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## Canada Update: Important Legal News and Highlights of Significant Cases from January 2012 through March 2012

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# CANADA UPDATE: IMPORTANT LEGAL NEWS AND HIGHLIGHTS OF SIGNIFICANT CASES FROM JANUARY 2012 THROUGH MARCH 2012

Dorothy Tran\*

THIS spring edition of the Canada Reporter includes two parts, beginning with summaries of important legal news in varying fields of law, such as intellectual property, environmental law, and constitutional law. The second part of the spring edition is a review of *R. v. Ipeelee*, which consolidated two appeals cases, one from Ontario, and another from British Columbia. This important case hails from the Supreme Court of Canada.

Part I of the report calls attention to the current and future impact these events have and will have on Canadian law and other countries as well. In the realm of intellectual property, the Canadian Intellectual Property Office has recently announced that it will begin accepting applications for the trademark of sounds, bringing Canada's Intellectual Property law into line with that of many other nations.<sup>1</sup> In environmental law, a class action regarding the release of toxic chemicals that occurred in 2004 has finally been authorized, and is being called by the media the largest environmental class action to ever hit Canada. Finally, earlier this spring the transnational issue of gay marriage has prompted the Canadian government to clarify and reiterate its views on the subject, and to change its marriage laws which impact thousands of non-Canadians, so as to come into accordance with the government's stances.

In the second part of the report, the Supreme Court of Canada's opinion *R. v. Ipeelee* reaffirmed that in criminal cases, the history and backgrounds of aboriginal defendants must be considered when sentencing.<sup>2</sup>

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\* This is Ms. Tran's third and final publication for the Law and Business Review of the Americas. She would like to thank the 2011-2012 International Law Review Association Board for their hard work and dedication. Furthermore, Ms. Tran would like to welcome the incoming board, including the new Canada Reporter, and wish them all a successful year.

1. Bob Tarantino, *Sounds Like a Revolution – Trade-marking Sounds in Canada*, HEENAN BLAICKIE LLP (Apr. 4 2012), <http://www.jdsupra.com/post/documentViewer.aspx?fid=ac573cac-f2eb-4239-a74a-41ac7dd9284c>.
2. The Canadian Press, *Aboriginal History Must Factor in Sentences, Supreme Court Says*, CBCNEWS, <http://www.cbc.ca/news/canada/saskatchewan/story/2012/03/23/north-supreme-court-aboriginal.html> (hereinafter *Aboriginal History Must Factor in Sentences*).

This reaffirmation holds special implications for the aboriginals in Canada, and may also inform courts in other countries with large aboriginal or indigenous populations that face similar problems.

## I. IMPORTANT LEGAL NEWS

### A. CANADIAN INTELLECTUAL PROPERTY OFFICE MAKES “SOUND” WAVES

The Canadian Intellectual Property Office has long held the position that untraditional marks, such as sounds, cannot be registered<sup>3</sup> due to a requirement of the *Trade-marks Act* that in order to register a mark, drawings representing the mark accurately must be provided to the office.<sup>4</sup> Unlike a mark consisting of a visual image, sounds are more difficult to depict graphically.<sup>5</sup> On March 28, 2012, however, the Canadian Intellectual Property Office announced its decision to immediately begin accepting applications for the trademarking of “aural logos” or sounds, despite its history of reservations regarding untraditional marks.<sup>6</sup> The driving force behind this change is twenty years of perseverance on the part of Metro-Goldwyn-Mayer Studios, Inc. (MGM Studios).<sup>7</sup> Anyone who has seen an MGM movie has most likely heard the distinct roar of the MGM lion, which accompanies the opening of each of its films.<sup>8</sup> In 1992, MGM Studios applied to Canada’s Intellectual Property Office to register the lion’s roar.<sup>9</sup> The application was initially rejected in 2010,<sup>10</sup> but this past March, MGM Studio’s battle with the IPO finally culminated when it won its appeal in Federal Court.<sup>11</sup> Sounds may only be the beginning of the changes to come for Canadian Intellectual Property law. Along with the trademark of sounds, which was included in a proposal of “changes to the *Trade-marks Act* Regulations,”<sup>12</sup> proposals were also recently made in support of accepting other “nontraditional marks, such as . . . motion marks and holograms.”<sup>13</sup> So, what registration process can

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3. Neil Melliship, *I Hear You Calling – Sound Mark Applications Not Being Accepted*, <http://trademarkblog.ca/i-hear-you-calling-sound-mark-applications-now-being-accepted/> (Mar. 28, 2012) [hereinafter *I Hear You Calling*].

4. *Id.*; see also 30(h) Trade Marks Act, R.S.C. 1985 c. T-13 s. 30(h).

5. Omar El Akkad, *Canadian Court Clear Ways to Trademark Sounds*, THE GLOBE AND MAIL, Mar. 29, 2012, available at [http://www.theglobeandmail.com/report-on-business/canadian-court-clears-way-to-trademark-sounds/article2384923/?utm\\_medium=Feeds%3A%20RSS%2FAtom&utm\\_source=Home&utm\\_content=2384923](http://www.theglobeandmail.com/report-on-business/canadian-court-clears-way-to-trademark-sounds/article2384923/?utm_medium=Feeds%3A%20RSS%2FAtom&utm_source=Home&utm_content=2384923).

6. *Id.*; Tarantino, see also, *supra* note 1; see also Pres Release, Canadian Intellectual Property Office, Trade-Mark Consisting of a Sound (Mar. 28, 2012), <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03439.html> [hereinafter *Trade-Mark Consisting of a Sound*].

7. Akkad, *supra* note 5.

8. *Id.*; see also *I Hear You Calling*, *supra* note 3.

9. *Id.*

10. Canadian Intellectual Property Blog, *Lion Now Roars Louder in Canada*, <http://www.canadaipblog.com/search/label/sound%20mark> (Mar. 30, 2012).

11. *Id.*

12. *I Hear You Calling*, *supra*, note 3.

13. *Id.*

intellectual property and entertainment lawyers expect to come across? The Canadian Intellectual Property Office has stated that:

The application for the registration of a trade-mark consisting of sound should:

- (a) state that the application is for the registration of a sound mark;
- (b) contain a drawing that graphically represents the sound;
- (c) contain a description of the sound; and
- (d) contain an electronic recording of the sound<sup>14</sup>

To identify sounds accurately, a “waveform” which is “the shape and form of an aural signal”<sup>15</sup> seems to be the only way to qualify an image as a suitable graphical representation.

The MGM lion’s roar is a fairly short sound, but there is concern in the intellectual property community that people will wish to register longer sounds, such as songs, which already receive protection under copyright laws.<sup>16</sup> While the trademarking of sounds does not seem to include protection for songs, the boundaries of the new law have yet to be tested, or set. If both copyright and trademark protections were to be given to a particular sound mark, a possible problem that might arise is conflict between which laws would prevail regarding the extent of and the length of time that mark would receive protection.<sup>17</sup> Furthermore, these changes will impact the workload of the Intellectual Property Office. The IPO, which reviews registration applications for trademarks and copyrights, will have an extra step added to the review process. They will need to ensure that all works that come through their offices do not incorporate sounds that have already been registered.<sup>18</sup> Of course, one solution is to look to other countries, such as the United States, Australia, and those in the European Union, which all already allow the registration of sound marks, for additional guidance.<sup>19</sup>

#### B. PLAINTIFFS SUE IN LARGEST CLASS ACTION TO DATE

On August 9, 2004, The Canadian Electrolytic Zinc Ltd., located in Salaberry-de-Valleyfield, Quebec, released a toxic cloud consisting of sulphur trioxide.<sup>20</sup> Unbeknownst to the company, which was acquired in 2006 by one of the largest mining companies in the world, Xstrata,<sup>21</sup> the toxic discharge would continue to remain an issue for many more years to come. The company had previously attempted to have the suit dismissed,

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14. Trade-Mark Consisting of a Sound, *supra* note 6.

15. Akkad, *supra* note 5.

16. Tarantino, *supra* note 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. Jennifer Brown, *Quebec Court Authorizes Environmental Class Action*, CANADIANLAWYERMAG.COM, <http://www.canadianlawyermag.com/legalfeeds/753/Quebec-court-authorizes-environmental-class-action.html>.

21. Andre R. Gignac, *Largest Environmental Class Action in Canada is Authorized*, DIGITAL JOURNAL, Mar. 12 2012, <http://digitaljournal.com/article/321550>.

but ran out of options when the Supreme Court of Canada denied its appeal in 2011.<sup>22</sup> Most recently, a court from the District of Montreal authorized the case to be heard,<sup>23</sup> and Francois Deraspe, the lead plaintiff in the case, will represent the entire class in litigation with the counsel of his attorney, Chantal Desjardins.<sup>24</sup>

One of the main points alleged is that Electrolytic Zinc released 10 tons of sulphur trioxide, which became sulfuric acid vapor when mixed with oxygen, into the atmosphere.<sup>25</sup> The toxic cloud affected thousands of people across multiple towns, causing burns, rashes, and respiratory problems.<sup>26</sup> For these ailments, the company could end up paying over 900 million dollars.<sup>27</sup> Especially if the facts contained within a report that was released to the public in 2009 are shown. These facts indicate that the toxic release could have been prevented. For example, the report states that the sulphur trioxide was released due to a worn out pump—a pump employees knew was in need of replacement many days before the August 4 toxic release occurred.<sup>28</sup> Furthermore, the company not only failed to shut the refinery down immediately after becoming aware of the release, but it also failed to notify emergency services, even going so far as to attempt to cover up the situation by referring to it as a “small problem” when contacted by 911 about the toxic cloud.<sup>29</sup> This very large and potentially very expensive lawsuit will hopefully hold Electrolytic Zinc accountable for its negligence and act as a warning to other companies that emergency procedures must always be ready to be implemented.

### C. SAME-SEX MARRIAGE IS HERE TO STAY

Canadian courts first began to hand out marriage licenses to same-sex couples in the year 2003,<sup>30</sup> and the federal government officially made same-sex marriage legal across Canada in the year 2005.<sup>31</sup> Since then, roughly 5,000 same-sex non-Canadian couples have flocked to Canada to

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22. *Id.*

23. *Id.*

24. Brown, *supra* note 20.

25. *Court Authorizes the Largest Environmental Class Action in Canada's History*, MARKETWIRE, L.P. March 20, 2012.

26. Brown, *supra* note 20.

27. *Id.*; *Court Authorizes the Largest Environmental Class Action in Canada's History*, *supra* note 25.

28. *Court Authorizes the Largest Environmental Class Action in Canada's History*, *supra* note 25.

29. *Id.*

30. Matthew Pomy, *Canada to Change Marriage law to Legally Recognize all Non-Resident Sam-Sex Marriage*, JURIST.ORG. Jan. 15, 2012, <http://jurist.org/paperchase/2012/01/canada-to-change-marriage-law-to-legally-recognize-all-non-resident-same-sex-marriages.php>.

31. Tamara Baluja, *Ottawa Moves to Close Legal Loophole on Same-Sex Marriage*, THE GLOBE AND MAIL, Feb. 17, 2012, available at <http://www.theglobeandmail.com/news/politics/bill-to-close-loophole-in-same-sex-marriages-creates-double-standard/article2342275/> [hereinafter Baluja, *Ottawa Moves to Close Legal Loophole*].

be married.<sup>32</sup> It seemed as if the debate over same-sex marriage had been over for quite some time—at least in Canada. That is why it came as such a surprise when a same-sex couple was told that they had never been legally married.<sup>33</sup> The couple, residents of Florida and England, respectively, both places where same-sex marriage has not been recognized under the law, was unable to obtain a divorce in Canada, even though they were married there.<sup>34</sup> The stated reason for denying the couple a divorce was that because their home countries did not recognize same-sex marriages, Canada could also not recognize such marriages—thereby extinguishing the need for a divorce.<sup>35</sup> As one can imagine, backlash ensued immediately, prompting a quick response from the government.

Justice Minister Rob Nicholson has stated that the federal government has no desire to backtrack on its previous decision, and he affirmatively noted that in the eyes of the law, “marriages performed in Canada that aren’t recognized in the couple’s home jurisdiction will be recognized in Canada.”<sup>36</sup> In an effort to reiterate its stance on same-sex marriage, and rectify the situation for the lesbian couple who was denied a divorce, as well as others similarly positioned, the government has revealed plans to amend the Civil Marriage Act.<sup>37</sup> The amendment will provide provisions for same-sex non-Canadian couples to dissolve their marriages.<sup>38</sup> The main change in the Civil Marriage Act will be that the one-year residency requirement for those who wish to divorce in Canada will not apply to same-sex non-Canadian couples.<sup>39</sup> As long as the parties have been separated for at least one full year, divorces will be granted.<sup>40</sup> Furthermore, the two other grounds for divorce—adultery and abuse, which are still available to residents of Canada, will not be included in the provisions for same-sex non-resident couples.<sup>41</sup>

Of course, not everyone is happy with the legislation. Some believe that having two sets of rules is discriminatory, and that set residency requirements are necessary in order to treat straight and gay couples simi-

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32. *Id.*, Pomy, *supra* note 30.

33. Sung un Kim, *Canada: Same-Sex Marriages of Non-Residents not Valid*, JURIST.ORG Jan. 13, 2012, <http://jurist.org/paperchase/2012/01/canada-same-sex-marriages-of-non-residents-not-valid.php><http://jurist.org/paperchase/2012/01/canada-same-sex-marriages-of-non-residents-not-valid.php>.

34. Laura Payton, *Conservatives to Change Civil Marriage Law*, CBCNEWS (Jan. 13, 2012), available at <http://www.cbc.ca/news/canada/story/2012/01/13/pol-same-sex-marriage-nicholson.html>.

35. *Id.*; Kim, *supra* note 33.

36. Payton, *supra* note 34.

37. *Same-Sex Marriage Law Change Addresses Divorce*, CBCNEWS (Feb. 17, 2012), available at <http://www.cbc.ca/news/canada/story/2012/02/17/gay-marriage-loop-hole.html> [hereinafter *Same-Sex Marriage Law Change Addresses Divorce*].

38. Payton, *supra* note 34;

39. *Id.*

40. Tamara Baluja, *Same-Sex Marriage Bill Said to be Rife with ‘Pretzel Logic’*, THE GLOBE AND MAIL, Feb. 18, 2012 at A6 [hereinafter *Baluja, Pretzel Logic*]; *Same-Sex Marriage Law Change Addresses Divorce*, *supra* note 37.

41. Baluja, *Pretzel Logic*, *supra* note 40.

larly.<sup>42</sup> Others believe nothing was wrong with the Civil Marriage Act to begin with.<sup>43</sup> These individuals believe the only reason for the amendment was to quell the backlash and take focus off of the idea that attacking the validity of same-sex marriage was a ploy by the conservative Harper government to change back the laws to pre-same-sex marriage days.<sup>44</sup> Another view, that of a Toronto family law attorney, is that the legislation is unnecessary, and that the courts should instead be authorized to waive the residency requirement.<sup>45</sup> While equality was obviously the intent when same-sex marriage was legalized in 2005, the reality of the situation is that the issue is still widely controversial, both across the world, and across Canada. Without changing all of the laws that impede the rights of same-sex couples, there will always be individuals who will attempt to use loopholes to deny others their rights. "Equality is thwarted if government lawyers do [not] absorb the principles underlying th[e] law into their conduct."<sup>46</sup> People are correct to question why government lawyers attempted to deny the couple a divorce on the basis of an invalid marriage, as opposed to solely asserting that the divorce could not be granted due to the one-year residency requirement, which seems to be the true barrier and the law that was in need of fixing. Whether or not there was an ulterior motive, same-sex marriage is here to stay. Perhaps the situation, which gave rise to the clarifications, was a much-needed blessing in disguise. Continued change to the legal framework in order to correspond to Canada's tolerant views is still critical, and doing so will reaffirm and sustain the concept of equality in marriage in the years to come.

## II. SIGNIFICANT COURT DECISION

### A. *R. v. Ipeelee*: ABORIGINALS IN CANADA'S CRIMINAL JUSTICE SYSTEM

On March 23, 2012, the Supreme Court of Canada issued a combined opinion for two appeals cases. The court ruled 6-1 on how the *Criminal Code* sentencing principles and objectives should be applied by trial judges to Aboriginal offenders.<sup>47</sup> Justice LeBel, writing for the majority, held that trial court judges must consider the unique history and individual backgrounds of Aboriginal offenders when determining sentences in

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42. *A Staunch Defense of Same-Sex Marriage*, THE GLOBE AND MAIL, Jan. 13, 2012 available at <http://www.theglobeandmail.com/news/opinions/editorials/a-staunch-defence-of-gay-marriage/article2302534/>.

43. Payton, *supra* note 34.

44. *Id.*; Robert Leckey, *It Takes More than a Verdict to Win Equality*, THE GLOBE AND MAIL, Jan. 12, 2012 available at <http://www.theglobeandmail.com/news/opinions/opinion/it-takes-more-than-a-verdict-to-win-equality/article2300322/>.

45. Baluja, *Ottawa Moves to Close Legal Loophole*, *supra* note 31.

46. Leckey, *supra* note 44.

47. *R. v. Ipeelee*, File 33650, 34245, 2012 S.C.C. 13 (Oct. 17, 2012) para. 33, available at <http://scc.lexum.org/en/2012/2012scc13/2012scc13.html>; Aboriginal History Must Factor in Sentences, *supra* note 2.

criminal cases.<sup>48</sup> Furthermore, the Court found that the *Criminal Code* also required judges to contemplate other punishments, besides imprisonment. In its analysis the Court revisited the Gladue principles, guidelines on sentencing that it had previously set forth in the 1999 case *R. v. Gladue*.<sup>49</sup> The Court looked at the general principles of sentencing,<sup>50</sup> the offenses of the two appellants at bar—breaches by both of their long-term supervisory orders (LTSOs),<sup>51</sup> and the various socio-economic, cultural, and historical reasons for why weight must be giving to the unique circumstances of Aboriginal offenders.<sup>52</sup> The Supreme Court of Canada found that the lower courts had failed to properly consider relevant factors when sentencing Ipeelee and Ladue, which resulted in unfit sentences, disproportionate to their crimes.<sup>53</sup> The lone dissenter was Justice Rothstein, who believes that “protection of the public is paramount” and should thus be weighed more heavily than other considerations during sentencing.<sup>54</sup> This case is significant in that by requiring lower courts to give special consideration to Aboriginals, the Supreme Court has, in a way, allocated the duty of rectifying past injustices and breaking the cycle of crime in Aboriginal societies.

### 1. Background

As mentioned previously, the Supreme Court consolidated two cases. The appellant in the first case was Manasie Ipeelee, a man of Aboriginal origin who grew up in a broken home without parental figures, turned to alcohol at the age of eleven, committed his first criminal offense at the age of twelve, and never finished school.<sup>55</sup> After multiple convictions of violent crimes committed between stints in prison or while on probation, Ipeelee committed a crime that would lead him to be designated a “long-term offender under s. 753.1(1) of the *Criminal Code*.”<sup>56</sup> He was sentenced to six years of prison for sexually assaulting a woman, and as a long-term offender, Ipeelee had to follow his prison sentence with ten years under a long-term supervisory order (LTSO).<sup>57</sup> One of the terms of his LTSO was to refrain from drinking any alcohol, but Ipeelee breached that condition when he was caught by the police riding his bicycle intoxi-

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48. Aboriginal History Must Factor in Sentences, *supra* note 2; see also Jamie Davis, *Canada High Court Orders Judges to Consider Aboriginal History when Sentencing*, JURIST.ORG (Mar. 24, 2012) <http://jurist.org/paperchase/2012/03/canada-high-court-orders-judges-to-consider-Aboriginal-history-when-sentencing.php>; see also Alaska Indigenous, *Alaska Rural Justice*, <http://alaskaindigenous.wordpress.com/2012/03/28/alaska-rural-justice/> (last accessed Mar. 26, 2012) [hereinafter *Alaska Rural Justice*].

49. *Id.*; see generally *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679 (SCC) (Can.).

50. *Ipeelee*, [2012] SCC 13 ¶ 34-39.

51. *Id.* ¶ 40-87.

52. *Id.* ¶ 40-87.

53. *Id.* ¶ 29.

54. *Id.* ¶ 120.

55. *Id.* ¶ 2; *Alaska Rural Justice*, *supra* note 48.

56. *Ipeelee*, [2012] SCC 13 ¶ 10.

57. *Id.*



cated.<sup>58</sup> At the trial court level the judge presiding over Ipeelee's case stated that, "when protection of the public is the paramount concern, an offender's Aboriginal status is of 'diminished importance'"<sup>59</sup> and chose to focus instead on the fact that Ipeelee's LTSO breach was for alcohol consumption and that his criminal history was entwined with alcohol abuse. Ipeelee was sentenced to three years of imprisonment for breaching his LTSO, which he appealed all the way up to the Supreme Court of Canada.<sup>60</sup>

The second case concerned Frank Ladue, an Aboriginal man who was allegedly sexually, physically, and emotionally abused as a child.<sup>61</sup> Ladue, like Ipeelee, turned to alcohol at an early age, and later on in his life became addicted to various drugs.<sup>62</sup> Ladue has been convicted of over forty crimes, and he was designated a long-term offender after he sexually assaulted a woman in the fall of 2002, with his LTSO term beginning in December of 2006.<sup>63</sup> After finally getting out of prison, Ladue was sent to a halfway house in an area where drugs were easily accessible, and while there he tested positive for cocaine, a breach of his LTSO.<sup>64</sup> He was sentenced to three years of prison, which he appealed and got reduced to one year, with the Court of Appeal for British Columbia holding that three years was an unfit sentence and too long when considering his background and circumstances.<sup>65</sup> The Crown challenged the reduced sentence.

## 2. *Majority Opinion*

In its analysis, the Supreme Court first looked to the *Criminal Code*, which was amended in 1996 to include objectives and principles, which act as guidelines for proper sentencing."<sup>66</sup> It found the main principle of sentencing to be proportionality—proportionality of the sentence to the offense as well as to the "degree of responsibility of the offender."<sup>67</sup> Proportionality is important because it instills confidence in the criminal justice system that whatever sentence is given is fair to and deserved by the offender.<sup>68</sup> In looking at the specific violations in the two appeals cases, the Court discussed long-term supervision orders, which can last up to ten years, and identified two purposes for designating offenders under LT-SOs. The first purpose is to protect the public from violent offenders, while the second purpose is a continuing objective of rehabilitating of-

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58. *Id.*; Aboriginal History Must Factor in Sentences, *supra* note 2.

59. *Ipeelee*, [2012] SCC 13 ¶ 15.

60. Aboriginal History Must Factor in Sentences, *supra* note 2.

61. *Ipeelee*, [2012] SCC 13 ¶ 19.

62. *Id.* ¶ 20.

63. *Id.* ¶ 24-26.

64. *Ipeelee*, [2012] SCC 13 ¶ 27; Aboriginal History Must Factor in Sentences, *supra* note 2.

65. *Ipeelee*, [2012] SCC 13 ¶ 29-31.

66. *Id.* ¶ 35.

67. *Id.* ¶ 36.

68. *Id.* ¶ 37.

fenders enough to eventually reintegrate them fully into society at the end of their LTSO terms.<sup>69</sup> The key goal of the LTSO regime is to reintroduce individuals back into society. If the purpose of the LTSO regime was mainly to protect the public from long-term offenders committing more crimes, the best way to do to that would be to keep the offenders incarcerated, instead of conditioning their release upon certain agreements. If judges thought there was no chance of rehabilitation for a certain individual, he or she would be designated a “violent offender” instead of a “long-term offender,” the difference being that the individual would never be released into the public at all. Conditioning release, and keeping long-term offenders accountable through steady supervision help deter criminal activity until full rehabilitation and reintegration can be attained.

Applying the *Criminal Code* sentencing principles of proportionality and fairness, the Supreme Court stated that the punishment for breaches of LTSOs should vary depending on the severity of the violations and the circumstances of the offender.<sup>70</sup> In order to determine appropriate sentences for a breach, the Court specifically looked at the *Criminal Code*’s directive that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”<sup>71</sup> The Code calls attention to the circumstances of Aboriginals in its guidelines because there is a serious problem of overrepresentation of Aboriginals in Canada’s criminal justice system—Aboriginals account for approximately one-third of the prison population, while they make up no more than two percent of Canada’s whole population.<sup>72</sup> The Supreme Court discussed the disproportionate representation of Aboriginals, and indicated that there are two main reasons for the disproportion. First, Aboriginals are more likely repeat crimes because when sentencing judges fail to follow the guidelines provided by the *Criminal Code* and expounded in *Gladue*, unfit sentences are passed that do nothing to remedy the root problems causing criminal activity. Second, there is systemic discrimination. Due to a history of oppression, Aboriginals tend to fall into the lower socio-economic tiers of Canadian society, and judges are more likely to choose prison terms instead of alternatives for lesser crimes when committed by those in the lower tiers.<sup>73</sup> Post-*Gladue*, judges have failed in their duty to consider the unique circumstances of Aboriginals, which has perpetuated the overrepresentation of Aboriginals in prison. Because of this, there was a need to reiterate and reaffirm many of the sentiments from *Gladue*. Once such sentiment is the outlook that trial judges have the “power to influence the treatment

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69. *Id.* ¶ 50.

70. *Id.* ¶ 52.

71. *Id.* ¶ 56; Criminal Code R.S.C. 1985 c. C-46 s. 718.2(e).

72. Alaska Rural Justice, *supra* note 48.

73. *Ipeelee*, [2012] SCC 13 ¶ 67.

of aboriginal offenders in the justice system.”<sup>74</sup> This means that sentencing judges are in the best positions to make a difference in whether an Aboriginal offender will become rehabilitated and deterred from further criminal activity, or will end up reoffending the law. They can do so through carefully crafting sentences, and seeking alternatives to the typical imprisonment. Also, by assessing the unique circumstances of Aboriginal offenders, judges can gain insight into the culpability of that individual, which will aid in establishing appropriate sentences. The current sentencing mechanisms used by judges are obviously not “respond[ing] to the needs, experiences and perspectives of aboriginal people or aboriginal communities,” but the principles reaffirmed by the Supreme Court in *R. v. Ipeelee*, if implemented correctly, can most certainly change that.<sup>75</sup>

### 3. *Dissent*

Justice Rothstein, the lone dissenter, disagreed with the majority on quite a few points. Most notably, he disagreed that the main purpose of long-term supervision orders is to rehabilitate and reintegrate offenders. He stated that the paramount consideration should always be protection of the public, as “there is no guarantee that rehabilitation and reintegration will be achieved with long-term offenders in view of their history of repetitive sexual or violent behaviour.”<sup>76</sup> As such, J. Rothstein believes that breaches in LTSOs illustrate the need for judges to consider protection of the public over the objective of rehabilitation.<sup>77</sup>

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74. *Gladue*, [1999] S.C.R. 688 ¶ 65.

75. *Gladue*, [1999] S.C.R. 688 ¶ 74.

76. *Ipeelee*, [2012] SCC 13 ¶ 120; see also Lydia Guo, *R. v. Ipeelee: Correction, Conviction and Culture*, THECOURT.CA (Apr. 1, 2012), <http://www.thecourt.ca/2012/04/01/r-v-ipeelee-correction-conviction-and-culture/>.

77. *Ipeelee*, [2012] SCC 13 ¶ 121-22.