriginal rights is also responsible for their criminal prosecution and sentencing.\textsuperscript{265} Indeed, Aboriginal peoples have not been treated as being equal before the law and have not seen themselves or their values reflected in the law in general. One could only question why they would have any respect for the rule of law.

The reasons of O’Neill J. in \textit{Dantimo} and \textit{Paibomsai} go furthest in incorporating the honour of the Crown via treaties, land claims and Aboriginal rights into the sentencing of an individual Aboriginal offender. Noteably, neither decision was appealed by the Crown. \textit{Gladue} sentencing

\begin{itemize}
\item \textsuperscript{261} \textit{Paibomsai}, supra note 27.
\item \textsuperscript{262} \textit{Ibid} at para 100.
\item \textsuperscript{263} \textit{Ibid} at para 105. Other RCAP recommendations noted by O’Neill J. included returning to Aboriginal peoples greater community control over the utilization and management of health dollars and health and healing processes.
\item \textsuperscript{264} \textit{Ibid} at paras 108-110.
\end{itemize}
in general incorporates the honour of the Crown in the context of Aboriginal sentencing, with its judicial notice of cultural difference and restorative justice, socio-economic circumstances, the impacts of colonialism and racism and discrimination on Aboriginal offenders. The court in *Paibomsai* and *Dantimo* only teases out and states what is already implicitly understood. Given that poor socio-economic circumstances which are connected to a history of unresolved rights and land claims and dishonoured treaties are closely connected to Aboriginal criminality, the better question is how can the honour of the Crown not be engaged in the sentencing of Aboriginal offenders? This is to say nothing of the impacts of the colonialist imposition of a culturally foreign justice system and attempts at forced assimilation such as residential schools and the sixties scoop, all recognized as causal factors in Aboriginal offending. Indeed, in *Ipeelee* the Court stated:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.  

Racism and discrimination experienced by Aboriginal offenders both within and external to the criminal justice system can also be said to be a byproduct of other broader historical factors, including colonialism, cultural difference and socio-economics. The court in *Dantimo* and *Paibomsai* recognizes that reconciliation in the section 35 context spills over into Aboriginal sentencing – that so long as section 35 rights remain outstanding and unresolved, so too will Aboriginal over-representation in the criminal justice system, given underlying causal factors.

266 *Supra* note 68 at para 60.
Similarly, writing about the Australian indigenous context, Edney posits that the recognition of native title elucidated by the High Court of Australia in *Mabo* can be linked to sentencing indigenous offenders. The distant temporal and physical act of dispossession of indigenous peoples recognized in *Mabo* has relevance to the punishment of indigenous persons because dispossession goes not only to native title but is necessarily relevant to all aspects of the legal system:

In such a history, dispossession is first and last the constitutive feature of the relationship between the indigenous and the non-indigenous community. The law, as a source of authoritative communal understanding, may attempt to claim that it has a separate and formal existence outside of those historical facts and independent from claims of memory. As *Mabo* itself makes evident however, the law itself may not always be able to successfully quarantine itself from those wider power relations.

The consequences of dispossession, says Edney, have been tragic and systematic, compounded over time and emerging as inter-generational:

Low income, poor health, average lower life expectancy, higher infant morbidity and other negative consequences such as involvement in the criminal justice system are all aspects of systematic social and economic disadvantage that have as their ultimate source the fact of dispossession.

Edney states that in Australia, dispossession is generally framed as irrelevant to the criminal justice system, but,

If the sentencing process did incorporate the historical fact of dispossession indigenous involvement in crime and punishment would be comprehended in a far different manner.

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268 Supra note 15.

269 Supra note 16.

270 Ibid at 34.

271 Ibid at 31.

272 Ibid at 31-32.
Edney articulates the ultimate cause of indigenous offending as dispossession and disenfranchisement concluding that the evolving recognition of dispossession as the key explanatory factor of indigenous offending allows for the emergence of differential treatment of indigenous offenders on that basis.\textsuperscript{273} Where the actions of the state are causal factors themselves, indigenous offending is not caused by alcoholism, unemployment and lack of opportunities, but rather the direct effect of state practice.\textsuperscript{274} Post \textit{Mabo}, posits Edney, the broader issue of reconciliation became prominent in the face of native title with a focus on a \textit{moral} reckoning of the history of Australia.\textsuperscript{275}

The forthright sentencing decisions in \textit{Dantimo} and \textit{Paibomsai} raise questions pertaining to not only the honour of the Crown but also its connectedness to morality in the law as it relates to the Crown’s interaction with Aboriginal peoples, reflecting a natural law view of the rule of law. Other \textit{Gladue} sentencing cases as discussed above may also be seen to parry with the honour of the Crown and questions of morality in the law. Edney recognizes that ascribing a causal relationship between dispossession and current indigenous offending is contentious:

\begin{quote}
In this sense making a linkage threatens the method by which the non-indigenous community imposes punishment upon indigenous communities by focusing concern on the most basic question at all for a system of punishment: on what basis is it morally proper to impose punishment upon indigenous persons given the fact of historical dispossession and its generational effects?\textsuperscript{276}
\end{quote}

Edney advocates embracing historical facts in the context of the punishment of indigenous persons and postulates dispossession as a central explanatory tool to account for indigenous offending. Willful blindness in the criminal justice system comes at a high price:

\begin{itemize}
  \item \textsuperscript{273} \textit{Ibid} at 36.
  \item \textsuperscript{274} \textit{Ibid} at 33-34.
  \item \textsuperscript{275} \textit{Ibid} at 28.
\end{itemize}
What is clear however is that the disproportionate representation of indigenous persons in the criminal justice system represents not only a significant intrusion into the lives of indigenous communities but has a cumulative moral cost for the non-indigenous community that should not be ignored.\(^{277}\)

As noted by Norrie, albeit in a somewhat different context, “Hence much legal argument is a kind of moral shadow-boxing or ventriloquism which deals with moral issues, but at one remove.”\(^{278}\)

The sentencing of Aboriginal offenders pursuant to section 718.2(e) could be said to do just that absent the recognition that the honour of the Crown is engaged. Indeed, in *Ipeelee* the Court clarified the impact of Aboriginal sentencing principles:

> First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness…Canadian criminal law is based on the premise that criminal liability only flows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely - if ever – attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.\(^{279}\)

An Aboriginal offender can be viewed simultaneously as both an offender in the commission of a specific criminal offence and as a victim in the larger and ongoing historical, social and cultural context of Crown / Aboriginal relations.\(^{280}\) Norrie posits that a fully moral account of criminal wrongdoing would have to recognize both that the social and structural factors impacting the criminal were effective in causing crime, and that the offender was also its causal agent. Responsibility is something that is shared, so that there is a moral reckoning for offenders but part of that reckoning involves looking at the social conditions in which they acted. The moral reckoning is shared between the individual and their society and this includes

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\(^{276}\) *Ibid* at 32.  
\(^{277}\) *Ibid* at 34.  
\(^{278}\) *Supra* note 38 at 179.  
\(^{279}\) *Supra* note 68 at para 73.  
\(^{280}\) Chartrand, *supra* note 86 at 9.
its institutional forms such as the state.\textsuperscript{281} Indeed, Norrie could be writing reasons in an Aboriginal sentencing case:

Individual agency is always ambiguous on a relational model, so that our moral judgments are also ambivalent. They are doubly ambivalent in the criminal area when individuals whom we presume to hold morally responsible for their wrongdoing are those who have the least opportunities to develop other career paths and life patterns in an unjustly structured social order. In choosing to find such people responsible, to blame and to punish them, we recognize that they are agents, but conveniently we forget that agency exists ’in between’ the individual and the social, that it is shared.\textsuperscript{282}

Similarly, I do not intend to suggest that the engagement of the honour of the Crown in sentencing Aboriginal offenders equals the abdication of any kind of individual accountability for the crime. Rather it suggests that section 718.2(e) and the proportionality principle – the degree of responsibility of the offender -should be viewed in light of the honour of the Crown and sentencing should incorporate restorative approaches and Aboriginal community involvement in order to facilitate reconciliation between the Crown and Aboriginal peoples and rehabilitate the rule of law. The lack of state or collective morality in sentencing Aboriginal offenders contributes to the demise of the rule of law for Aboriginal peoples (and arguably for non-Aboriginal Canadians). Vandervort references the rule of law in a consensual justice system suggesting:

This adaptation of the consensual model would encourage society to view itself collectively as morally accountable for structuring many aspects of the situations within which individuals make choices. A society that viewed itself in this manner - as a collaborator -would be less punitive towards some individuals and less lavish in its praise of others. Identification of classes of cases in which the application of positive law often led to unconscionable results for the individuals affected would be understood to imply shared societal responsibility for the outcomes. As the community became aware of situational determinants that render choices made by individuals ones which it

\textsuperscript{281} Norrie, supra note 38 at 220.
\textsuperscript{282} Ibid at 221.
is “grossly unfair” to regard as “free” the rudimentary elements of a program for social change would be established.283

Those “rudimentary elements of a program for social change” resonate in the court’s call to action in Dantimo and Paibomsai. The courts have made it clear in Gladue and many subsequent cases that the actions of the Crown are considered causal factors in Aboriginal offending including the imposition of a foreign justice system, residential schools, the sixties scoop, and in some cases, unresolved land and Aboriginal rights claims, among others. Gladue can be seen as dejure reflecting the honour of the Crown and introducing veiled morality into the sentencing of Aboriginal offenders. Section 718.2(e) and the values enshrined therein must be viewed in relation to the overall colonial experience and the desire by government to address an element of this via accommodation in sentencing. The provision can be viewed as a legislative attempt within the criminal justice milieu to reconcile the interests of Aboriginal peoples with the Crown.284

In R. v. Quash the court clearly agreed that section 718.2(e) was intended to incorporate reconciliatory principles.285 In applying section 718.2(e) in the sentencing of an Aboriginal offender, Justice Michael Cozens noted as context the government apology on June 11, 2008 for Canada’s role in the residential school system. The apology recognized that the damage went beyond the negative impact on the individual, stating that this policy had a lasting and damaging impact on Aboriginal culture, heritage and language and that the legacy of Indian residential schools has contributed to social problems that continue to exist in many communities. Accordingly, said Cozens J., the government

283 Supra note 97 at 219.
must be prepared to accept responsibility and directly address some of the fallout in the
criminal justice system from this decades long attempt at assimilation. In accepting
responsibility for residential schools and its tragic impacts,

the Government of Canada implicitly should be seen as also accepting
responsibility for ongoing participation in ameliorating the consequences of this
impact on First Nations individuals, their families and their communities.  

The negative impacts are found all too often in the criminal justice system, in both
victims and offenders, noted the court. While Cozens J. does not state his legal rationale
for why Canada should be seen to implicitly accept responsibility for this fallout,
including in sentencing, the honour of the Crown and morality in the law can be
reasonably inferred. Cozens J. ventured further, engaging reconciliatory principles:

It is not enough to apologize for harm done without making reparation for the harm.
This reparation must reach beyond the payment of monies to former students of the
residential schools. It must extend to how we treat First Nations peoples involved in the
criminal justice system, regardless of their role within it. Legislation designed to "get
tough" on crime must not lose sight of the fact that the very individuals that suffered
harm, either directly or indirectly, perhaps as children of students of residential schools,
may be the same individuals who are committing the crimes and who are, under such
legislation, the individuals that the justice system will now "get tough" on.  

The court concludes that “true justice requires proportionality, and it is incumbent on the
criminal justice system to strive to achieve this proportionality in each case for each
offender.”

*Quash* is another good example of how the honour of the Crown and reconciliatory principles can
be brought to bear in the sentencing of Aboriginal offenders. The court’s specific analysis with

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284 Chartrand, *supra* note 86 at 8.
285 *Quash*, *supra* note 27.
286 *Ibid* at para 55.
287 *Ibid* at para 56.
respect to residential schools in this case could be expanded to include all Crown actions, policies and failures to act that are recognized as causal factors in Aboriginal offending. The honour of the Crown would require a different sentencing approach for Aboriginal offenders independent of section 718.2(e) and reconciliation would be seen as a normative principle underlying the sentencing of Aboriginal offenders. Reconciliation strikes the right note as a holistic concept, but how does such a concept find expression in sentencing in such a way as to heal relationships and guide them towards a brighter future? A truly restorative approach to sentencing Aboriginal offenders mandated by the honour of the Crown and involving the Aboriginal community, would facilitate reconciliation as between the offender, their community and the state and between the Crown and Aboriginal peoples writ large. Such an approach would also serve to facilitate the reconciliation of mainstream and Aboriginal legal traditions. This posits reconciliation as an interpretive normative principle that shapes the sentencing of Aboriginal offenders. The honour of the Crown and Crown/Aboriginal reconciliation can be seen to apply to the individual in the sentencing process given the interconnectedness of Aboriginal offending with collective criminal causal factors for Aboriginal peoples generated by the Canadian state as previously enumerated. Aboriginal criminogenic causal factors relate to the injustices perpetrated not only on the individual but also on the collective; accordingly addressing them in the sentencing of the individual offender can be said to facilitate Crown reconciliation with Aboriginal peoples.

\[288\] *Ibid* at para 57.
Chapter 7. Conclusion

The argument I have developed thus far is that the honour of the Crown and reconciliation principles are engaged in sentencing Aboriginal offenders within the Canadian criminal justice system. Such an interpretation facilitates a new relationship between the Crown and Aboriginal peoples and will contribute to the rehabilitation of the rule of law. As posited by Borrows, the central issue that lies at the foundation of our legal system is: “What is the meaning and significance of the past as it relates to the present configuration of law in Canada today, and who gets to determine the answer to this question in our official legal narratives?” This thesis argues that the past and ongoing history of Crown / Aboriginal relations must be understood as a key criminogenic factor for many Aboriginal offenders; indeed, this has been configured into the law via section 718.2(e) of the Criminal Code, albeit inadequately. This history also invokes the honour of the Crown in the sentencing process for Aboriginal offenders regardless of 718.2(e); in this context a fulsome interpretation of reconciliation and the rule of law requires the involvement of Aboriginal communities and culturally appropriate restorative measures.

Aboriginal people are drastically over-represented as those charged and convicted of criminal offences and in Canada’s correctional facilities. This problem of Aboriginal over-representation in the justice system continues to worsen rather than improve; demographic projections suggest these disproportionate rates will continue well into the next decade. The offending circumstances of Aboriginal offenders are often related to substance abuse, inter-generational abuse, residential schools and the sixties scoop, low levels of education, employment, and
income and family issues, among other factors. For many of these criminogenic factors, community breakdown related to the impacts of colonialism and assimilation attempts also play a pivotal role. Numerous theories have emerged that attempt to explain this injustice including: cultural difference theory; socio economic theory; colonialism theory; racism and discrimination; and a breakdown or vacuum in the rule of law for Aboriginal peoples. This list is by no means exhaustive and the different causal factors must be understood holistically, in relation to one another.

To some degree these contextual Aboriginal criminogenic factors were recognized by the Canadian government in the enactment of section 718.2(e) of the Criminal Code and by the Supreme Court of Canada in Gladue. Arising from section 718.2(e) and Gladue, judges must take into account the systemic and individual background dynamics of Aboriginal offenders in the sentencing process. They must also consider culturally appropriate (restorative) alternatives to incarceration where possible. Even prior to the enactment of section 718.2(e), there existed common law sentencing principles that were engaged when the offender being sentenced was Aboriginal. Thus, special consideration for the Aboriginal background and unique cultural factors of these offenders does not arise entirely as a product of section 718.2(e), judges were already conducting this analysis to varying degrees. This can be seen as a unique common law sentencing obligation, justified in part by the recognition of the negative impact of an imposed and culturally foreign criminal justice system on Aboriginal peoples who have been oppressed and discriminated against by that system. The reasoning also stemmed from an understanding

\[289\] Supra note 130 at 170.

\[290\] Chartrand, supra note 86 at 4.
of the socio-economic conditions of Aboriginal communities and how this reflects the impacts of colonization as well as recognition of the cultural conflict between non-Aboriginal and Aboriginal conceptions of justice.\(^{291}\)

Section 718.2(e) and *Gladue* analysis provide a vehicle for the courts to inject the honour of the Crown into the sentencing of Aboriginal offenders, albeit at one remove. However, the honour of the Crown requires a vigorous *Gladue* type analysis by judges sentencing Aboriginal offenders regardless of the existence of section 718.2(e). The honour of the Crown requires a more nationally consistent and vigorous *Gladue* type analysis than section 718.2(e) currently generates. *Gladue* reasoning pursuant to this section often seems inconsistent across courts, largely dependant upon the degree of awareness and support for the principles that a particular judge brings to their interpretation of the section and the case law. Recognition that the requirement of such an analysis is constitutional in nature, arising from the honour of the Crown and reconciliation, would provide impetus for more consistent and vigorous application of *Gladue* type analysis. Recognition that the honour of the Crown is engaged in sentencing Aboriginal offenders, and that *Gladue* type analysis is thereby a constitutionalized principle, also means that the requirement can not be repealed, and is not subject to the whims of any particular government. While I am limited to making the argument that the honour of the Crown is engaged in sentencing Aboriginal offenders, such a constitutionalized principle could be interpreted to apply in other analogous stages in the criminal justice process, such as bail and parole eligibility, particularly where the courts have already extended *Gladue* beyond its statutory roots in 718.2(e). The honour of the Crown and reconciliation as constitutional principles could

\(^{291}\) *Ibid* at 3.
also be said to require the incorporation of restorative approaches and Aboriginal community involvement in Aboriginal sentencing in order to facilitate reconciliation between the Crown and Aboriginal peoples.

The notion of the honour of the Crown has been developed by the courts to direct government interaction with Aboriginal peoples within the fiduciary context; where treaties and documents are being interpreted; and where Aboriginal rights proven or unproven are involved and may be infringed. However, there is no exhaustive definition of the meaning of the honour of the Crown or the limits to its interpretation. While the Supreme Court has moved away from the imposition of fiduciary duties writ large, the concept of the honour of the Crown remains open ended, a broader Crown / Aboriginal relationship umbrella. In Haida Nation the Supreme Court outlined a new approach to protecting Aboriginal interests, employing the notion of the honour of the Crown, an approach subsequently followed in both Taku Tlingit and Mikisew Cree. Haida Nation represents the first time that the concept honour of the Crown has been relied upon as the source of a positive duty to act, indicating its ongoing legal evolution. While in these cases, the honour of the Crown imposes a broad duty on the Crown to consult in good faith with Aboriginal peoples pertaining to development that may affect their rights, the Supreme Court of Canada has stated that the honour of the Crown is always at stake in its dealings with Aboriginal peoples.

The involvement of Aboriginal offenders within the criminal justice system is a Crown dealing with Aboriginal peoples, rather than just an Aboriginal individual, given the often underlying criminogenic factors of colonialism, attempts at forced assimilation, cultural difference, racism
and socio-economic disadvantage that attach to Aboriginal peoples collectively, not to mention
the crisis in the rule of law for Aboriginal peoples. The imposition of the mainstream criminal
justice system on Aboriginal peoples was an element of the assertion of sovereignty by the
Crown which triggers the honour of the Crown in the form of the Canadian state. The criminal
justice system is indeed a foreign imposition, one that does not reflect Aboriginal normative
and cultural values and that disproportionately incarcera tes their members. The honour of the
Crown should also be interpreted in the context of the systemic discrimination faced by
Aboriginal people as a result of the acts of the Crown, particularly in the criminal justice
system. Courts have made it clear that government cannot act towards Aboriginal people in a
way that the courts regard as dishonourable. While the fairly narrow legal scope of the
Government’s fiduciary obligations towards Aboriginal people suggests restraint, it is
nonetheless clear that there is a governmental obligation not to act dishonourably. A
constitutionalized requirement of honourable governance is one way of understanding the
honour of the Crown in practice. 293 Discrimination against Aboriginal peoples within the
criminal justice system as judicially noticed by the Supreme Court of Canada in Williams and
Gladue, constitutes dishonourable conduct. As noted by the Court in Ipeelee, “Just sanctions
are those that do not operate in a discriminatory manner.” 294 It is difficult to conceptualize
more dishonourable conduct at least within the current Canadian context, than systemic,
institutionalized discrimination in the criminal context against a socio-economically
disadvantaged group whose situation is at least partially the result of colonialism, attempts at
forced assimilation and cultural difference. In this context, the disproportionate representation

292 Stoney Band, supra note 90.
293 Henderson, supra note 120 at 29-30.
294 Supra note 68 at para 68.
of Aboriginal peoples within the criminal justice system becomes self-explanatory. The rule of law can be seen to be in jeopardy for Aboriginal peoples given the systemic discrimination they experience within the criminal justice system and their lack of confidence and trust in its ability to deliver justice, particularly in a way culturally meaningful to Aboriginal peoples. In the Davies Commission case, the trial court concluded that the honour of the Crown applied, arising partially from circumstances that demonstrated the distrust by Canada's Aboriginal population of the justice system because of the way they have been treated historically. While there is no panacea, according to the Court in Ipeelee,

“there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.”

O’Neill J. in Dantimo and Paibomsai effectively incorporates the honour of the Crown in sentencing Aboriginal offenders, stating what is already implicitly understood. Given that poor socio-economic circumstances which are connected to a history of unresolved claims and dishonoured treaties are closely connected to Aboriginal criminality, the better question is how can the honour of the Crown not be engaged in the sentencing of Aboriginal offenders? This is to say nothing of the impacts of the colonialist imposition of a culturally foreign justice system and attempts at forced assimilation such as residential schools and the sixties scoop, all recognized as causal factors in Aboriginal offending. Racism and discrimination experienced by Aboriginal offenders both within and external to the the criminal justice system can also be said to be a byproduct of other broader historical factors, including colonialism, cultural difference and

295 Supra note 68 at para 69.
socio-economics. In *Dantimo* and *Paibomsai*, O’Neill J. recognized that reconciliation in the section 35 context spills over into Aboriginal sentencing – that so long as section 35 rights remain outstanding and unresolved, so too will Aboriginal over-representation in the criminal justice system, given underlying causal factors.

A generous interpretation of the honour of the Crown and the assertion of Crown sovereignty would also facilitate Crown / Aboriginal reconciliation as directed by the Supreme Court in *Haida Nation*. The honour of the Crown is a factor in Aboriginal sentencing; such an interpretation is fundamental to Crown / Aboriginal reconciliation and maintenance of the rule of law. As *Mikisew Cree* makes clear, the honour of the Crown arises out of the need for reconciliation between Aboriginal and non-Aboriginal people in a number of different contexts. Reconciliation is enshrined in the Canadian Constitution, at least via sections 25 and 35, if not more foundationally as an unwritten constitutional principle. The concept of reconciliation must be given a holistic interpretation in order to be meaningful to Aboriginal peoples. Reconciliation is a two way street or wampum belt; it must reflect the intentions and values of both parties, developing as an intersocietal legal concept. This thesis posits Crown / Aboriginal reconciliation as an interpretive normative principle that shapes the interpretation of criminal law and Crown obligations, including the honour of the Crown, much like the protection of minorities shaped the interpretation of law in *Lalonde*. As a normative principle, reconciliation also infuses the rule of law for Aboriginal peoples; indeed, it has the potential to rehabilitate it.

Reconciliation can be seen to require a much broader reckoning than that explicitly provided for in section 35 or those specific situations currently enumerated as governed by the honour of the
Sentencing Aboriginal Offenders: 
The Honour of the Crown, Reconciliation and Rehabilitation of the Rule of Law

Crown. The courts have made clear that reconciliation is mandated by the history of Crown / Aboriginal relations and colonialism. This distinctive history produces a legal requirement of reconciliation and honour-based governance if the rule of law is to be a reality for Aboriginal peoples in Canada. As such, reconciliation may require addressing the ills that are the outcomes of the assertion of Crown sovereignty and assimilation attempts, the denigration of Aboriginal laws and culture and the socio-economic duress that followed. In *Frontenac Ventures Corporation*, reconciliation between the Crown and Aboriginal peoples was seen as influential in sentencing the Aboriginal offenders for contempt. Reconciliation was facilitated by the Court in sentencing individuals where the interests of the community were involved and reconciliation in the individual sentencing context was seen to further reconciliation between the First Nation and the government. *Quash* is another good example of how the honour of the Crown and reconciliatory principles have been engaged in the sentencing of Aboriginal offenders. The court’s specific analysis with respect to the impact of residential schools on Aboriginal communities and Aboriginal offending in this case could be expanded to include all Crown actions, policies and failures to act that are recognized as causal factors in Aboriginal offending.

Canada must be prepared to accept responsibility and directly address some of the fallout in the criminal justice system from the history of Crown / Aboriginal relations. The honour of the Crown then requires a different sentencing approach for Aboriginal offenders independent of section 718.2(e) and reconciliation is a normative principle underlying the sentencing of Aboriginal offenders. Crown/ Aboriginal reconciliation can be seen to apply to the individual in the sentencing process given the interconnectedness of Aboriginal offending with collective criminal causal factors for Aboriginal peoples as previously enumerated. Aboriginal
criminogenic causal factors relate to the injustices perpetrated not only on the individual but also on the collective; accordingly addressing them in the sentencing of the individual offender can be said to facilitate Crown reconciliation with Aboriginal peoples.

Further, Aboriginal offender rehabilitation needs to go hand in hand with the rehabilitation of the rule of law for Aboriginal peoples as a pivotal component of reconciliation. As noted by the trial court in the *Davies Commission* case, Canada's Aboriginal population distrusts the justice system because of the way they have been treated historically. In *Dantimo* and *Paibomsai*, the court observed that longstanding Aboriginal rights issues must be resolved in order to address Aboriginal alienation from, and a lack of respect for, the justice system and to encourage respect for the rule of law. The court references the crisis in the rule of law for Aboriginal peoples in that the same Crown and justice system that for years failed them with respect to treaties and Aboriginal rights is also responsible for their criminal prosecution and sentencing. Aboriginal peoples have not been treated as being equal before the law and have not seen themselves or their values reflected in the criminal law. Given the history of Crown / Aboriginal relations in Canada, including colonialism, racism and discrimination, attempts at forced assimilation and the imposition of a foreign justice system, along with the accompanying outcomes as reflected in socio-economics and disproportionate Aboriginal representation within the justice system, sentencing law which isolates Aboriginal criminality from this greater context loses its moral foundation. As noted by Edney, the broader issue of reconciliation in the face of indigenous dispossession is nothing short of a moral reckoning of history. This moral reckoning is shared between the individual and their society, including the state and the criminal justice system. The power of the common law extends to offer a vision
of a good and moral society, one in which the rule of law has meaning for all its members, including importantly, the most oppressed and dispossessed.

Reconciliation must be understood as an intersocietal legal concept, informed by Aboriginal conceptions of reconciliation. Sentencing should incorporate restorative approaches and Aboriginal community involvement in order to facilitate reconciliation between the Crown and Aboriginal peoples and rehabilitate the rule of law. Just sanctions cannot be imposed otherwise. The lack of state or collective morality in sentencing Aboriginal offenders contributes to the demise of the rule of law for Aboriginal peoples (and arguably for non-Aboriginal Canadians). The integrity of the rule of law demands equal respect for Aboriginal peoples; the moral authority of law will only materialize for them as part of the process of reconciliation. The vigorous involvement of Aboriginal communities in mediated criminal justice approaches has the potential to bridge cultural difference and ameliorate the history of colonialist imposition of the system as well as the ensuing racism and discrimination that devolved. In the process, the rehabilitation of the Aboriginal offender will over time extend to a rehabilitation of the rule of law for Aboriginal peoples, as the criminal justice system builds a moral foundation in its dealings with Aboriginal people. If indeed, the honour of the Crown is the conscience of the country, a “constitutional therapy for the ill of colonization on Aboriginal peoples” an impoverished interpretation will not suffice.

296 Walters, supra note 142 at 189.
297 Henderson, supra note 120 at 51.
BIBLIOGRAPHY

Legislation

*Criminal Code*, RSC 1985, c C-46.


Jurisprudence


*British Columbia (Ministry of Attorney General, Criminal Justice Branch) v British Columbia (Commission of Inquiry into the Death of Frank Paul - Davies Commission)*, 2008 BCSC 817, 84 Admin LR (4th) 297.


*Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 OR (3d) 1, leave to appeal to SCC refused, [2008] SCCA No. 357.


*Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council*, 82 O.R. (3d) 721 (ON CA).
Lalonde v Ontario (Commission de restructuration des services de santé), 56 OR (3d) 505, [2001] OJ No. 4767 (ON CA).


Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388.


R v Amitook, [2006] 3 CNLR 249 (CQ).

R v Arcand, 2010 ABCA 363, 264 CCC (3d) 134.


R v Gregoire, 2009 NLTD 21, 284 Nfld & PEIR 290.


R v Jensen, [2005] OJ No. 1052, 74 OR (3d) 561 (ON CA).

R v McDonald, 2001 NSPC 7, 193 NSR (2d) 256.

R v Moses, [1992] 3 CNLR 116 (YK Terr Ct.).

R v Mumford, [2007] OJ No. 4267, 75 WCB (2d) 784 (ON SC).


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R v Potts, [1990] OJ No. 2567 (ON Prov. Div.).


R v Sim, [2005] OJ No. 4432, 78 OR (3d) 183 (ON CA).


R v Wells, 2000 SCC 10, [2000] 1 SCR.


Roncarelli v Duplessis, [1959] SCR 121.


Secondary Material


Correctional Service Canada. Aboriginal Offenders a Statistical Analysis (2011) [unpublished].


Dell, Colleen Anne & Tara Lyons. Harm Reduction Policies and Programs for Persons of Aboriginal Descent (Ottawa: Canadian Centre on Substance Abuse, 2007).


Fuller, Lon L. “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) 71 Harv L Rev 630.


House of Commons, Standing Committee on Justice and Legal Affairs. Minutes of Proceedings and Evidence no. 62 (Nov. 17, 1994).


___, *Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation* (Ottawa: Indian and Northern Affairs Canada, 2010).


Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide* (Ottawa: Canada Communications Group, 1995).


