Her Majesty the Queen v. Collins
[Indexed as: R. v. Collins]

104 O.R. (3d) 241
2011 ONCA 182
Court of Appeal for Ontario,
O'Connor A.C.J.O., Rosenberg and R.P. Armstrong
JJ.A.
March 7, 2011

Criminal law -- Sentencing -- Aboriginal offenders -- Aboriginal accused playing role in large-scale welfare fraud -- Accused not having primary responsibility for fraudulent scheme -- Accused having no criminal record, caring for disabled daughter and taking part in scheme to feed gambling addiction -- Accused's appeal from sentence of 16 months' incarceration allowed -- Trial judge erring in his application of Gladue -- Aboriginal offenders not required to establish causal link between systemic and background factors and commission of offence -- Nature of offence requiring custodial disposition but shorter period of imprisonment and longer probation term appropriate given Gladue factors and circumstances of offender -- Sentence varied to ten months' incarceration and two years' probation.

The accused, a 51-year-old aboriginal first offender, pleaded guilty to fraud over $5,000. She participated in a large-scale fraud directed at the Ontario Works program delivered on the Fort William First Nation ("FWFN"). The FWFN Ontario Works program administrator and the Ontario Works caseworker created and authorized false client applications and issued cheques. The accused provided identities for which false claims were created and cashed the cheques issued on those files. She processed 67 cheques with a total value of over $96,000, of which she retained approximately $65,000 for her own benefit. She committed the offence to feed a gambling addiction. She had a disabled daughter. The accused's father attended a residential school as a child, and her mother was raised in a home riddled with substance abuse and violence. The sentencing judge considered s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46 and the Gladue factors but found that "the evidence does not support the argument that systemic factors are responsible for bringing the accused before the court". He also found that, while the accused did not have an easy upbringing, "the responsibility for what she has done must be hers". He sentenced the accused to 16 months' incarceration followed by two years' probation and ordered her to make restitution in the amount of $96,000. The accused appealed.

Held, the appeal should be allowed.

There is nothing in the governing authorities that places the burden of persuasion on an aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence. Further, s. 718.2(e) and the Gladue approach to sentencing aboriginal offenders 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 the members of that society. In this case, the systemic and background factors affecting the FWFN generally and the accused in particular must have played a part in bringing her before the courts.

Her earliest years were shaped by abject poverty, and she grew up in an atmosphere of dislocation, discrimination and alienation. Even if the systemic and background factors did not play a part in bringing the accused before the courts, the Gladue principles still required recognition of the impact of Canada's treatment of its aboriginal population in shaping the appropriate sentence.

Fresh evidence was admitted on consent indicating that the accused was addressing her gambling addiction and that the Band council was supportive of her. The offence had divided the community, with some elders taking the position that she should be prosecuted to the full extent of the law, and others praising her as devoted wife and mother who should not be incarcerated. The trial judge was correct that given the need for deterrence and denunciation for this type of offence, a custodial disposition was required, even though the accused was neither the sole nor the primary offender in this scheme. The trial judge erred in not giving sufficient weight to the impact of the accused's incarceration on her disabled child and upon the accused, who would be separated from her child for the first time in 18 years. Giving proper weight to the Gladue factor and the accused's circumstances, a shorter period of incarceration and a longer period of probation would be appropriate.

The sentence was varied to ten months' incarceration followed by two years' probation. The restitution order was affirmed.

APPEAL by the accused from the sentence imposed by G.P. Smith J. of the Superior Court of Justice dated October 20, 2009.

Cases referred to R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19, 171 D.L.R. (4th) 385, 238 N.R. 1, J.E. 99-881, 121 B.C.A.C. 161, 133 C.C.C. (3d) 385, [1999] 2 C.N.L.R. 252, 23 C.R. (5th) 197, 41 W.C.B. (2d) 402; R. v. Kakekagamick (2006), 2006 CanLII 28549 (ON CA), 81 O.R. (3d) 664, [2006] O.J. No. 3346, 214 O.A.C. 127, 211 C.C.C. (3d) 289, 40 C.R. (6th) 383, 70 W.C.B. (2d) 470 (C.A.); R. v. Wells, [2000] 1 S.C.R. 207, [2000] S.C.J. No. 11, 2000 SCC 10 (CanLII), 182 D.L.R. (4th) 257, 250 N.R. 364, [2000] 3 W.W.R. 613, J.E. 2000-414, 250 A.R. 273, 141 C.C.C. (3d) 368, [2000] 2 C.N.L.R. 274, 30 C.R. (5th) 254, 45 W.C.B. (2d) 80, consd Statutes referred to Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e) Ontario Works Act, 1997, S.O. 1997, c. 25, Sch. A [as am.]

Michael Dineen, for applicant/appellant.

Dena Bonnet, for respondent.

The judgment of the court was delivered by

[1] ROSENBERG J.A.: -- The principal issue in this sentence appeal is the application of the principles set out in s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46 and R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19 to an aboriginal offender involved in a serious fraud on the public. The appellant pleaded guilty to one count of fraud over $5,000, for her part in a much larger fraud directed at the Ontario Works program delivered on the Fort William First Nation ("FWFN"). G.P. Smith J. imposed a sentence of 16 months'

incarceration followed by two years of probation, and made a restitution order for $96,000. The appellant submits that the sentencing judge misapplied the Gladue principles and erred in failing to impose a conditional sentence of imprisonment. In the alternative, the appellant submits that the length of the prison sentence should be reduced. For the following reasons, I would allow the appeal and reduce the sentence of imprisonment to ten months. The Facts

The general scheme

[2] Social assistance benefits are delivered in Ontario under the authority of the Ontario Works Act, 1997, S.O. 1997, c. 25, Sch. A. The Ontario Works program provides temporary financial assistance to Ontario residents most in need while they satisfy obligations to become and stay employed. First Nations territories in the province are exempt from the search-for-work requirements of the Act. The FWFN is a federal reserve adjacent to the City of Thunder Bay. The Ontario Works program is administered on the FWFN through a local delivery agent office using specialized software systems that maintain a client database. The FWFN Ontario Works program computer system is separate from the networked computer systems utilized by the FWFN Band administration for other programs, and is independent from the networked system of the Province of Ontario. For this reason, the province cannot electronically monitor the FWFN social assistance database.

[3] Between 2000 and 2002, the FWFN Ontario Works program administrator was Shirley Allan. Her role was to validate client records and applications, and authorize benefit payments to clients who met eligibility criteria. Upon Ms. Allan's authorization, the computer software would print out benefits cheques in the name of clients, in amounts determined by the software based on family size and declared needs. During the same time, Rochelle Johnson was the Ontario Works caseworker. She is also the appellant's sister. Like Ms. Allan, Ms. Johnson received, validated and authorized client records and applications, and would approve or disapprove benefit payments. Both were commissioners of oaths, and both swore oaths of confidentiality as part of their employment.

[4] The fraudulent scheme was committed through the creation and authorization of false client applications. False client files were created by the submission of fraudulent materials misrepresenting the residency and/or financial status of individuals. Some of the files had forged signatures or were not signed at all. Some formerly legitimate and deactivated files were fraudulently reactivated. In all these cases, Ms. Allan and Ms. Johnson approved these applications and issued cheques. People complicit in the scheme would either cash the cheques for themselves or deliver them to the complicit payee and divide the proceeds upon redemption. During the relevant time, only Ms. Allan and Ms. Johnson had access to the computer to generate and approve applications and cheques until Annabelle Bell was hired as a caseworker in the summer of 2002. Ms. Bell was not a suspect in the fraud.

[5] The investigation into the fraudulent activity commenced on January 13, 2003, when Walter Bannon, a participant in the fraud, initiated a complaint and turned over documentary evidence to the police. Mr. Bannon named Shirley Allan as a participant and encouraged Ms. Allan to contact the police herself, which she did on January 14, 2003. Ms. Allan described in detail her

own involvement in the scheme, as well as the participation of the other accused, including the appellant.

[6] Several participants in the fraud were sentenced prior to the appellant. Shirley Allan, a central figure in the fraud, whose participation amounted to a breach of trust, but who co- operated in the police investigation, received a 26-month sentence. Rochelle Johnson received a total sentence of two years. Walter Bannon, whose involvement was similar to, but shorter than, the appellant's, received a conditional sentence of two years less one day, in recognition of his co-operation. He had a significant criminal record. In addition, restitution orders were made against Mr. Bannon and Ms. Allan. Giselle Thibert, who cashed $65,000 in cheques, was sentenced to nine months' imprisonment; she had a related criminal record but it was shorter than Mr. Bannon's. Maurice Solomon, whose participation was limited to receipt of $3,000, received a six- month conditional sentence order and a restitution order; he also had a criminal record.

[7] The total estimated financial loss due to the fraudulent activity while the scheme was operating is $1.285 million. The scheme led to the FWFN bank account often being in an overdraft position, which led to interest charges totalling approximately $17,000. Some innocent people, whose identities were used in the scheme, suffered financially because, when they required social assistance, it was refused as they were already shown to be receiving assistance.

Appellant's participation in the scheme

[8] The appellant was one of the earliest participants in the scheme. She was approached by family members employed by the Band and was asked to participate in this scheme. Her role was to provide identities for which false claims were created and to cash the cheques issued on those files. The appellant collected and cashed benefit cheques in several formats: cheques written in the appellant's name; in her middle name; in the name of other individuals; and in her name as a trustee for beneficiaries. All of these cheques were fraudulent. Some of the named individuals on the cheques were complicit in the fraud, while others were unaware that cheques had been issued in their name or that their name was used as a beneficiary in the appellant's trusteeship. It was also alleged that the appellant stole at least three blank cheques, which she made out in amounts totalling $15,500 payable to herself.

[9] Handwriting analysis indicated that with two exceptions, one person had signed all the payee signatures and all the endorsements signing those cheques over to S. Collins or J. Collins. The appellant used five separate banking accounts to process 67 cheques. The total value of these 67 cheques was $96,298.51.

[10] There was some dispute as to how much money the appellant actually kept and how much she kicked back to other participants in the scheme. The synopsis of facts that was filed at the sentence hearing contains this statement:

> The amount attributable to Susan Collins' participation in this scheme is approximately $68,500. This calculation is based on her collection of benefits as a fraudulent trustee, and as the third party to whom cheques were fraudulently signed over.

[11] In his submissions on sentence, defence counsel was vague as to how much the appellant admitted receiving:

> My client believes that the sum that she profited from that is substantially less [than $96,000] because part of the scheme was, "We give you cheques in your name, you go cash it, we get the lion's share of it, you get to get some of your gambling money out of it." But obviously she didn't keep records in that regard.

[12] Crown counsel in her sentencing submissions appeared to accept this submission, although she put it in an aggravating context:

> And she was participating, assisting, actively engaged and the suggestion we hear today is that she was even paying kick-backs, that they were taking a chunk of the fraudulent monies that she was obtaining. So she's very clearly actively participating in the breach of trust.

[13] The money the appellant did receive went to feed her gambling addiction, either lost at the local casino or used to replace money from the family bank account that she lost gambling, in order to conceal her gambling from her husband.

[14] The appellant's husband believes that his wife was intentionally targeted and enticed into illegal activities because of her gambling addiction. A letter from the appellant's pastor also touches on the same theme. The pastor, who has known the appellant and her family since 1972, indicated that participation in a welfare fraud was out of character for her and surmised that she was influenced by family members:

> It is unfortunate she got caught in the welfare fraud scheme with a lot of family and friends -- family loyalty is a strong virtue on most reserves, which at times can open one to become participant with one's circles.

The appellant's background

[15] The appellant was 51 years of age at the time of sentencing and had no criminal record. She was born in Thunder Bay, the fourth of ten children. Her father was born on a First Nation reserve in the Georgian Bay area and had attended a residential school. He never spoke with his children about his experiences there. As a young man, he relinquished his treaty rights to become a Canadian citizen. The appellant's mother was born and raised on the FWFN reserve, in a home riddled with substance abuse and violence. She married the appellant's father at age 17 and lost her aboriginal status as a result of her husband's earlier enfranchisement. After they married, the appellant's parents lived as outcasts on the periphery of the FWFN community since they no longer had the right to live in the reserve community. None of their children held Indian status, and the family was discriminated against because they were not considered to be part of the aboriginal community. The children routinely witnessed violence between their parents.

[16] The appellant was seven when her father left the home, leaving her mother to care for ten children, without eligibility for any social assistance from her own community. Eventually, they were able to move into a home on the reserve, but the children were shunned and ostracized by

community members because of their lack of status. The appellant's mother believes that many of the problems her children faced in their adult lives can be traced to the racism they experienced from their own community during their childhood years.

[17] Historically, the FWFN was a prosperous community due to the economic gains of commercial fishing. Many of the children in the community attended a school in Squaw Bay, which was administered by the Roman Catholic Church. The majority of the community members abandoned their cultural practices when they adopted the Catholic faith, which continues to have a strong following on the reserve. The prosperity and wellness of the FWFN began to decline for several reasons, not least of which was the dislocation of community members due to attendance at the residential schools. When the children returned as young adults, they lacked connection to their community and heritage. Substance abuse, family violence and cases of sexual abuse increased. Changes in the economy resulted in unemployment that encompasses the majority of its members. Most community members live below the poverty line.

[18] The appellant married her husband in 1980 and gained aboriginal status rights at that time. The appellant's mother, along with her ten children, regained Native status rights in 1985, when the Canadian Government passed Bill C-31.

[19] The appellant had a child from a previous relationship and had three more children with her husband. Their youngest daughter suffered a stroke two weeks after her birth, leaving her with permanent brain damage and paralysis. The appellant has been her full-time caregiver for the last 18 years. The appellant's husband was the Chief of the FWFN at the time of the offence. He is the sole provider in the household. Their marriage has suffered through hardships over the years. While neither have a history of substance abuse, their children have not been as fortunate. Their oldest son is currently serving a federal term of incarceration. The appellant suffers from a gambling addiction, which her husband has financed throughout the years. Her gambling has led to stress in their marriage.

[20] The appellant was willing to make restitution and defence counsel indicated that he had $10,000 in his trust account that was immediately available for that purpose.

[21] Prior to sentencing, the appellant suffered from three brain aneurysms, one of which required surgery in 2005. Her memory began to deteriorate, and as a result, she was referred for a neuropsychological assessment in December 2007. The report from the assessment noted that the appellant's IQ falls in the "extremely low range" compared to other people her age. Her working memory and verbal comprehension were "low average" in comparison to people in her education group (grade 8). The report also noted the appellant's processing speed was poor. While her condition has stabilized, she suffers from a decline in memory, language and processing speed that is most likely connected to her aneurysms.

Other community information

[22] The pre-sentence report indicates that the large fraudulent scheme has divided and severely damaged the relationships of many families on the First Nation. This is evident from letters filed

at the sentence hearing. Letters addressed to the Crown Attorney from several elders of the community urge that the perpetrators of the fraud be prosecuted to the full extent of the law and not given "community service". The letters particularly target the appellant's husband, who was Chief during the time of the fraud and who they claim must have known of the fraud perpetrated by the appellant and several of her relatives. (The Crown made no allegation that the appellant's husband was involved in the fraud.) Letters to the appellant's trial counsel that were filed at the sentence hearing are quite different. They describe the appellant as a loving mother and devoted wife and urge that the family be kept together and that the appellant be required to reimburse the community through restitution and community service rather than imprisonment.

The Trial Judge's Reasons for Sentence

[23] The trial judge held that, in major fraud cases, denunciation and deterrence are the paramount considerations and that mitigating factors and rehabilitation of the accused become secondary. The trial judge discussed at length the impact of s. 718.2(e), Gladue and this court's decision in R. v. Kakekagamick (2006), 2006 CanLII 28549 (ON CA), 81 O.R. (3d) 664, [2006] O.J. No. 3346 (C.A.). The trial judge referred to his own reasons for sentence in another case in these terms:

> A sentencing judge must perform a three-way balancing act -- that is, the judge must balance the competing sentencing principles, the interests of the offender, and the interests of the community before reaching a conclusion. How this differs from the balancing that is performed in the sentencing of non-Aboriginal offenders is that the interests of the offender will be different. There will be a focus on the past circumstances of the offender that may have brought him or her before the court, such as addiction, abuse, poverty, just to name a few. There should also be a consideration of the communal values of the Aboriginal heritage, and an analysis of whether the offender would have a better opportunity of rehabilitation if he is sentenced within his community where he can receive spiritual guidance from band elders, or other rehabilitative techniques that are culturally specific.

[24] The trial judge considered the principles to be applied where a conditional sentence of imprisonment was sought and referred, in particular, to R. v. Wells, 2000 SCC 10 (CanLII), [2000] 1 S.C.R. 207, [2000] S.C.J. No. 11. As applied to fraud cases, the trial judge held that factors to be considered are the amount of money involved, the time period over which the fraud took place, the likelihood of restitution, display of remorse and the role played by the offender in the fraud. The trial judge noted the size of the entire fraud and accepted that the appellant's personal participation was in the sum of $96,289.51, of which she retained approximately $65,000 for her own benefit. He considered the appellant to have been an active participant in the fraud and that her acts in finding and supplying false identities were crucial to the opening of false files. He found that the length of time of the fraud and the significant degree of planning and participation were aggravating factors. The trial judge found that the appellant's motivation "was simply greed, fuelled in part by her admitted gambling addiction". The appellant did not offer any co- operation in uncovering the fraud and her involvement ended only when she was apprehended. He thought it unlikely that the appellant would be able to make full restitution.

[25] The mitigating factors identified were the appellant's guilty plea, age, lack of prior record, her health issues and her responsibility for caring for her disabled daughter. The trial judge, however, minimized these latter two factors. He noted that the medical evidence did not show any current concerns for the appellant's own health. As far as the appellant's daughter, the trial judge found that there was no evidence that she could not function without the appellant's assistance or that incarcerating the appellant would place her daughter in jeopardy. He said this:

> If [the daughter] requires so much of her mother's care that jail would jeopardize her care, one cannot but wonder why the accused spent so many hours gambling away the proceeds of her share of the fraud in the local casinos.

[26] The trial judge then turned to application of what he termed "the so-called 'Gladue' factors that have contributed to bringing Susan Collins before the Court". The trial judge reviewed the information concerning systemic factors on the FWFN generally and then said as follows:

> Notwithstanding the evidence that the poverty and suffering on the Fort William First Nation Reserve is considerable and that the residential school experience is in part responsible, I find that the evidence does not support the argument that systemic factors are responsible for bringing the accused before the court. In any event, this is the type of case referred to in Wells where the seriousness of the crime and need for denunciation take precedence over any other considerations.
>
> On this point, I adopt the comments of Richards J.A. in R. v. Gopher, [2006] S.J. No. 12 (C.A.), who said, at para. 39, that:
>
> > No community, aboriginal or non-aboriginal, can succeed and move forward unless its members have faith that public affairs are conducted honestly and in accordance with the law. The significance and nature of the offences at issue in this case and the overwhelming need to clearly denounce them and to deter similar offences, tend to leave little room to give effect to the unique circumstances of aboriginal offenders (emphasis added).
>
> It is clear that Ms. Collins did not have an easy upbringing however the responsibility for what she has done must be hers. She made a choice to become involved in the fraudulent scheme and she actively became a key player. She had numerous opportunities to resile from the scheme but chose to stay involved. Her actions have hurt and divided her community. They have also caused damage to those whose identities were stolen as well as some who were not able to receive benefits because their names have been used in the fraud. (Emphasis added)

[27] The trial judge concluded that a conditional sentence would not reflect the seriousness of the offence, the moral blameworthiness of the appellant, the need for general deterrence, sentences imposed in similar cases and the degree of the appellant's participation. The trial judge also noted that confidence of Band members and the public confidence in the Band administration and aboriginal leaders to manage their affairs and govern themselves had been severely damaged by the fraudulent scheme. He concluded with this comment:

> Each individual must be accountable for their own actions. Blaming others, your upbringing or minimizing one's participation cannot, generally speaking for serious crimes such as large scale fraud, absolve a person from the consequences of their actions. The Fresh Evidence

[28] With the consent of the Crown, the appellant filed fresh evidence consisting of the following:

> A certificate of completion of a brief (4 day) gambling information and treatment group;
>
> A Band Council Resolution supporting consideration of "restorative justice alternate conditional sentence rather than incarceration";
>
> A letter from an Elder indicating that the appellant realized that she had a gambling addiction and is willing to continue to seek help for that addiction;
>
> Letters confirming the appellant's volunteer work, including work at an Addictions Awareness Conference in 2010 and at the FWFN Annual Pow-wow. Analysis

[29] Counsel for the appellant submits that the trial judge erred in two respects. He erred in his application of s. 718.2(e) as interpreted in Gladue and Wells from the Supreme Court of Canada and Kakekagamick from this court. Second, he erred in imposing a sentence that was excessive in the circumstances.

[30] I agree with the appellant that the trial judge erred in his application of Gladue, Wells and Kakekagamick. The error is presented most starkly in this passage from the trial judge's reasons:

> Notwithstanding the evidence that the poverty and suffering on the Fort William First Nation Reserve is considerable and that the residential school experience is in part responsible, I find that the evidence does not support the argument that systemic factors are responsible for bringing the accused before this court. In any event, this is the type of case referred to in Wells where the seriousness of the crime and the need for denunciation take precedence over any other considerations.

[31] This theme was picked up again at the conclusion of the trial judge's reasons:

> Each individual must be accountable for their own actions. Blaming others, your upbringing or minimizing one's participation cannot, generally speaking for serious crimes such as large scale fraud, absolve a person from the consequences of their actions.

[32] There is nothing in the governing authorities that places the burden of persuasion on an aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence. Further, s. 718.2(e) and the Gladue approach to sentencing aboriginal offenders 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 the members of that society.

[33] As expressed in Gladue, Wells and Kakekagamick, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": Gladue, at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge. As counsel for the appellant submitted in this case, it would be almost impossible for most aboriginal offenders to establish a direct causal link between systemic factors and any particular offence. Commission of offences are affected by a host of circumstances, the systemic factors of the particular aboriginal community may, as the name suggests, be nothing more than the background or the setting for commission of the offence. However, the Gladue principles require those factors to be taken into account. In cases where those factors are shown to have played a significant role, it may be that imprisonment will utterly fail to vindicate the objectives of deterrence or denunciation: Gladue, at para. 69. In other cases, where the impact is not as dramatic, those systemic and background factors must nevertheless be taken into account in shaping the appropriate penal response.

[34] 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.

[35] Even if the systemic and background factors did not play a part in bringing the appellant before the courts, the Gladue principles still require recognition of the impact of Canada's treatment of its aboriginal population in shaping the appropriate sentence. The court is required to consider how this particular offender has been affected by those systemic factors. As the court said in Gladue, at para. 80:

> As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances? (Emphasis added)

[36] And, as the court said, at para. 81: "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." And again, at para. 68:

> It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the

> circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions. (Emphasis added)

[37] I conclude this discussion with the point made by LaForme J.A., at paras. 34 and 35, of Kakekagamick:

> Nor is being an Aboriginal offender, as I have heard it referred to, a "get out of jail free" card.
>
> Rather, s. 718.2(e) was enacted as a remedial provision, in recognition of the fact that Aboriginal people are seriously over-represented in Canada's prison population and in recognition of the reasons for why this over-representation occurs.

[38] Given the trial judge's error in principle, it falls to this court to impose a fit sentence. I acknowledge that this is a particularly difficult sentencing decision. I accept the trial judge's finding that the scheme, of which the appellant was a participant, had a serious impact on the First Nation and undermined public confidence in the First Nation's ability to administer the social assistance system and governance generally. The divisions in the community created by this fraudulent scheme are testified to by the letters filed at trial and on this appeal.

[39] But there also must be a measure of proportionality. The appellant was one of many involved; she did not bear entire, even primary, responsibility for administering either the social assistance system or the fraudulent scheme. The trial judge explicitly recognized this fact in both his reasons and in imposing a sentence of 16 months, which was less than that imposed on Ms. Johnson (two years) and Ms. Allan (26 months). But that, in my view, is the central problem with the sentence imposed. It was shaped by the trial judge's assessment of the appellant's level of participation in the broader scheme and without factoring in the Gladue principles. When those factors are taken into account, a different sentence was required. A sentence which admittedly must, as well, take into account the range of sentences imposed on the other perpetrators, such as Giselle Thibert.

[40] I have reluctantly concluded that this is not an appropriate case for a conditional sentence of imprisonment. The offence was too serious and the need for general deterrence and denunciation overwhelming. However, the Gladue principles mandated consideration of the least intrusive punishment consistent with the appropriate objectives. As the court said in Gladue, at para. 93: "If there is no alternative to incarceration the length of the term must be carefully considered."

[41] There are other factors at play as well, including the long period of release on bail, the lack of criminal record and the appellant's service to the community. I would also give more weight than the trial judge to the impact on the appellant of being separated from her disabled daughter. It is one thing to be away from that child for a few hours a week spent gambling than to be

completely removed from her for a period of months. It is not just the impact on the child; the wrenching experience imprisonment would represent for a mother who has devoted the past 18 years of her own life caring for her disabled child must be considered.

[42] In my view, the appropriate disposition would be a sentence composed of a relatively lenient period of incarceration to be followed by a lengthy period of probation. Disposition

[43] Accordingly, I would allow the appeal from sentence and reduce the sentence of imprisonment to ten months to be followed by two years' probation on the terms imposed by the trial judge. I would not interfere with the restitution order.

Appeal allowed.