The Big Chill?: Contextual Judgment after R. v Hamilton

Richard Devlin
*Dalhousie University*

Matthew Sherrard
*McInnes Cooper*

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The tone and thrust of the Ontario Court of Appeal's decision in \textit{R. v. Hamilton} will serve to chill efforts by sentencing judges to tailor their responsibilities to accord with the recognized realities of systemic and intersectional inequality in Canadian society. The decision presents an unduly conservative response to the judicial function question, and an understandable, if excessively cautious, answer with regard to the application of systemic, intersectional inequality issues in practice. Specifically, the decision underplays the overall remedial goal of section 718 of the Criminal Code by overemphasizing the particularity of Aboriginal peoples, and ignoring the specificity of especially vulnerable communities who suffer from intersecting forms of inequality. However, the Court of Appeal was correct to insist on the production of evidence by which to assess the particulars of each case, and in \textit{Hamilton} the evidentiary link was insufficient. Social contextualism must be continually integrated into the common law in accordance with Charter values, but this is not solely the responsibility of judges. It must be perceived as a systems value applicable to all participants in the criminal justice system.

Le ton et la portée de la décision de la Cour d'appel de l'Ontario dans \textit{R. v. Hamilton} vont refroidir les efforts des juges qui déterminent les peines pour adapter leurs responsabilités aux réalités reconnues de l'inégalité systémique et de la discrimination multiple dans la société canadienne. La décision est une réaction indûment circonspecte à la question relative à la fonction judiciaire et une réponse compréhensible, quoique prudente à l'extrême, à l'application, dans la pratique, de l'inégalité systémique et de la discrimination multiple.

Plus précisément, la décision sous-estime les mesures correctives envisagées par l'article 718 du Code criminel en accordant une trop grande importance à la particularité des peuples autochtones et en laissant de côté la spécificité des collectivités les plus vulnérables qui souffrent de discrimination multiple. Toutefois, la Cour d'appel a raison lorsqu'elle insiste sur une preuve adéquate à la lumière de laquelle il faut examiner les circonstances de chaque cas, et dans \textit{Hamilton}, les liens étaient insuffisants. La contextualisation sociale doit continuellement être intégrée à la common law, conformément aux valeurs préconisées par la Charte des droits et libertés de la personne, mais ce n'est pas la responsabilité des seuls juges. Elle doit être perçue comme une valeur systémique applicable à toutes les parties prenantes du système de justice pénale.

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\* Professor and Associate Dean of Graduate Studies and Research, Dalhousie Law School; University Research Program, Dalhousie University

\** Combined Honours BA (International Development - Dalhousie/Contemporary Studies - King's College), LL.B. (Dalhousie). Matt will be clerking with Madam Justice Tremblay-Lamer of the Federal Court (Trial Division) from September 2006 to August 2007. He is an articled clerk with McInnes Cooper (Halifax).
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Impartiality is one thing, indifference another. A judge may show alertness to the problems of our days without putting his impartiality into jeopardy.

Canadian Judicial Council

Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison.

Lamer C.J.

Introduction

In 1994, the Canadian Judicial Council endorsed the idea that judges should be aware of social context issues in the exercise of their power of judgment when it passed a resolution “approv[ing] the concept of comprehensive, in-depth, credible education programs on social context issues which include gender and race.” Three years later, the Council reaffirmed that it was committed “to provide opportunities for the judges in their courts to attend social context programs in at least the areas of gender equity, racial equity, and Aboriginal justice.” Similarly, in a number of leading cases, including R. v. Lavallée,5 R. v. R.D.S.6 and R. v. Gladue,7 the Supreme Court of Canada has confirmed that it is legitimate, indeed essential, that judges

explore the significance of social context as they fulfil their responsibility for impartial judgment.8

More concretely, former Chief Justice Antonio Lamer has argued that if we want "better judges" then we can do so "by making them more aware of the broader social, economic, cultural and political context within which ... judges function in a society as diverse as Canada."9 Recently, the current Chief Justice, Beverley McLachlin, has argued that the new paradigm of substantive equality... requires us to recognize the context of historical, racial and ethnic inequality and the myths and stereotypes that this context has produced. It requires us to disabuse ourselves of these preconceived notions, acknowledged or unacknowledged, to understand the reality that disadvantaged groups face, and to examine the claim of unequal treatment afresh on the basis of this understanding.10

Reviewing the case law, she has emphasized the "importance ... of adapting the law to combat the problem of widespread racism in society," of recognizing that "courts can and should take proactive steps to recognize racism and prevent it from compromising trials and thereby marring justice," and that "law is seen as a tool to combat inequality, and enhance substantive equality."11 Pointedly, the Chief Justice concluded, "[o]ur way to equality is not equality by homogeneity."12 In response to these initiatives, the National Judicial Institute has delivered a number of programmes designed to assist judges to come to terms with the substantive, methodological and skills dimensions of socially contextual decision-making.13

Despite these vitally important exhortations and developments, the question remains: how, exactly, is a judge to factor in social context in the day-to-day performance of her/his tasks? In the abstract, contextualism

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11. Ibid. at 21-22.
12. Ibid. at 22.
might sound laudable\textsuperscript{14}; but on the ground, when litigants and their lawyers are presenting their cases, how is a judge to dovetail the generalities of social context with the particularities of an individual case? How is a judge to fit the tongue of specific circumstances into the groove of systemic and structural forces of inequality? If equality is not homogeneity, then what is it? An insight into these challenges is to be found in the recent Ontario Court of Appeal decision, \textit{R. v. Hamilton}.\textsuperscript{15}

In the penultimate paragraph of \textit{Hamilton}, Doherty J.A., in delivering the unanimous reasons for judgment on behalf of himself and O'Connor A.C.J.O. and Gillese J.A., notes that the case is "a significant appeal for the administration of justice."\textsuperscript{16} In this essay, we will take this claim one step further to suggest that \textit{Hamilton} is perhaps the most important case since \textit{R.D.S.}\textsuperscript{17} on the issues of social context and the appropriate judicial function. In \textit{R.D.S.} the Supreme Court of Canada, by a bare majority, accepted that it is appropriate for a trial judge to take into consideration the social context.

\begin{itemize}
  \item[14.] Undoubtedly there are some in the judiciary and elsewhere who are opposed to the contextualist method, see, e.g., Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1. However, in light of the previously mentioned resolutions of the Canadian Judicial Council and directions from the Supreme Court of Canada, there can be little doubt that contextualism is the new orthodoxy. The focus in this essay is not whether contextualism is legitimate; it is how to do contextualism.
  \item[15.] \textit{R. v. Hamilton} (2004), 72 O.R. (3d) 1 [\textit{Hamilton}].
  \item[16.] \textit{Ibid.}, ¶166.
  \item[17.] \textit{Supra} note 6.
\end{itemize}
of systemic racism\textsuperscript{18} in making determinations of credibility.\textsuperscript{19} In the trial level decision of \textit{Hamilton},\textsuperscript{20} Justice Casey Hill followed \textit{R.D.S.} to impose conditional sentences on two black female drug couriers, justifying his decision on the systemic and intersectional dynamics of poverty, race, gender. The Ontario Court of Appeal pronounced that he was wrong to do so. We will argue that, while some of the points made by the Court of Appeal might be justified on the particulars of this case, the overall tone and thrust of the decision represents a problematic conception of the judicial function and will chill efforts by trial judges to tailor their

\begin{footnotesize}
18. Throughout this essay we use the term "systemic racism" to denote not only the existence of racism in Canadian institutions (education system, legal system, etc.) but also in the broader sense of the term. Systemic racism therefore refers to the prevalence of racism in all facets and realms of society—institutional, cultural, political, social and economic—that directly impact on the lived realities of those it affects. This conception has been accepted by both government and the courts. In \textit{R. v. Parks} the Ontario Court of Appeal quoted with approval the following:

\begin{quote}
[The government recognizes that throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society (such patterns and practices as they affect racial minorities being known as systemic racism): Government of Ontario, "Terms of Reference: Commission on Race Relations in Criminal Justice" at 1, cited in \textit{R. v. Parks} (1993), 84 C.C.C. (3d) 353 ¶ 49 (Ont. C.A.) (leave to appeal refused [1994] 1 S.C.R. x) [\textit{Parks}].
\end{quote}


\end{footnotesize}
responsibilities to the realities of systemic and intersectional inequality in Canadian society.

I. Facts

The respondents, Ms. Hamilton and Ms. Mason, were detained at Pearson International Airport on suspicion of being drug couriers ("mules") for cocaine being smuggled from Jamaica. The suspicions proved accurate, with Ms. Hamilton having ingested ninety-three pellets of cocaine and Ms. Mason eighty-three. Some of the pellets leached into Ms. Hamilton’s bloodstream and she became critically ill. Eventually, she recovered. Both respondents pled guilty. Ms. Hamilton was an impoverished, single black mother on social assistance with three children. She had been physically abused by the father of two of her children. She had couriered the cocaine for compensation but otherwise had no stake in the drug scheme. Ms. Hamilton reported that her decision was "a direct result of her financial hardship"; she had left school in grade nine due to her pregnancy with her first child, she received no assistance from the fathers of the children, and due to her limited education she had few marketable skills and her childcare obligations further restricted her employment opportunities. Ms. Mason was also a single black mother with two children and received no financial support from the father. She too had no criminal record.

The trial judge, Casey Hill, imposed a twenty-month conditional sentence on Ms. Hamilton, and a twenty-four months less a day conditional sentence on Ms. Mason. This result was reached after sentencing proceedings that lasted several months, that included the calling of an expert witness, reviews of approximately one thousand pages of social science and statistical materials that the judge brought to the attention of counsel, and lengthy submissions by both the Crown and defence. Justice Hill’s reasons for decision ran to 237 paragraphs plus some 80 footnotes.


23. Supra note 15 ¶ 16-25.
Pivotal in his reasoning was an acute awareness of the intersecting and interlocking dynamics of gender, poverty and race. He observed that

[offenders like those before the court are subject to both the systemic economic inequality of women caring on their own for young children and the compounding disadvantage of systemic racism securing their poverty status. These individuals, almost inevitably without a prior criminal record, are in turn conscripted by the drug distribution hierarchy [targeting] their vulnerability. Poor, then exploited in their poverty, these women when captured and convicted have been subjected to severe sentences perpetuating their position of disadvantage while effectively orphaning their young children for a period of time.]

The Crown appealed on the basis that the sentences were too low and did not accord with the principles of sentencing for cocaine importation. The Court of Appeal unanimously agreed that Justice Hill had committed a reversible error, and that a more appropriate sentence would be twenty months imprisonment for Ms. Hamilton and twenty-four months less a day imprisonment for Ms. Mason. However, in light of the duration of the appeal process, and the fact that the respondents had served almost seventeen months of their conditional sentences, the Court found that the “hardship” of imprisonment was “readily apparent.” Hence, the Court of Appeal concluded that “[t]he administration of justice would not be served by incarcerating the respondents for a few months at this time.”

II. Analysis
The Court of Appeal’s reasons for this decision could be analyzed from a number of perspectives including, for example, the war on drugs, sentencing principles, floodgate concerns, the significance of potential

24. Hamilton, supra note 20 ¶ 198.
26. Supra note 15 ¶ 166. In reaching this conclusion the Court of Appeal effectively appeal-proofed their decision. This is unfortunate because this decision appears to be at odds with another recent decision of the Ontario Court of Appeal, R. v. Borde (2003), 8 C.R. (6th) 203 [Borde] in which a differently constituted bench is much more sympathetic to contextualist method. It is also unfortunate that the Supreme Court of Canada refused leave to appeal a companion case to Hamilton and Mason, see R. v. Spencer (2004), 72 O.R. (3d) 47 (Ont. C.A.), leave to appeal to S.C.C. refused. [2005] WL1477801 [Spencer].
27. D. Tanovich, supra note 19.
deportation, restorative justice principles, the impact of delays in proceedings, appellate court deference to sentencing judges, and/or the role of expert evidence. For the purposes of the present discussion, we concentrate primarily on addressing two issues: the broader question of how trial judges should conduct themselves in court if there is concern about social context (the “judicial function” question); and, the narrower question of how a trial judge might funnel the realities of systemic inequality to the facts of a particular case (the “doing contextualism” question). We will suggest that the Court of Appeal presents an unfortunate and chilling response to the judicial function question, and an understandable, if excessively cautious, answer to the doing contextualism question.

1. The “judicial function” question
There is some ambivalence in the Court of Appeal’s analysis of Hill J.’s performance of his judicial role. At certain points, the Court demonstrates solicitude for Hill J.’s approach. For example, in the opening paragraph Doherty J.A. notes:

The imposition of a fit sentence can be as difficult a task as any faced by a trial judge. That task is particularly difficult where otherwise decent, law-abiding persons commit very serious crimes in circumstances that justifiably attract understanding and empathy. These two cases fall within that category of cases.

Elsewhere, the Court acknowledges Hill J.’s “scrupulous fairness,” the fact that he gave “thoughtful and detailed reasons” and that he “made extensive reference to the material he produced and tracked the concerns he expressed when he introduced the issues of race and gender bias into the proceedings.” The Court of Appeal acknowledged that “the trial judge’s extensive experience in sentencing couriers had left him with genuine and legitimate concerns about the effectiveness and fairness of sentencing practices as applied to single poor black women who couriered cocaine into Canada for relatively little gain.” They even praised him for possessing “a judicial ear attuned to the realities of the lives of persons like the respondents.”

31. Supra note 15 ¶ 72.
32. Supra note 15 ¶ 6.
33. Supra note 15 ¶ 61.
34. Supra note 15 ¶ 65.
35. Supra note 15 ¶ 138.
However, the main thrust of the Ontario Court of Appeal's decision is an indictment of contextual judging. The bottom line is to be found in the third paragraph:

[The trial judge] expanded the sentencing proceedings to include broad societal issues that were not raised by the parties. A proceeding that was intended to determine fit sentences for two specific offenders who committed two specific crimes became an inquiry by the trial judge into much broader and more complex issues. In conducting this inquiry, the trial judge stepped outside of the proper role of a judge on sentencing and ultimately imposed sentences that were inconsistent with the statutory principles of sentencing and binding authorities from this court.36

The reason Hill J. erred, according to the Court of Appeal, is due to his understanding of the sentencing process:

As difficult as the determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the specific offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and specific offender as revealed by the evidence adduced in the proceedings. A sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.37

More specifically, Doherty J.A. found fault with at least two aspects of the judge's conduct of the proceedings: his reliance on "material he had produced during the hearing and his own experiences as a judge."38 As a result, Doherty J.A. found that "the trial judge effectively took over the sentencing proceedings, and in doing so went beyond the role assigned to a trial judge in such proceedings."39

On several occasions, the Court of Appeal expressed consternation with the "extraordinary role"40 adopted by the trial judge. Doherty J.A. lamented the fact that Hill J. took the initiative to raise issues of systemic inequality,41 claiming that the introduction of international reports, statistical information, law reform materials and newspaper articles constituted a "veritable blizzard of raw statistical information"42 causing a "dramatic

36. Supra note 15 ¶ 3 [emphasis in original].
37. Supra note 15 ¶ 2 [emphasis in original].
38. Supra note 15 ¶ 6, see also ¶ 65.
39. Supra note 15 ¶ 7.
40. Supra note 15 ¶ 72.
41. Supra note 15 ¶ 6, 26, 28.
42. Supra note 15 ¶ 75.
turn'^ in the proceedings. The Court also cautioned about the dangers of "unwarranted delay" and "unnecessary prolixity."^ In characterizing the issues at stake, it emphasized that "[t]here had been no suggestion by any party to the proceedings that race or gender had any relevance to the determination of fit sentences for the respondents before the trial judge distributed his materials."^ As a result, Doherty J.A. chastized Hill J. for having "assumed the combined role of advocate, witness and judge"^ and for

unilaterally decid[ing] to use these proceedings to raise, explore, and address various issues which he believed negatively impacted on the effectiveness and fairness of current sentencing practices as they related to some cocaine importers. Through his personal experience and personal research, the trial judge became the prime source of information in respect of those issues. The trial judge also became the driving force pursuing those issues during the proceedings.47

The Court of Appeal also suggested that Hill J. came perilously close to "turning the sentencing hearing into a de facto commission of inquiry."48

Finally, to justify their rejection of Hill J.'s methodology, the Court of Appeal invoked the shibboleths of judicial impartiality and neutrality.49 They reminded the trial judge that "the criminal process, including the sentencing process, is basically adversarial" and that usually the trial judge's role is a "neutral, passive arbiter...[whose job is] to listen, clarify where necessary and, ultimately, evaluate the merits of the competing cases presented by the parties."50

We agree that it is incumbent upon courts of appeal to exercise a firm hand when dealing with errant judges. However, with respect, we suggest the Ontario Court of Appeal is in error in this case due to its excessively conventional vision of the judicial role. In our opinion, there is good constitutional, statutory and common law authority to support Hill J.'s contextualist approach to this case. We will deal with each of these in turn.

43. Supra note 15 ¶ 52.
44. Supra note 15 ¶ 68.
45. Supra note 15 ¶ 53.
46. Supra note 15 ¶ 65, see also ¶ 71.
47. Supra note 15 ¶ 65.
48. Supra note 15 ¶ 70. This criticism echoes, but does not cite, the Supreme Court of Canada’s warning in Wells that it is important not to "transform the role of a sentencing judge into that of a board of inquiry." R. v. Wells (2000), 30 C.R. (5th) 254 ¶ 55 [Wells].
49. Supra note 15 ¶ 68.
50. Supra note 15 ¶ 67.
51. Supra note 15.
a. *Egalitarian constitutional norms*

On the constitutional level, Canada has committed itself to the principle of substantive equality, as is evidenced by ss. 15 and 27 of the *Charter*. In cases such as *Andrews, Law* and *Lovelace* the Supreme Court of Canada has endorsed the principle of substantive equality. This more contemporary perspective on equality asserts that in order to counteract and compensate for past inequalities that manifest in continued disadvantage, there may be a need for differential treatment in order to meet the goals of substantive equality. As McIntyre J. pronounced in *Andrews*, "identical treatment may frequently produce serious inequality." Beyond the question of the nature of egalitarian Charter rights there is also the larger normative question of Charter values. In *Hill v. Church of Scientology* (a case which ironically involved Casey Hill when he was a crown prosecutor) the Supreme Court of Canada proclaimed that "[t]he *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the Courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*." If this is so in the civil law context, it is even more pressing in "criminal cases [which] present the prime example of governmental action." In *Pepsi-Cola* the Court has announced that

[*the Charter* constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within western democracies. *Charter* rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order .... The *Charter* must thus be viewed as one of the guiding

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52. *Canadian Charter of Rights & Freedoms*, ss. 15, 27 [*Charter*]: s. 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

s. 27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.


55. [1995] 2 S.C.R. 1130 ¶ 1169 [*Hill*].

instruments in the development of Canadian law .... The development of the common law must therefore reflect [such] value[s].

As we will argue below, the sentencing judge was cognizant of the differential circumstances of poor, single black mothers and carefully tailored his decision to conform to the demands of the Charter value of substantive equality. The Court of Appeal, as we shall see, is uncomfortable with such a differential understanding of sentencing norms and, as such, appears somewhat ambivalent about substantive equality. Instead, it seems to be attracted to a more formal and individualized conception of equality.

b. Statutory authorizations: ss. 723(3) and 718.2(e) of the Criminal Code

Constitutional rights and norms such as substantive equality tend to operate at a high level of generality in providing direction to how the judicial function should be executed. However, statute law can give such rights and norms concrete form. In particular, sections 723(3) and 718.2(e) of the Criminal Code are significant in any assessment of Hill J.'s decision.

Section 723(3) explicitly empowers a trial judge to raise matters on her or his own initiative at sentencing. It provides that

[t]he Court may, on its own motion, after hearing argument from the prosecutor and offender, require evidence that would assist it in determining the appropriate sentence.

This is a relatively new provision, introduced as part of the Bill C-41 reforms. To date, it has generated very little judicial commentary. The two Alberta cases that have given it consideration are in agreement that:

- it is a legitimate mechanism to help a judge fulfill the responsibility of controlling the sentencing process;
- appeal courts should show some deference to trial judges who believe they are required to invoke this provision;
- it is incumbent upon the trial judge to be precise in communicating with counsel as to what information might be relevant, so that counsel can meaningfully respond;


58. In 1996 the federal government introduced Bill C-41 to create a new Part XXIII of the Criminal Code which outlined a comprehensive reform of sentencing principles.
The Big Chill?

- it cannot be expanded to become "in pith and substance a request for an inquiry";

- it does not grant an open-ended authority to require the production of any report, evidence or person—there must be some logical nexus or relevance between what is being ordered to be produced and the matter under consideration;

- it does not authorize trial judges to seek potentially unreasonable information.59

While the Court of Appeal recognizes the existence of s. 723(3) in Hamilton, they give it relatively short shrift, claiming that it does not mean that "the trial judge's power is without limits or that it will be routinely exercised."60 While this is true, there is nothing in Hill J.'s decision to suggest that he was being cavalier or limitless in his approach. He communicated very clearly with counsel, there was a manifest "logical nexus" between the materials produced and the issue before him, the information was "reasonable" and there was no possibility of it being an open-ended "inquiry." Hill J. was simply respecting his parliamentarily-imposed mandate to ensure that he was "determining the appropriate sentence." At a minimum, s. 723(3) rejects the ideal(ist) image of the judge as "neutral passive arbiter"61 that was so heavily relied upon by Doherty J.A.

Section 718.2(e) of the Criminal Code, which articulates the restraint principle, is perhaps an even more pertinent application of how egalitarian norms might impact upon the judicial function. It provides:

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

The restraint principle has been endorsed by the Supreme Court of Canada in both Gladue and Wells.62 One would have thought that this provided sufficient authority for Hill J. to impose conditional rather than custodial sentences in the circumstances of this case. But the Court of Appeal decided otherwise. Although Doherty J.A. accepts that "[t]here can be no doubt that 718.2(e) applies to all offenders,"63 and recognized both Wells and Gladue, he gave them only passing consideration.64 Rather, in an interesting

60.  Supra note 16 ¶ 67.
61.  Supra note 16.
63.  Hamilton, supra note 15 ¶ 98.
64.  Supra note 15 ¶ 66, 87, 98, 100.
rhetorical move he immediately jumped to the last clause of 718.2(e) to emphasize the relevance of the restraint principle to Aboriginal people, for reasons of cultural ineffectiveness. Specifically, Doherty J.A. opines that the “restraint principle is applied with particular force where the offender is an aboriginal not to somehow try to make up for historical mistreatment of aboriginals, but because imprisonment may be less effective than other dispositions in achieving the goals of sentencing where the offender is aboriginal.” 65 Having identified this as the rationale for 718.2(e) he then claims that

Parliament has chosen to identify aboriginals as a group with respect to whom the restraint principle applies with particular force. If it is shown that the historical mistreatment and cultural views of another group combine to make imprisonment ineffective in achieving the goals of sentencing, it has been suggested that a court may consider those factors in applying the restraint principle in sentencing individuals from that group: see R. v. Borde, .... There was no evidence in the mass of material adduced in these proceedings to suggest that poor black women share a culture perspective with respect to punishment that is akin to the aboriginal perspective. 66

And to solidify his claim Doherty J.A. adds a footnote:

Note 5: In R. v. Spencer, ... heard with these appeals, there was evidence from a family counsellor employed by the Jamaican Canadian Association. She testified that the black community was a diverse group with a broad range of cultures and beliefs. She also testified that to her knowledge, the Jamaican community did not have a different view about sentencing and personal responsibility for criminal conduct than did other Canadians. 67

Revealingly, he concludes his brief discussion:

In any event, proportionality remains the fundamental principle of sentencing. Section 718.2(e) cannot justify a sentence which deprecates the seriousness of the offence. Where the offence is sufficiently serious, imprisonment will be the only reasonable response regardless of the ethnic or cultural background of the offender: R. v. Wells, supra, at p. 386. 68 [emphasis added]

These comments suggest to us that the Ontario Court of Appeal appears to misunderstand the overall remedial goal of s. 718, by overemphasizing the particularity of Aboriginal peoples, and ignoring the specificity of

65. Supra note 15 ¶ 98.
66. Supra note 15 ¶ 99 [footnotes omitted].
67. Supra note 15; Spencer, supra note 26.
68. Supra note 15 ¶ 100 [emphasis added].
especially vulnerable communities such as African-Canadians. To support this claim it is necessary to unpack the Court of Appeal’s analysis of 718.2(e).

First, unlike the Supreme Court of Canada in *Gladue*, the Court of Appeal pays no regard to s. 12 of the *Interpretation Act* which provides that “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives.” A crucial rationale for ss. 718.2(d) and (e), and all the reforms engendered by Bill C-41, is the “general principle of restraint.” While this is acknowledged by the Court of Appeal, we suggest that it failed to apply the spirit of s. 718.2(e) and its subsequent interpretation by the Supreme Court of Canada in *Wells* and *Gladue*, to the context of non-aboriginal, intersectional inequality.

Parliament specifically recognized a need to acknowledge social, political and economic inequalities through special sentencing principles that apply to Aboriginal offenders by virtue of s.718.2(e). The driving force behind these amendments, the historic and continued marginalization of Aboriginal people in Canadian society, is reflected in the *Gladue* and *Wells* decisions. Specifically, there is a focus on the effect this marginalization has had on this group in terms of their interaction with the Canadian judicial system. While some of these roots are demonstrably unique to Aboriginal people, we would suggest that the recognition of the “systemic and background factors” that influence the offender can and should be applied to other groups who experience similar pernicious societal influences. Specifically, we suggest these sentencing considerations should be extended to African-Canadians. There is a proportionally greater likelihood that members of this group may experience the inimical effects of historic and contemporary marginalization, and as a result may also be disproportionately drawn into the criminal justice system. The applicability of this reasoning in the case of African-Canadian offenders has been judicially recognized. For example, in *R. v. Parks*, Doherty J.A., speaking for a unanimous Ontario Court of Appeal, articulated in unambiguous terms that:

>[r]acism, and in particular anti-black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of

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70. *Ibid.*, ¶ 38, see also ¶ 43.
71. In the words of Doherty J.A. in *Hamilton*, supra note 15 ¶ 98: “There can be no doubt that s. 718.2(e) applies to all offenders. Imprisonment is appropriate only when there is no other reasonable sanction.”
negative racial stereotypes. Furthermore, our institutions, including the
criminal justice system, reflect and perpetuate those negative stereotypes.
These elements combine to infect our society as a whole with the evil of
racism. Blacks are among the primary victims of that evil.\textsuperscript{72}

In addition to the historical dimension, another principal rationale for
s.718.2(e) relates to “serious social problems...that require more creative
and innovative solutions,”\textsuperscript{73} particularly identifying Aboriginal people for
special consideration at the sentencing stage in light of their disproportionate
representation in the prison population. In \textit{Gladue}, the Supreme Court of
Canada acknowledged that judges “may take judicial notice of the broad
systemic and background factors affecting [A]boriginal people....”\textsuperscript{74}
This position reflects a progressive view that places the offender within
a particular social context, and tries to understand the substantive impact
that these circumstances have on an individual’s true degree of culpability.
It is important to remain cognizant that s.718.2(e) does not necessarily
mandate a different sentencing result for those deemed to qualify for judicial
accommodation. The provision “requires a different \textit{methodology} for
assessing a fit sentence for an...offender: it does not mandate, necessarily,
a different \textit{result}.”\textsuperscript{75} In our opinion, the sentencing judge was pursuing
such a methodology when he sought additional submissions from counsel
on the material he considered possibly relevant. He was not predetermining
the result, he was attempting to determine the appropriate result. He was
not saying that racial identity is the equivalent of a get-out-of-jail-free-card;
rather he was seeking information on how the interlocking structural
variables of gender, class and race might synergize to have an impact on
the choices available to Ms. Hamilton and Ms. Mason.

Second, Doherty J.A. provides no authority for the proposition
that the principle of restraint is justified solely on the basis of cultural
“ineffectiveness” and not “historical mistreatment.”\textsuperscript{76} Indeed such a
claim seems to underemphasize key elements of the Supreme Court of
Canada’s analysis in \textit{Gladue} which discusses at length not only the general
ineffectiveness of incarceration\textsuperscript{77} but also the historic and contemporary

\textsuperscript{72} Parks, supra note 18 ¶ 54.
\textsuperscript{73} Mr. Justice E.G. Ewaschuk, \textit{Criminal Pleadings & Practice in Canada}, looseleaf (Aurora:
\textsuperscript{74} \textit{Gladue}, supra note 7 ¶ 93.
\textsuperscript{75} Wells, supra note 48 ¶ 44 [emphasis in original].
\textsuperscript{76} Hamilton, supra note 15 ¶ 98.
\textsuperscript{77} Gladue, supra note 7 ¶ 52-57.
overrepresentation of Aboriginal Canadians in penal institutions.\textsuperscript{78} Parliament's direction for restraint, then, is not just an abstract, ahistorical philosophical commitment; it is deeply embedded in an awareness of ongoing systemic inequality, which in turn is grounded in concomitant historical roots. If this is relevant for Aboriginal peoples, it is also potentially relevant for others such as Ms. Hamilton and Ms. Mason who might have experienced not only historic but ongoing systemic and intersecting forms of inequality.

Third, the Court of Appeal's focus on culturally specific effectiveness reveals an incomplete reading of the Supreme Court of Canada's decisions in \textit{Wells} and \textit{Gladue}. In fact, both \textit{Wells} and \textit{Gladue} recognize the importance of ongoing systemic and background factors. While the disproportionate incarceration of Aboriginals is surely a legacy of historical mistreatment, it is equally, or even more prominently, a reflection of the continuing mistreatment of Aboriginals by the justice system, and by Canadian society as a whole. The Court of Appeal failed to recognize adequately the broader social context view articulated in \textit{Gladue}, which accounted for contemporary institutional and societal forms of discrimination as follows:

The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against [A]boriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.\textsuperscript{79}

The Supreme Court of Canada in \textit{Gladue} viewed incarceration as an ineffective means of rehabilitation for some Aboriginal offenders, not only because it was culturally inappropriate, but also due to the fact that "regrettably discrimination towards them is so often rampant in penal institutions."\textsuperscript{80} In \textit{Hamilton} the Ontario Court of Appeal's apparent

\textsuperscript{78} In \textit{Gladue}, supra note 7 at ¶64 the Supreme Court of Canada unequivocally stated: These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy [sic] it, to the extent that a remedy is possible through the sentencing process.

\textsuperscript{79} \textit{Gladue}, supra note 7 ¶65.

\textsuperscript{80} \textit{Gladue}, supra note 7 ¶68.
The prioritization of cultural over systemic forces produces a regressive result in terms of the legal recognition of the effects of contemporary racism on certain segments of the Canadian population.\footnote{We do not want to dismiss the important point raised by the Court of Appeal in Hamilton, supra note 15 \# 147, to the effect that [t]he recruitment of young black poor women with no criminal records to carry cocaine into Canada from Jamaica could be encouraged by a sentencing policy that treats the very factors which make them attractive as couriers as justifying a non-custodial sentence. The number of persons who are prepared to take the significant physical risk associated with smuggling cocaine into Canada, particularly after ingesting it, can only be increased if the likely disposition is a conditional sentence. The conditional sentences imposed on these respondents can only reinforce the minds of drug overseers the wisdom of their recruitment philosophy. In doing so, it increases the vulnerability of persons like the respondents. For these reasons, conditional sentences neither contribute to respect for the law, nor to the maintenance of “a just, peaceful and safe society”.}

The explicit reference to alternative punitive consequences for Aboriginals in s.718.2(e) is not only due to the fact that incarceration is less effective for them, but rather acknowledges that their disproportionate level of incarceration is an indication of a deeper societal crisis. It is an implied recognition of the pernicious societal situation facing Aboriginals, and an expression of the Parliamentary desire to ameliorate this situation. In reference to s.718.2(e) before the House of Commons Standing Committee on Justice and Legal Affairs, former Justice Minister Allan Rock explained the role the government hoped this provision would play:

\[ {...} \]

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.\footnote{In the above quote, in essence the Court of Appeal is emphasizing the deterrence principle of sentencing. While the concern for the potentially increased vulnerability of people like the respondent is a valid one, and not easily resolved, we propose that other sentencing principles need to be given due consideration. The deterrence element of sentencing needs to be weighed and balanced against other principles such as parity, and methodologically should not be presumed to be more salient, especially where intersecting forms of inequality are at play. This mandate to consider properly the spectrum of sentencing principles is clearly articulated in the 1996 reforms through Bill C-41. Moreover, while at first blush the Court’s point may appear to have empirical validity, it is conjectural. If the legal system wants to be more effective and efficient in its use of criminal sanctions, surely the main emphasis should not be the vulnerable couriers, but the drug overseers.}

In other words, there is a crucially remedial element in accommodating sentencing for Aboriginal offenders in light of modern systemic racism as well as historical mistreatment. Throughout the \textit{Gladue} decision, the unanimous Supreme Court of Canada exhibited an understanding that Canadian society has undoubtedly contributed to the present marginalized
position of Aboriginal people in Canada. This understanding is based on both a contemporary and historical view of the forces and effects of this marginalization and oppression. Furthermore, the Supreme Court of Canada in Gladue views s. 718.2(e) as an unequivocal mandate for the “judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.” This is precisely what Hill J. was trying to do in the context of Ms. Hamilton and Ms. Mason.

We would suggest that the systemic forces of racism in Canada that affect African-Canadians are similar to those experienced by Aboriginal people: “a history of poverty; discrimination in education, the media, employment and housing; and over-representation in the criminal justice system and in prisons.” Similar to Aboriginal offenders, African-Canadian offenders are subject to a disproportionate level of incarceration relative to their statistical representation in Canadian society. As Hill J. noted, the Supreme Court of Canada itself has acknowledged that “African Canadians and Aboriginal people are overrepresented in the criminal justice system.”

Indeed, in the recent Borde case, also from the Ontario Court of Appeal, the appellants argued that due to “the similarity between the

83. Gladue, supra note 7 ¶ 61: “Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg as far as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned.”

84. Gladue, supra note 7 ¶ 51: “A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada’s aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.”

85. Gladue, supra note 7 ¶ 58: “If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians.”

86. Borde, supra note 26 ¶ 18 says “[t]here 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,” citing R. v. Williams, [1998] 1 S.C.R. 1128 ¶ 58

87. Gladue, supra note 7 ¶ 64: “The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.”

88. Gladue, supra note 7 ¶ 64 [emphasis added].

89. Borde, supra note 26 ¶ 17.

90. In reference to the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen’s Printer, 1995) the Court of Appeal in Borde, supra note 26 ¶ 18 says “[t]he clear finding of the Commission is that there has been a dramatic increase in prison admissions for black offenders in Ontario in recent years.” Note also that in introducing the Bill C-41 reforms Alan Rock argued:

jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration ... It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely.

(House of Commons Debates (20 Sept. 1994) at 5873).

plight of Aboriginal Canadians and African Canadians, the court should adopt a similar form of analysis for the purposes of sentencing."88 Such a principled extension of s.718.2(e) to African Canadian offenders seemed to be effectively endorsed by Rosenberg J.A. in Borde: "I accept that there are some similarities and that the background and systemic factors facing African-Canadians, where they are shown to have played a part in the offence, might be taken into account in imposing sentence."89 He continued:

> the principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes.90

Hill J. clearly and explicitly drew on this authority to substantiate his methodological position that systemic racism must be considered as an integral part of the overall context of African-Canadian offenders.91

Following Gladue, Wells and Borde we want to argue that the very principles of individualized sentencing demand that methodologically a judge should consider systemic racism and intersecting forms of inequality as crucial background factors of the offender, whether or not the person is an Aboriginal person. This is articulated by Hill J.'s reasons for decision:

> Whether or not for other groups s. 718.2(e) permits, or compels, a similar approach to that articulated in the Gladue and Wells cases respecting Aboriginal offenders, the purposes and principles of sentencing and the exercise of sentencing discretion in accordance with Charter values commands consideration of systemic factors in this case insofar as they are related to the commission of the offences for which the accused have been convicted. This is the essence of equity and individualized sentencing.92

The Ontario Court of Appeal, however, is decidedly more ambivalent about adopting a contextualizing methodology. At certain points, it seems to endorse the validity and necessity of considering systemic variables when it notes "[n]or do [we] think that anyone can take issue with the general assertion that racial and gender bias can contribute to the economic

88. Borde, supra note 26 ¶ 27.
89. Borde, supra note 26, sitting with O'Connor A.C.J.O. who also sat on the Hamilton appeal.
90. Borde, supra note 26 ¶ 32.
91. Hamilton, supra note 20 ¶ 189.
92. Supra note 20 ¶ 186 [emphasis added].
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plight of individuals like the respondents" and that "[a] sentencing judge is ... required to take into account all factors that are germane to the gravity of the offence and the personal culpability of the offender. That inquiry can encompass systemic racial and gender bias." As a result Doherty J.A. found that the respondents' "impoverished circumstances and poor economic prospects played an important role in their decision to commit these crimes. [Hence,] [t]he reason for their desperate financial circumstances was relevant on sentencing." Consequently, he determined that given their "explanation for their crimes, heard by a judicial ear attuned to the realities of the lives of persons like the respondents, warranted some mitigation of the respondents' personal culpability."

However, at other points, the Court of Appeal appears to suggest that such inquiries should, in the end, have no dispositive weight. According to the Court:

[o]ur criminal law rejects a determinist theory of crime...The blunt fact is that a wide variety of societal ills - including, in some cases, racial and gender bias - are part of the causal soup that leads some individuals to commit crimes. If those ills are given prominence in assessing personal culpability, an individual's responsibility for his or her own actions will be lost.

Elsewhere the Court announced that

[t]he fact that an offender is a member of a group that has historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence. Lower sentences predicated on nothing more than membership in a disadvantaged group further neither the principles of sentencing, nor the goals of equality.

Moreover, the Court categorically emphasized that

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94. Supra note 15 ¶ 134.
95. Supra note 15 ¶ 136. Note that in this discussion of mitigation the focus of the Court of Appeal tends to emphasize class and gender of the respondents rather than race [¶ 136-142]. Doherty J.A. reiterated this point in the companion case to Hamilton, R. v. Spencer (2004), 72 O.R. (3d) 47 ¶ 25 [Spencer]. However, Doherty J.A. determined that "the specific circumstances of Ms. Spencer do not support the conclusion that she was impoverished, that her race or gender contributed to her financial circumstances, or that she chose to commit the crime so as to provide for her family." (Spencer, ibid. ¶ 32). There may also be some irony in Doherty J.A.'s argument in Spencer. He made much of the fact that she is not impoverished, that she has an annual income of about $38,000 per year and that she has a good job. (Ibid. ¶ 28-29). He also points out that she is "an intelligent, capable, and industrious person with much to offer her community and her children" (Ibid. ¶ 48). Yet he proceeded to sentence her to twenty months in prison, and the possibility of deportation. (Ibid. ¶ 43-51). One can only wonder what impact such a sentence might have on her job prospects!
97. Supra note 15 ¶ 140 [emphasis added].
98. Supra note 15 ¶ 133.
[a] sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or 'make up' for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.99

This restrictive view seems to contradict the remedial function accorded to s.718.2(e) by both Parliament and the Supreme Court of Canada, as discussed above.

Fourth, the "in any event" and "regardless" language100 adopted by the Court of Appeal suggests that it is not particularly swayed by s. 718.2(e). Indeed, later in the reasons for decision Doherty J.A. explicitly claims that "in cases like these...the seriousness of the offence is the pre-eminent consideration on sentencing."101 Such a position is at odds with the rationale of s. 742.1 of the Criminal Code (the conditional sentence provision) which, as Alan Manson emphasizes, "means that no offence is so intrinsically grave that it is precluded from consideration for a conditional sentence regardless of the circumstances of the offence and the circumstances of the offender."102 In our opinion, Hill J. was not "deprecat[ing] the seriousness of the offence"103; rather he was attempting to find proportionality between the gravity of the offence and "the degree of responsibility of the offender" as called for by s. 718.1 of the Criminal Code and as acknowledged as legitimate by the Court of Appeal.104 The difference is that Hill J.'s approach is a socially contextualized application of the proportionality principle.

99. Supra note 15 ¶ 2.
100. Supra note 15 ¶ 100.
101. Supra note 15 ¶ 139 [emphasis added]. See also ¶ 143. Such propositions may also take Doherty J.A. close to a "category based approach to sentencing," a position which has been clearly rejected by the Supreme Court of Canada. See, e.g., Wells, supra note 48 ¶ 45. For a critique of the very concept of a category of "serious offence," see Renée Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons" (2001) 39 Osgoode Hall L.J. 469 at 479-481.
102. Manson, supra note 28 at 379; see also R. v. Laliberte (2000), 31 C.R. (5th) 1 ¶ 32-33 (Sask. C.A.) [Laliberte].
103. Hamilton, supra note 15 ¶ 100. Doherty J.A. argues at ¶148 that the perspective of the African-Canadian community with regard to the harm caused by cocaine suggests that non-custodial sentences for cocaine importation are strictly inappropriate. With respect, we suggest (as did Hill J. at trial) that the source of that harm should be more squarely attributed to the more influential actors in the importation scheme, rather than the couriers. More important though, is a need for a different methodological approach to sentencing for those who may experience systemic racism and intersecting forms of inequality. On the evidence presented in the Hamilton and Mason case, we are not suggesting that the Court of Appeal was unjustified in its position. However, we do maintain that its methodology, in failing to give due weight to the impact of interlocking inequality, reflects an unnecessarily immured conception of the judicial role, and unduly chills judicial efforts to consider the effects of inequality in sentencing proceedings.
104. Supra note 15 ¶ 91.
Rather than ignoring the "group characteristics" dimensions of the case, or erasing the "ethnic or cultural background of the offender," Hill J. was attempting the difficult task of linking the systemic with the particular, not to determine or fix the appropriate sentence, but to contextualize the range of possibly appropriate sentences.

The crux of the difference between the Court of Appeal's position and that of Hill J. would appear to relate to what should properly be considered part of the offender's background. Hill J. endorses a perspective that gives substantial effect to the recognition that for a poor African-Canadian woman living in contemporary Canadian society, systemic racism necessarily forms part of her "background." In Parks, as we have already indicated, Doherty J.A. expressed a surprisingly similar view on the pervasiveness of "anti-black racism" both socially and institutionally, one he does not seem to apply substantively in the Hamilton appeal.

An individual offender cannot simply be considered in isolation from her context for sentencing purposes. Michael Plaxton asserts that "...the sentencing process single-mindedly works to say something about the offender – and no one else – [therefore we] must conclude that it cannot effectively serve as a platform for decrying systemic racism." Such single-mindedness is mistaken. By oversimplifying and reducing the complex nature of lived gender, race and class-based discrimination, such a view seeks to diminish and negate the vital impact these forces can have on the individual. Its fundamental point of departure is that each person is wholly accountable for the choices that s/he makes, irrespective of social, economic or political status. This is a classic liberal analysis which "assumes a rational, free-choosing, individual who is prior to (and independent of) both the community and other individuals." While it would be convenient for analytical purposes to extract the offender from her social circumstances, this is contrary to the important principle of individualizing sentences and exacerbates the impact of interlocking inequalities by denying their salience. Ironically, in attempting to prioritize
a focus on the individual rather than the group, such a position serves to obscure a proper perspective of the individual, as inextricable from her context.

As Christopher Nowlin points out, "individual behaviour, including criminal behaviour, is not categorically autonomous, rational and free, but is influenced by any number of social, political, economic, emotional and cultural circumstances." This more contemporaneous conception of agency understands that individuals are not simply fungible, undifferentiated, atomized beings, wholly autonomous with regard to decision-making processes and similarly situated in terms of the options available to them. Rather, Nowlin's position is a more nuanced and complex approach that acknowledges the variety of forces at work on any given individual at any given moment of time. Furthermore, such a vision of human agency also understands that certain groups of people may experience a particular constellation of forces that can serve to construct a reality whereby the spectrum of choices are much more constrained. The influence of social, political and cultural circumstances should not be eliminated from an analysis that seeks to understand why individuals in a certain set of circumstances choose a course of action, a fortiori when penal consequences are at stake. All of this suggests the absolute necessity of adopting and applying a social context analysis to sentencing cases.

Critics of Hill J.'s reasoning in Hamilton may contend that an accommodative approach on the basis of intersecting inequalities offends the important "parity principle" of sentencing; similar offenders should receive similar sentences for similar offences under similar circumstances. Yet, the parity principle itself is premised on the perspective that a sentence must be individualized to the particular offender. In turn, methodologically this requires serious and substantive consideration of this person's background and history, including any extenuating circumstances of the accused. Presumably, this is required to apportion the appropriate degree of moral blameworthiness for the offence. Therefore, Hill J.'s decision does not represent a radical departure from the parity principle, but rather demonstrates a clear application and affirmation of it. Such an approach considers the individual offender with an understanding of the systemic

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112. Nowlin, supra note 110 at 59.
113. Ewaschuk, supra note 73 at 18-4; Criminal Code, R.S.C. 1985, c. C-46, s.718.2(b).
societal forces at play on her, a position reinforced by a substantive understanding of equality as we discussed in Part II(1)(a). Indeed, a failure to account for such societal circumstances as interlocking inequalities would seem to be contrary to the parity principle.

Finally, on the significance of s. 718.2(e), in R. v. Wells the Supreme Court of Canada acknowledged that if counsel were not forthcoming with relevant information then “...s. 718.2(e) places an affirmative obligation upon the sentencing judge to inquire into the relevant circumstances ... [and] authorizes the sentencing judge on his or her own initiative to request that a witness be called to testify as to reasonable alternatives to a custodial sentence.” Such inquiries by the sentencing judge must be “limited to ‘appropriate circumstances’” and “practicable” and not “transform the role of the sentencing judge into a board of inquiry.”

Again we would emphasize that nothing in Hill J.’s methodology suggests a wide-ranging inquiry, and that 718.2(e), when read in conjunction with 723.3, provides ample statutory authority for contextually sensitive sentencing methodologies and determinations.

c. Common law authority: bias and fundamental alteration of the proceedings

Finally, under the rubric of the “judicial function question” it is important to address the issue of bias. The Crown (just as it had done in R.D.S.) had argued that Hill J.’s conduct of the trial constituted either a reasonable apprehension of bias or a fundamental alteration of the proceedings. The foundation of the challenge was that during the course of the proceedings Hill J. “sent counsel about 700 pages of material garnered from his own researches.”

Following Wells, Hill J. acknowledged that “[t]he individualized sentencing process” is not designed “to transform the role of the sentencing judge into a board of inquiry.” Notwithstanding this caveat, he decided that as sentencing judge he could not derogate from his obligation to

114. See also J. Andres Hannah-Suarez, “Moral Luck in Canadian Law: Socio-economic Deprivation, Retributive Punishment and the Judicial Interpretation of Section 718.2(e) of the Criminal Code” (2003) 2 J.L. & Equality 255 at 277:

The over-representation of Aboriginals in Canadian prisons points to factors outside of the Aboriginal offenders’ control (unless we are willing to espouse the distasteful view that Aboriginal over-representation is due to some inherent criminality). Thus, the subsection directs the courts to identify and pay attention to the causes behind this over-representation - causes that because of their externality to the offenders would reduce their moral responsibility for the crimes.

115. Wells, supra note 48 ¶ 54.

116. Wells, supra note 48 ¶ 54-55.


118. Supra note 15 ¶ 52. Actually it was about a thousand pages: ibid. ¶ 59.

119. Hamilton, supra note 20 ¶ 182.
properly consider broader contextual issues that may impinge on the culpability of the offender. This duty, he argued, may necessarily entail the consideration of statistical evidence in order to correctly understand the background of the offence in question.  

The Court of Appeal explicitly rejected the bias argument advanced by the Crown, but agreed with "the fundamental alteration" argument. Despite a passing recognition that a trial judge might be justified in taking an active role in the sentencing process, the Court of Appeal agreed with the Crown that Hill J. had "turned the proceedings from one designed to determine a fit sentence for individual offenders, to one designed to enquire into a variety of societal problems...overstepping his role, [and] fundamentally alter[ing] the nature of the proceedings." While we agree that Hill J. did engage in some alteration of the traditional process, it was hardly fundamental; the full integrity of the adversarial system remained intact.

It is very important that we pay attention to how Hill J. conducted the proceedings. There is no hint of prejudgment in Hill J.'s introduction of the materials. His is a cautious interrogation of the potential relevance of intersecting structural variables such as class, gender and race. Notably, he observes that:

as a trial judge in this port of entry, Brampton, responsible for the Pearson International Airport, I think it is fair to say that having done this for almost nine years, that I have been struck by the number of single mothers, black women who have appeared before me over that time period. And it leads me to wonder whether this is a group that is targeted for courier

120. Supra note 20 ¶ 182, citing R. v. Edwards (1996), 105 C.C.C. (3d) 21 (Ont. C.A.): "Nevertheless, appeal courts have emphasized the desirability of the trial judge dealing with sentencing initiatives, social context issues, and statistical bases in the first instance on the basis of evidence."
121. Hamilton, supra note 15 ¶ 64. However, at other times they come close to finding bias: "Looking at the entirety of the proceedings, there is a risk that a reasonable observer could conclude that the trial judge's findings as to the significance of race and gender bias in fixing appropriate sentences had been made before he directed an inquiry into those issues." [Ibid. ¶ 71]. On the common law of bias, a large number of cases have held that if a lawyer does not object at trial they are precluded from raising it on appeal. See R. v. Curragh Inc. (1997), 113 C.C.C. (3d) 481 at 487. The Court of Appeal in Hamilton refers to Curragh but completely bypasses the argument.
122. Hamilton, supra note 15 ¶ 66:
No one suggests that a trial judge is obliged to remain passive during the sentencing phase of the criminal process. Trial judges can, and sometimes must, assume an active role in the course of a sentencing proceeding. Section 723(3) of the Criminal Code provides that a court may, on its own motion, require the production of evidence that "would assist in the determination of the appropriate sentence." Quite apart from that statutory power, the case law has long recognized that where a trial judge is required by law to consider a factor in determining the appropriate sentence and counsel has not provided the information necessary to properly consider that factor, the court can, on its own initiative, make the necessary inquiries and obtain the necessary evidence.
123. Supra note 15 ¶ 63.
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... conscription by the overseers, whether in fact, compared to other narcotics offences or other offences generally, females, female blacks, form a disproportionate group within the population of people sentenced for cocaine importing. Where that takes me I'm not sure, but we should know in sentencing, it seems to me, whether there is a disproportionate effect on any particular group by a sentencing policy.124

Despite allegations and inferences by the Court of Appeal that he acted unilaterally,125 Hill J. was careful to explicitly raise the issues with counsel and provide them with all the information that he thought might be useful in helping him determine the appropriate sentence.126 He clearly articulated his "concerns and any tentative opinions he had formed."127 Nothing in this represents a fusion of the roles of "advocate, witness and judge"128 as denounced by the Court of Appeal. Rather, it is simply a judge raising concerns that might be potentially relevant, giving the lawyers full opportunity to consider and address these concerns, and then making a judgment that is informed by the lawyers' submissions. For a judge to be a "prime source of information"129 or a "driving force pursuing [social context] issues"130 should not be interpreted as erroneous decision-making—it is responsible decision-making when lawyers miss the boat.131 For a judge not to intervene in such a circumstance would be tantamount to judicial complicity in an avoidable systems failure.

It is a judge's solemn responsibility to ensure that all of the relevant evidence is before the court in order to assess properly factors relevant to sentencing, including evidence that will serve to elucidate contextual factors.132 Indeed, in relation to Aboriginal offenders, the Supreme Court of Canada explicitly articulated this approach in Gladue, saying that "...where counsel do not adduce this evidence...it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an [A]boriginal person."133 The fact that Hill J. had contextual evidence at his disposal, and made it available to counsel, should not necessarily be perceived as a bias in, or a fundamental alteration of, the proceedings. Rather, it showed his methodological

124. Supra note 15 ¶ 55, citing Hill J.
125. Supra note 15 ¶ 65, 69.
126. Supra note 15 ¶ 72.
127. Supra note 15
128. Supra note 15 ¶ 65.
129. Supra note 15
130. Supra note 15
131. See Gladue, supra note 7 ¶ 83, 93 for a brief discussion of the responsibility of counsel to adduce evidence of systemic or a background factors that might be relevant for a sentencing judge.
132. For example, in Laliberte, supra note 102 ¶ 58-69, Vancise J.A.
133. Gladue, supra note 7 ¶ 84.
commitment to ensuring that the relevant information needed to properly contextualize the circumstances of the offence was considered. The issue centres on the perspective one adopts as to the proper role of a judge in such a proceeding. In its rejection of Hill J.’s agency in bringing forth crucial information where it was necessary to a just proceeding, the Court of Appeal thereby proposes an unnecessarily immured conception of an adjudicator’s proper role. This was a deliberate choice and not a necessary result for the Court of Appeal, in light of the discretion accorded judges in the performance of their duties through cases such as Gladue, Wells and Borde.\footnote{134} 

2. The “doing contextualism” question: the importance of case-specific information

Although we have argued that the Court of Appeal has adopted a mistaken conception of the appropriate judicial role, there is some merit in the critique of how Hill J. sought to link the realities of systemic inequality in Canadian society to the particulars of Ms. Hamilton’s and Ms. Mason’s circumstances. The Supreme Court of Canada has characterized this as “case specific information.”\footnote{135} The Court of Appeal points out that in the case of Ms. Hamilton, “other than ... one comment in the pre-sentence report, there was no evidence before the trial judge as to how [she] came to be involved in the scheme, the nature of the scheme, or the role played by any other individual.”\footnote{136} Although the Court of Appeal may go too far in claiming that there was a “fundamental disconnect between the case on sentencing presented by counsel ... and the case of the paradigmatic cocaine courier constructed by the trial judge,”\footnote{137} it had a valid point that “[t]here was no evidence that these respondents were conscripted, virtue-tested, or paid minimal compensation...”\footnote{138} 

Specifically, the Court of Appeal highlighted four particular findings of the trial judge:

- the respondents were “conscripted” by the “drug distribution hierarchy” to participate in their crimes (¶198);
- the involvement of the respondents was the result of “virtue-testing” by “drug operation overseers” (¶195);
- the respondents were paid relatively minimal amounts and used those amounts to provide the bare necessities for their families (¶191); and

\footnote{134} Gladue, supra note 7 ¶ 81, 82; Wells, supra note 48 ¶ 34, 45, 49; and Borde, supra note 26 ¶ 32, 35. 
\footnote{135} Gladue, supra note 7 ¶ 95. 
\footnote{136} Hamilton, supra note 15 ¶ 11. 
\footnote{137} Supra note 15 ¶ 73. 
\footnote{138} Supra note 15 ¶ 74.}
The respondents' children would be "effectively orphaned" if the respondents were incarcerated (¶198).\footnote{139}

In response, the Court of Appeal found an insufficient evidentiary link:

The respondents chose not to offer any explanation for, or description of, their involvement in the crimes, apart from Ms. Hamilton's indication that she acted out of financial need. The trial judge had no information as to how the respondents came to be involved in this scheme, what their prior association or relationship was with the individuals who may have hired them, when or where the importation plans were formed, what amount of compensation was paid to the respondents, or how the respondents proposed to use that compensation. He also had no information concerning the care of the children if the respondents went to jail. All of this information was uniquely within the knowledge of the respondents. If the respondents were conscripted - that is, compelled to engage in this activity - they could have said so. If they agreed to be involved in the crimes only after repeated requests, they could have said so, just as they could have provided other details concerning their involvement in the scheme and the compensation they received. Similarly, if the effect of the respondents' imprisonment on the children was as drastic as the trial judge held it to be, I would have expected the respondents to have led evidence to that effect.\footnote{140}

In this part of their analysis the Court of Appeal is correct. The generic cannot simply be presumed to determine the specific.

In getting to this critical juncture, the Court of Appeal revisited the \textit{R.D.S.} case and argued that, despite the significant differences between the three sets of reasons for decision offered by Justices Major, Cory and L'Heureux-Dubé, they all agreed that "fact-finding has to ultimately have some basis in the evidence."\footnote{141} Doherty J.A. continued:

\textit{R. v. S. (R.D.)} draws a distinction between findings of fact based exclusively on personal judicial experience and judicial perceptions of applicable social context, and findings of fact based on evidence viewed through the lens of personal judicial experience and social context. The latter is proper; the former is not.\footnote{142}

To make the point on these particular facts Doherty J.A. provided the following illustration:

The proper use of personal experience and social context can be demonstrated by reference to Ms. Hamilton's evidence concerning the motive for her crime. She testified that she acted out of dire financial
need. The fact that a crime was committed for financial gain can, in some circumstances, mitigate personal responsibility, and, in different circumstances, it can increase personal responsibility. The trial judge was required to determine what weight should be given on sentencing to Ms. Hamilton’s admitted financial motive for committing the crime. In making that assessment, he was entitled to put her statement as to her motive in its proper context by recognizing, based on his experiences and the operative social context, that individuals in the circumstances of Ms. Hamilton often find themselves in very real financial need for reasons that include societal factors, like racial and gender bias, over which those individuals have no control. Used in this way, the tools of personal judicial experience and social context help illuminate the evidence. This use can be contrasted with the trial judge’s use of his experience in other cases to make the specific finding of fact that these respondents were conscripted — that is, compelled by drug overseers to engage in this criminal activity — when there was no evidence as to how the respondents came to be involved.143

This analysis makes sense given the nature of the evidence in this particular case—it was within the purview and capacity of the defendants (or perhaps more importantly, their lawyers) to indicate their circumstances. But we should also note that the circumstances of a case like R.D.S. are more difficult. In that situation, the evidence required would be systemic racism on the part of members of a police force. This is beyond the purview of defendants, and being systemic, would be very difficult to find evidence to support; i.e., even if one could determine that police forces tend to engage in systemic discrimination, how does one prove that a specific incident between a particular black youth and a particular police officer was racially motivated? But this case was not one of those situations—there was no claim in this case that the women were victims of racial profiling by Customs Canada; rather the concern was that the systemic variables of race, gender and poverty help explain why they became importers of drugs.

There are relatively straightforward ways to resolve this gap between the general and the particular in a case of this nature. Lawyers, as well as probation officers who draft pre-sentence reports, need to be much more aware of social context issues and be willing to include them as part of their analyses.144 Social contextualism is not simply a responsibility of judges, it is responsibility of all members of the criminal justice system; it is a systems value.145 If a judge believes there are gaps in the evidence s/he should put them to the parties to elicit their responses. For example, if the

143. Supra note 15 ¶ 127.
144. Gladue, supra note 7 ¶ 83-84, 93.
145. See also Cairns Way, supra note 13.
judge is concerned about conscription, virtue testing, poverty, children or the safety of an accused, s/he should be able to ask for submissions on this point. But this highlights the paradoxical nature of the Court of Appeal’s decision in *Hamilton*. If Hill J. had asked for submissions on these issues, this would have been added to the catalogue of infractions claimed by the Court of Appeal; and because he did not receive evidence on these matters he was condemned for relying on “generalizations” and his own “experiences in sentencing other individuals who couriered cocaine from Jamaica.”\(^{146}\) This, unfortunately, would appear to put the sentencing judge in a “damned if you do/ damned if you don’t” situation.

**Conclusion**

Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity. I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of the law, a deeper and truer comprehension of the methods had opened the priestly ears to the call of other voices.\(^{147}\)

While there is widespread rhetorical condemnation of the evils of systemic inequality in Canadian society, there is a corresponding dearth of pragmatic measures that seek to practically “level the playing field.” Time and again we hear the message that discrimination is a societal scourge, that it cannot be tolerated, and that it is time for change. Yet this discourse remains stunted by recourse to conventional shibboleths and inaction. If these messages, whether through poster campaigns or podium denouncements, are not accompanied by specific measures taken to recognize tangibly and account for inequality in real terms, the discursive condemnations ring hollow. While indubitably a policy concern that requires both social and political attention, there is a corresponding duty on the legal system to address, and redress, the effects of systemic inequality when such issues come within its purview.

The *Hamilton* decision by Hill J. represented an important development in the evolution of Canadian judicial reasoning in the recognition of the systemic interaction of class, gender and race, in a similar manner to *Gladue* and *Wells*. All of these decisions share a fundamental recognition that in order to imbue Canada’s egalitarian discourse with any substance

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and significance, judicial results need to reflect an accounting of the effects of the lived realities of interlocking inequalities.

Without oversimplifying a complex process of interrelated cause and effect, it can be seen that due to systemic forces of class, gender and race in society, certain marginalized groups will be “virtue-tested” to an extent not experienced by mainstream members of Canadian society. In the case of poor, African-Canadian single mothers in the Brampton region, Hill J. found that they were “virtue tested by drug operation overseers deliberately preying on their social and economic disadvantage.”

This distinctly differential treatment experienced by vulnerable groups results in part from their marginal position. It must be properly understood to take place within the context of social, economic and political deprivation whereby members of a marginalized group face a greatly reduced array of opportunities and choices. Therefore, not only are they “virtue-tested” by the fact that they may be disproportionately exposed to criminal elements relative to other segments of the population, but their dilemma is significantly compounded by the fact that they do not have as many options as mainstream members of society. This creates a self-perpetuating “double-jeopardy” for members of these marginalized groups. They are more vulnerable to “virtue-testing” due to their marginalized position, and this position is simultaneously the source of a reduced continuum of choice (with regard to education, employment opportunities, etc.) which adds further pressure to their situation. Society must surely bear a degree of responsibility for this situation, and accommodated sentencing is a tangible manner in which to express it.

As recognized by Hill J., society cannot shirk its responsibility in terms of the continued and prevalent existence of systemic inequality. As Doherty J.A. says, “[o]ne of the purposes of sentencing is to get at the root causes of the criminal activity and where possible eliminate that cause.”

The Court of Appeal, in the course of its decision, points out that Hill J. “candidly acknowledged” that his approach was “a new way of looking at the world.” Undoubtedly, appellate courts have an important obligation to ensure that sentencing proceedings are conducted fairly and efficiently,

149. “Because the sentencing function is an inherently individualized process, important systemic and background circumstances playing a part in the offence should be relevant to do justice in every case. Borrowing the words of McLachlin C.J.C. in Sauvé, penitentiary imprisonment in the presence of such factors may ‘not be a fair or appropriate marker of the degree of individual responsibility’. In the sentencing process, society cannot shirk its responsibility, such as it may be, for the offender being before the court.” Hamilton, supra note 20 ¶ 221 [emphasis added].
150. Hamilton, supra note 15 ¶ 142.
151. Hamilton, supra note 15 ¶ 49.
and that trial judges avoid *ad hoc* and unprincipled penalties. However, with the Ontario Court of Appeal’s substantive failure to acknowledge the systemic and interlocking inequalities experienced by Ms. Hamilton and Ms. Mason, the judicial system may actually be seen to be perpetuating and continuing their pattern of marginalization in Canadian society. Doherty J.A. states that there is need for “a judicial ear attuned to the realities of the lives of persons like the respondents.” This statement seems ironic, considering that the significance of this “attuned ear” loses all force if it is devoid of more tangible manifestations of recognition. Words alone are hollow, and soon lose their force and significance if unaccompanied by more tangible results.

152. Ironically, in *Parks*, supra note 18 ¶ 53, Doherty J.A. echoed this sentiment when he observed that

[t]he perceptions of those who claim to be victims of racial prejudice cannot, necessarily, be equated with the reality of such victimization. However, to reject such perceptions out of hand, especially when they are strong and wide spread, is perhaps to demonstrate the very racial bias of which they speak.
