

**BARRIERS TO IMPLEMENTING  
HOLISTIC, COMMUNITY-BASED  
TREATMENT FOR OFFENDERS  
WITH FETAL ALCOHOL  
CONDITIONS**

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**By**

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## ABSTRACT

The thesis contends that holistic, community-based treatment is preferable to carceral options for offenders with fetal alcohol conditions, presents emerging support for this contention, identifies barriers to the implementation of community-based treatment, and culminates with analyses of ways of influencing policy reform or of legally mandating non-carceral treatment options. Potential avenues that will be examined include:

- *Charter of Rights and Freedoms*, s. 15, including an analysis from *Eldridge, Law, and Auton*, based on the duty to accommodate disabilities;
- *Constitution Act, 1982*, s. 35 and its recognition and affirmation of such relevant treaty right as the alcohol ban, particularly as the ban operates as a contextual factor in a s. 15 *Charter* analysis as applied to affected treaty beneficiaries; and
- Articles 23, 24 and 40 of the *Convention on the Rights of the Child*, and Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*, particularly as they influence the s. 1 analysis under the *Charter*.

A remedy mandating a positive state obligation to provide community-based treatment likely would require favourable cost-benefit analyses, as well as evidence of effectiveness of the treatment (the latter to be studied in a subsequent interdisciplinary Ph.D. program using qualitative research techniques). The implications of a finding of disability and mental disorder related to fetal alcohol conditions will be examined. The present research topic is at the interface of health and justice, and indeed is multidisciplinary in nature as fetal alcohol influences every aspect of affected individuals' lives. Moreover, the problem is situated in its historical, ideological, global, and trans-disciplinary context.

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If I have inadvertently omitted expressly thanking any of those who assisted me, please accept my sincere appreciation and my humble apologies. Although I have attributed much inspiration and assistance to others throughout this acknowledgement, as a final caveat, all limitations, errors, lacunae, or inadequacies in this thesis are mine alone.

Concluding thoughts turn to those who are the subject of this study, those struggling with disabilities such as fetal alcohol conditions; may they receive the support that they require to lead full and healthy lives in the community.

## **DEDICATION**

**To our loving daughter, Samantha,  
who passed away on July 12, 1983,  
but remains forever in our hearts.**

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## LIST OF ABBREVIATIONS

|        |   |
|--------|---|
| ABF    | Aboriginal Healing Fund   |
| ACADRE | Aboriginal Capacity and Developmental Research Environments             |
| ADHD   | Attention Deficit Hyperactive Disorder                                  |
| ARBD   | Alcohol Related Birth Defects   |
| ARND   | Alcohol Related Neurological Disorder                                   |
| ASD    | Autism Spectrum Disorder  |
| ASDs   | Autism Spectrum Disorders   |
| BAC    | Blood Alcohol Content   |
| BTC    | Breaking the Cycle  |
| CBA    | Canada Brewers' Association   |
| CALJ   | Canadian Association of Liquor Jurisdictions                            |
| CAUT   | Canadian Association of University Teachers                             |
| CCRA   | <i>Corrections and Conditional Release Act</i>                          |
| CIHR   | Canada Institute of Health Research                                     |
| DSM-IV | <i>Diagnostic and Statistical Manual of Mental Disorders, Volume IV</i> |
| ESD    | Environmental Sensitivity Disorder                                      |
| FACE   | Fetal Alcohol Canada Expertise  |
| FAE    | Fetal Alcohol Effects   |
| FAEE   | Fatty Acid Ethyl Esters   |
| FAS    | Fetal Alcohol Syndrome  |
| FAS/E  | Fetal Alcohol Syndrome and/or Fetal Alcohol Effects                     |

|       |   |
|-------|---|
| FASD  | Fetal Alcohol Spectrum Disorder                           |
| FASDs | Fetal Alcohol Spectrum Disorders                          |
| IAPH  | Institute of Aboriginal Peoples' Health                   |
| IBI   | Intensive Behavioral Intervention                         |
| IPHRC | Indigenous Peoples' Health Research Centre                |
| LAT   | Lovaas Autism Treatment                                   |
| NAHO  | National Aboriginal Health Organization                   |
| NCR   | Not Criminally Responsible                                |
| NIAAA | National Institute on Alcohol Abuse and Alcoholism (U.S.) |
| NNAMR | National Network for Aboriginal Mental Health Research    |
| NRTA  | Natural Resources Transfer Agreement                      |
| P-CAP | Parent-Child Assistance Program                           |
| PEER  | Parents as Early Educational Resource                     |
| pFAS  | Partial Fetal Alcohol Syndrome                            |
| SLGA  | Saskatchewan Liquor and Gaming Authority                  |
| IOM   | Institute of Medicine (U.S.)                              |
| UST   | Unfit to Stand Trial                                      |
| YAP   | Young Autism Project                                      |
| YCJA  | <i>Youth Criminal Justice Act</i>                         |
| YOA   | <i>Young Offenders Act</i>                                |

# 1. INTRODUCTION

## 1.1 Underlying Contention of the Thesis

The present research is based on the contention (for which there is emerging support) that, for fetal alcohol offenders, holistic, community-based treatment is preferable as a sentencing option to incarceration. The contention is supported *inter alia* by an understanding of the nature of the syndrome itself. Because of a reduced ability to think abstractly due to the damage that alcohol inflicted on their developing brains *in utero*, fetal alcohol affected individuals do not understand cause/effect relationships, including appreciation of the consequences of their actions, nor are they able to generalize what they learn in one situation to another.<sup>1</sup> Moreover, their judgment is poor, and they are easily influenced by others.<sup>2</sup> Although they may function fairly well in the structured, carceral environment, any useful coping skills learned there are not readily transferable upon release to noncarceral settings and must be largely relearned on the outside.<sup>3</sup> Because of impulsivity and obliviousness or blindness to consequences, fetal alcohol offenders are liable upon release to reoffend regardless of the length of the period

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<sup>1</sup> *R. v. Steeves*, [1998] B.C.J. No. 3151 (BC Prov. Ct.) at para 12-15, expert witness testimony of Dr. Diane Fast, cited in *R. v. M.L.*, [2000] S.J. No. 17 at para. 34.

<sup>2</sup> *Ibid.* at para. 15 (Steeves).

<sup>3</sup> *R. v. M.(B.)*, [2003] SKPC 83 (Sask. Prov. Youth Ct.) at para. 43-44, citing A. P. Streissguth, A.P., *Fetal Alcohol Syndrome: A Guide for Families and Communities* (Toronto: Brookes Publishing, 1997) at 238-243.

of incarceration, making recidivism rates high for this population.<sup>4</sup> The sentencing principle of deterrence does not function well for individuals whose ability to appreciate consequences is limited.<sup>5</sup> Statistics demonstrate repeatedly the disproportionately high rates of incarceration of Aboriginal people,<sup>6</sup> with fetal alcohol conditions a concomitant factor.<sup>7</sup>

It should be clarified that fetal alcohol is not solely an Aboriginal, but a global problem, found particularly where populations have been subjected to damaging effects of colonization or globalization, including grinding poverty.<sup>8</sup> Significantly, individuals with fetal alcohol conditions are highly susceptible to negative peer influences which carceral situations present, as well as being, in such setting, vulnerable to victimization.<sup>9</sup> Such factors render carceral situations, artificial settings removed from the natural world, inappropriate for them.

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<sup>4</sup> Conry J. and Fast, D. *Fetal Alcohol Syndrome and the Criminal Justice System* (BC Fetal Alcohol Syndrome Resource Society: Vancouver, c2000) at 104.

<sup>5</sup> *R. v. M.L.*, [2000] S.J. No. 17 (Sask. Youth Ct.), at para.46b.

<sup>6</sup> Canada Centre for Justice Statistics, *Aboriginal Peoples in Canada*, retrieved July 30, 2003, from the World Wide Web: <http://www.statcan.ca/english/freepub/85F0033MIE/85F0033MIE01001.pdf>.

<sup>7</sup> *Supra* note 1, at 2 (*Steeves & M.L.*) citing Streissguth et al's (1996) longitudinal American study of fetal alcohol affected youth, which found that 60% of the cohort aged 12 years or older had experienced trouble with the law; National Institute on Alcohol Abuse and Alcoholism (NIAAA), "Strategic Plan to Address Health Disparities," (Bethesda, Maryland: Feb. 8, 2001): "Children with FAS often develop behavior problems that increase their risk of becoming involved with the Criminal Justice System."

<sup>8</sup> Tait, C. L., Aboriginal Health Research Team, National Network of Aboriginal Mental Health Research, "Fetal Alcohol Syndrome among Canadian Aboriginal Peoples: Review and Analysis of the Intergenerational Links to Residential Schools," (Montreal, Quebec: Aboriginal Healing Foundation, 2002), at 113-117; and Gibson, F. *Home is My Road* (Toronto: Playwrights Canada Press, pending 2003). First produced in 2003 at Toronto's Factory Theatre Mainspace, April 12 to May 11, 2003, and the topic of a CBC radio interview with author, Florence Gibson, April 15, 2003, 10:00 p.m. on "Between the Covers".

<sup>9</sup> *Supra* note 4 at 69-71(Conry & Fast); and *United States v. Lee*, 1998 U.S. App. LEXIS 5967, No. 97-2830, United States Court of Appeals for the Eighth Circuit. In *Lee*, a "vulnerable-victim enhancement to sentence" was applied to an offender who plead guilty to sexually abusing a minor. The offender "knew or should have know that the victim of the offense was unusually vulnerable due to ... mental condition," pursuant to *U.S. Sentencing Guidelines Manual* 3A1.1(b)(1997). The victim of the sexual abuse had fetal

Further, in comparing carceral and community-based options, there is a cost factor to consider. Keeping one youth out of a correctional facility saves \$46,000 per year; and keeping one child out of foster care saves \$16,000 per year. A child with fetal alcohol syndrome costs an estimated \$1.5 million over its lifetime.<sup>10</sup> Cost of prenatal to age three intervention programs, such as the Manitoba “Stop FAS Program,” is but \$3400 per woman.<sup>11</sup> On the bases of the cost factors and the previous discussion, one can tentatively conclude that not only are community-based intervention programs less costly, they are also likely to be more effective in terms of their outcomes, than are carceral options. Therefore, it cannot be deemed reasonable, from a cost-benefit analysis, to persist with the status quo.

Although it is true that community-based intervention is generally considered more effective than incarceration by experts in the field, there is a gap in the research related to the effectiveness of particular community-based interventions.<sup>12</sup> What works best, and how to implement such effective interventions for individuals with fetal alcohol conditions is not fully determined. Appropriate interventions *per se* will be likely topics of future qualitative study. The present thesis investigates threshold topics to the noted

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alcohol syndrome and was unusually vulnerable for her age. The offender was sentenced to 21 months imprisonment and two years supervised release, which was affirmed on appeal.

<sup>10</sup> Streissguth, A. P., Aase, J.M., Clarren, S.K., Randels, S.P., LaDue, R.A. and Smith, D.F. “Fetal Alcohol Syndrome in Adolescents and Adults.” (1991) 165 JAMA, 1961-1967.

<sup>11</sup> Ridd, D., Manitoba Health, *Pregnant Addicted Women: Manitoba’s Experience*, “Stop FAS: Cost Savings” (3<sup>rd</sup> Annual Face Roundtable, *FAS: When the Children Grow Up*, Sept. 9, 2002, accessed September 30, 2002, <http://www.knowtv.com>).

<sup>12</sup> Streissguth, A. P. *Fetal Alcohol Syndrome, A Guide for Families and Communities* (Toronto: Brookes Publishing Co., 2001), at 279.

future qualitative study, including legal, ideological, historical, and policy issues that are impediments to community-based treatment. The thesis culminates in an analysis of potential avenues to mandate such treatment through the courts, or alternatively or in addition, through the avenue of policy reform. Only when community-based treatments become more extant can conclusive empirical analyses of their effectiveness take place.

## **1.2 Ideological and Historical Roots of Law and Justice, Including Post-Colonial and Restorative Perspectives<sup>13</sup>**

Conceptions of the very nature of law and justice can differ from one society to another, and in turn, influence the lives of its citizenry, especially those most marginalized and vulnerable to the imposition of sanctions. The nature of the system of law and justice conceived could itself be a barrier to the implementation of community-based treatment of offenders with fetal alcohol conditions. As the British-based system of criminal law evolved, such barriers developed in a number of ways.

For example, a movement occurred a millennium ago, in such system of law, away from customary rules that dealt with any wrongdoing at the community level, to more

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<sup>13</sup> This section, pages 4-9 is an abridgement of a 40-page unpublished paper submitted to Professor M. Benson for the Graduate Legal Theory Seminar, December, 2001, entitled “Criminal Justice Paradigms, Centralization of Power and Relativity of Values: Historical and Ideological Origins, and Continuing Dialectic.”

centralized, bureaucratic systems that viewed crime not as a civil wrong, to be redressed by compensation, but rather as a wrong against the king and later the state, a public wrong, subject to punishment.<sup>14</sup> Public wrong was eventually conceived of as deserving of penitentiary time, separating the wrongdoer from his or her roots in the community.<sup>15</sup> Eventual reintegration therein was not viewed with much concern.<sup>16</sup> Moreover, in the main, laws were no longer natural laws, evolving from the collective experience of the community, but, rather, were artificial and arbitrary, so-called positive laws, selected and imposed by the authority of the central state.<sup>17</sup>

Hobbesian theory, the precursor of the “western, liberal, rational enlightenment,”<sup>18</sup> provided the underlying ideology for the evolution of the centralized state and

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<sup>14</sup> Cayley, D. *The Expanding Prison, the Crisis in Crime and Punishment and the Search for Alternatives*, (Toronto: House of Ansansi Press Limited, 1998) at 167-9.

<sup>15</sup> Supra note 14 at 137-140 (Cayley). Penitentiaries were instituted in Christian monasteries in the Middle-Ages where solitary confinement was imposed on monks who broke their vows; it was considered a penance or earthly atonement for sin or for defiance in breaking the Church’s laws, and thus the name, penitentiary.

<sup>16</sup> *Ibid.* at 137-140. (Cayley)

<sup>17</sup> Austin, J. *Lectures on Jurisprudence, or, The Philosophy of Positive Law*, abridged from the larger work by Robert Campbell (London: J. Murray, 1909) at 106; and Kelsen, H. *General Theory of Norms*, translated by Michael Hartney (Oxford, Eng. Clarendon Press, c. 1991.) at 58. Positivists like Austin and Kelsen concerned themselves solely with what law “is,” not what law “ought to be”. As positive laws had no absolute basis, moral or otherwise, relativity of values emerged. Taken to the extreme, under the notion of positivism and relativity of values, Nazi laws, selected and imposed by the state, although reprehensible, were legitimate laws.

<sup>18</sup> Honderik, T., Ed. (*The Oxford Companion to Philosophy* (New York: Oxford University Press, 1995, at 236-7, **Enlightenment**, and at 483, **Liberalism**. The Age of Enlightenment or the Age of Reason which arose in Western Europe in the 16<sup>th</sup> and 17<sup>th</sup> centuries, contrasts with the religious (sometimes superstitious), customary ideals and traditions of the Middle Ages. Hobbes wrote his famous *Leviathan* in the aftermath of the English Civil War, Cromwell’s successful rebellion against Stuart King Charles I. Rather than engaging in endless religious wars and prosecutions, under the enlightenment, man was urged to employ his reason to become truly free from past authorities. Liberalism is the ideology that attaches great importance to individual liberties to pursue one’s own values (such as life, liberty, and property) as long as they do not intrude on another person’s corresponding rights. These replaced the web of mutual obligations which bound people together in ethnic, religious or other communities, and substituted individualism and competition. Alienation and crime may be evidence of a resultant lack of social supports.

positivism or state-made law, denuded of an intrinsic morality, with only force to legitimate it.<sup>19</sup> Hobbes contrasted the "modern" civil state to the anarchic state of nature,<sup>20</sup> commencing the dichotomy of civilized and savage, the "other" whom it was permissible to dominate,<sup>21</sup> as happened through the colonization process.<sup>22</sup> Locke, in turn, recognized three natural rights, life, liberty and property, otherwise freeing individuals to choose their ends in a self-interested manner. The state purportedly was to select, in a neutral manner, the minimum of laws which would apply to everyone.<sup>23</sup> Implicitly, Locke's model tends to benefit competitive, aggressive, acquisitive individuals more than those with communal values of sharing.<sup>24</sup> Those whose values

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<sup>19</sup> Hobbes, T. *Leviathan* [1651], Edited by Richard Tuck (Cambridge: Cambridge University Press, 1991) at 121-129.

<sup>20</sup> *Ibid.* at 89-90. According to Hobbes, man in the state of nature (including the Aboriginal of North America) is savage and violent, in a constant state of warfare and disorder, a "war of everyman against everyman." Without a strong central government, people would live in a state of anarchy and degradation. Property would not be secure and civilization would not progress.

<sup>21</sup> Hegel, G. W.F. *The Phenomenology of Spirit*, translated by A.V. Miller, with analysis of the text and forward by Findlay, J.N. (Oxford: Clarendon Press, 1977) at 124. Hegel maintained that the strategy of opposites diminishes and oppresses both parts of the duality, whether it be self/other, master/slave, or civilized/savage. For instance, in the master/slave dichotomy, both are diminished as the master becomes dependent on the slave and the slave, in turn, is subjugated to the will of the master.

<sup>22</sup> Memmi, A. *The Colonizer and the Colonized*, trans. by Greenfield, H. (New York: Orion Press, 1965) at 126. A similar relationship exists between the master/slave and colonizer/colonized; one dominates and one is subjugated, and in the process both are diminished.

<sup>23</sup> Locke J., *Two Treatises on Government* [1689], Ed. By Laslett, P. (Cambridge, U.K.: Cambridge University Press, 1965), Book II, at c. 8, paras. 95 and 106. Locke's ideology is thought to underpin the American Revolution of 1775-1783 and the resultant republican constitution of 1789.

<sup>24</sup> Fuller, L.L., *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969) at 181-186. Communal values of sharing are addressed by Lon Fuller. According to Fuller, communities are based on shared values and purposes, which form the law in and for that community, and give that law "an inner morality;" Unger, R. M. *Knowledge and Politics* (New York, N.Y.: 1984) 236-295. Roberto Unger proposed "organic groups" (groups bound by shared values and face-to-face consensus, with a natural harmony between the needs for community and autonomy). Such groups are based on Fuller's concept of shared values, but lack the domination that traditionally occurs in communitarian societies; Henderson, J.S.Y., "First Nations Legal Inheritances in Canada: The Mikmaq Model," (1996) 23 *Man. L. J.*, 1-31. Sakej Henderson asserts that prior to colonization, traditional, Aboriginal communities were organic communities, based on shared values (such as peace, kindness, sharing and trust) and principles of non-domination. In contrast to some communitarian societies, Aboriginal communities governed themselves on a consensual basis. Alienation from the community was rare. Problems were dealt with face to face, in an inclusive context, with an emphasis on healing and reconciliation, not punishment. Restorative justice, as we now conceive it, had its roots in such traditional, Aboriginal communities;



differ from the dominant culture are more likely to be marginalized and to suffer legal sanctions such as incarceration.<sup>25</sup> Both Hobbes and Locke conceived an apocryphal model of state authority, theorizing that citizens gave up some power to enter social contracts forming civil states which would create law and order, and by so doing, protect citizens and avoid the anarchy of the state of nature.<sup>26</sup>

The retributive model of justice suited the needs of centralized states as it provided a uniform and efficient manner of dominating widespread and diverse populations, through force and spectacles of punishment which were to deter all citizens.<sup>27</sup> Kant, Hegel, Hart and others ideologically justified this view of punishment. Kant and Hegel saw crime as absolute wrong that had to be atoned for or annulled by punishment.<sup>28</sup> Hart tempered this harsh view, holding that punishment was justified, but only were the

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Canada, *Report of the Royal Commission on Aboriginal Peoples: Special Report, Bridging the Cultural Divide: A Report on Aboriginal People in the Criminal Justice System, Part I, Aboriginal Concepts of Law and Justice—The Historical Realities* (Ottawa: Supply and Services Canada, 1996) at 1-25. Oral evidence is presented by Aboriginal groups of early traditions of restorative justice practices in their communities; and Roche, D. *Accountability in Restorative Justice* (Oxford: Oxford University Press, c2003), at p. 2 and 12-13. Declan Roche presents a similar, less utopian view of early indigenous communities and their restorative justice practices. He acknowledges the positive aspects, but includes a cautionary note as regards the need for internal and external accountability mechanisms. According to Roche, accountability is critical as community-based, restorative justice practices have the potential to become punitive and stigmatizing, rather than forgiving and reconciling.

<sup>25</sup> Kennedy, D., *A Critique of Adjudication (fin de siecle)* (Cambridge, Massachusetts: Harvard University Press, 1997) at 224-226. The state and the courts hold an implicit value system evident in the types of laws they legislate, adjudicate or enforce, and thereby privilege some individuals, giving them power over others. Not value-free after all, Locke's positivistic laws tend to empower one group over another, creating social stratification, of which disproportionate incarceration rates are a reflection.

<sup>26</sup> *Supra* at notes 19 and 23. (Hobbes and Locke)

<sup>27</sup> Foucault, M., *Discipline and Punish, The Birth of the Prison*, trans. By Alan Sheridan (New York: Vintage Books, A Division of Random House, Inc., 1996) at 3-61.

<sup>28</sup> Kant, I. *Philosophy of Law*, trans. W. Hastie (Clifton, N.J. and Edinburgh: Augustus M. Kelly, 1974) at 195-198; and Hegel, G. W. F., *Philosophy of Right*, trans. T.M.Knox (Oxford: Clarendon Press, 1952) at 69.

offender responsible, acting voluntarily and possessing the necessary mental element.<sup>29</sup> However, rather than favouring punishment, in the view of the present writer, it would be more ideologically consistent to systems of positive or pure law which lack absolute values, to conceive wrongdoing as breaching the social contract and, therefore, subject to contractual remedies such as damages or specific performance.

Restorative justice, in a community context, is proposed as a way of recapturing the best of what has been lost from the context of customary, community-based law and as a means of undoing the alienation and recycling of crime that seems a legacy of a retributive approach.<sup>30</sup> Paradoxically, restorative justice is based more on contractual

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<sup>29</sup> Hart, H. L. *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 44, 183-4, and 152. For example, the objection to punishment for wrongful actions undertaken while sleepwalking, even if such punishment were to promote overall deterrence of crime, is that such punishment is grossly unjust to the genuine sleepwalker who happens while asleep to inadvertently break the law. It is unjust to punish those who have not voluntarily broken the law: "What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied causes of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice.'" (p. 152)

<sup>30</sup> *Supra* note 14 at 170-175 (Cayley). One format for dispute resolution in restorative justice is the consensual circle, where everyone has a chance to be heard, in an unhurried, caring community atmosphere. The circle may include the offender, victim, family members, friends, neighbours, police, elders, as well as representatives from school, social services, health and justice. The complete story of the offender, the victim, the entire circumstances of the offence and the involvement of the community come to light. Responsibility can be taken for harm done to others, apologies proffered, plans made to make amends to the victim, and critically, approaches discussed to reintegrate the offender into the community. Community support is offered where needed. The success of the model depends on holistic implementation; if a healing or sentencing circle is appropriated and used outside an inclusive community structure, it is less likely to succeed. This model has been partially implemented in family conferences for young offenders in New Zealand, and in diversion programs in Canada and Scandinavia; and Roche, D. *Accountability in Restorative Justice* (Oxford: Oxford University Press, c 2003) at 2. More recently, according to Roche, restorative justice approaches have expanded into the United States, Europe, Australia, South Africa, Argentina, Papua New Guinea, and Singapore (p. 6). However, Roche emphasizes as a cautionary note that accountability issues, both internal and external, be addressed for restorative justice programs, as such community-based forms of justice have become, on occasion, in earlier times, and more currently, vigilante groups (p. 2 and p. 12-13).

remedies than is the retributive justice resorted to under the ideological legacy of social contractarians.

Principles of sentencing in the *Criminal Code*<sup>31</sup> reflect both the retributive and restorative approaches. Implementation of restorative approaches is impeded by the legacy of retribution and consequential breakdown in traditional community structures. No longer tolerable in a post-colonial era,<sup>32</sup> the legitimacy of positivism and retribution wanes in favour of more pluralistic approaches which emphasize social justice for all classes, races and cultures, including those individuals that may be disabled.

### **1.3 Historical Origins of Alcohol Use Among the Aboriginal Populations of Western Canada<sup>33</sup>**

A discussion of fetal alcohol conditions, and the resultant problems of Aboriginal peoples in Western Canada who suffer disproportionately from such conditions, cannot be undertaken properly in an ideological-historical vacuum. Consideration must be

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<sup>31</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 718 and 718.2.

<sup>32</sup> The colonial age is contemporaneous with the age of discovery and empire-building engaged in by European nation states. Indigenous peoples the world over were exploited and subjugated by the European colonizers. Post-colonialists contest the premises of superiority on which colonization was based, and attempt to repair the harm done by colonization.

<sup>33</sup> Section 1.3, “Historical Origins of Alcohol Use Among the Aboriginal Populations of Western Canada,” and Section 1.4 “The Treaty Alcohol Ban, pages 10-30, were submitted originally to Professor N. Zlotkin for the Advanced Native and Aboriginal Law 801.3, January, 2002, as a part of an unpublished paper entitled “*Charter*, Treaty, and *Constitutional* Solutions Proposed as Remedies to Obtain Interdisciplinary, Non-Carceral Treatment for FAS/E Offender.” Editing, revision and extension of these sections have been undertaken.

taken of European colonization and related influences over these Aboriginal peoples. The colonial age is contemporaneous with historical events of the 16<sup>th</sup> through the 19<sup>th</sup> century. European colonizers used their enlightenment ideology, albeit unconsciously, to justify acting in a self-interested manner under state sanction, while harming and exploiting Indigenous Peoples beyond Europe. A vehicle by which this self-interest was pursued was the North American whiskey trade. The whiskey trade may have affected all peoples of the west, and perhaps all of North America, promoting a culture of consumption, and increasing the power of the liquor cartel.<sup>34</sup> Colonization itself has been aptly described in the following passage penned by a Western Canadian scholar:

Colonization refers to an actual historic process which occurred before, during and after England asserted sovereignty over various areas in Canada. It refers to the actual dispossession of land, and the imposition of one legal system over another, the amalgamation of autonomous political entities and gradual assimilation of the colonized. It is the continual process of “bringing into subjection or subjugation” people who are living in a territory being colonized by Europeans.<sup>35</sup>

Post-colonial thinkers emphasize today’s need for decolonization, the political and cultural liberation of peoples formerly colonized by European powers. They contest the premises on which colonization was based, including Eurocentric and racist misconceptions that Aboriginal societies were less “advanced” than those of western Europe. Aboriginal peoples, viewed as the savage “other”, at the periphery of culture or civilization, were considered dependent on the superior culture of western Europe, seen by its emissaries as the centre and apex of human development, diffusing or spreading

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<sup>34</sup> The power of the liquor cartel may be seen today in the resistance to product warning labels in Canada, inadequate funding for prevention of addictions and fetal alcohol conditions, and lack of funding for treatment of individuals with fetal alcohol conditions, all of which could mitigate the ravages caused by alcohol.

<sup>35</sup> Bell, C. “Metis Constitutional Rights in Section 35(1),” (1997) 36 Alta. L. Rev. (No. 1) 180, at 9.

progress and civilization to that periphery. Forced dependency on the colonizer left Aboriginal peoples largely deprived of their languages and culture. Thus marginalized, such victims of colonialism became alienated and powerless. Assimilation, appropriation and extermination were common practices of the colonizers.<sup>36</sup> Such practices have produced the intergenerational trauma of residential schools, alcohol abuse, poverty, dislocation, family and community breakdown, and cultural genocide, rendering Aboriginal peoples vulnerable to encounters with a retributive justice system, and subject to state sanctions such as imprisonment.<sup>37</sup>

Much of the history of the 19<sup>th</sup> century whiskey trade in the north western plains of North America aptly exemplifies colonization and its effects on Aboriginal peoples. In treaties negotiated during this period, Indian peoples eventually attempted to include redress for the problems that colonization had created among their peoples. These two divergent threads, one colonial in nature (the whiskey trade), one post-colonial (the treaties), will be traced through the following historical analyses.

Distilled alcohol was introduced into the north west plains on a large scale during the whiskey trade of the mid- to late- 19<sup>th</sup> century. Before this, liquor had been used since

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<sup>36</sup> Blaut, J. M., *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993).

<sup>37</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples. Special Report, Bridging the Cultural Divide, Part 2, Current Realities: The Failure of the Justice System; The Root Causes of Over-Representation and Aboriginal Crime* (Ottawa: Supply and Services Canada, 1996), 39-53, at 47-52; *R. v. Fleury*, [1998] S.J. No. 538, citing the expert evidence of Dr. John Hylton, including various documents such as *The Report of the Aboriginal Justice Inquiry of Manitoba, Aboriginal Over-Representation; The Report of the Royal Commission on Aboriginal Peoples, Injustice Personified- Aboriginal Over-Representation*; and the *Saskatchewan Indian Justice Review Committee, Social and Economic Indicators*, at paras. 15-17.

the 1600-1700s as part of ceremonial trading rites at coastal trading forts termed “factories.” When the fur trade moved inland along the rivers, liquor was used to trade with designated band members. As early as 1821, when it merged with the North West Company after years of cutthroat competition involving prodigious use of liquor as a trade good, the Hudson’s Bay Company had adopted an official policy prohibiting the sale of liquor to Indian people, a policy adopted because of adverse experience with the evils of alcohol abuse by American Indians. Pivotal events affecting the development of the large scale use of distilled alcohol occurred between 1863-1870. In 1863, Hudson’s Bay Company partners, long absorbed in the fur trade, sold their shares to investors interested in land sales and railroad exploration. By 1870, after years of negotiations, these new owners of the Hudson’s Bay Company had sold Rupert’s Land (which included all land north of the American border draining into Hudson Bay) to the Canadian government.<sup>38</sup> For a time during and after these events, there was a vacuum of authority in Rupert’s Land, as Canada was a small country, relatively unprepared to deal with this vast, undeveloped territory.

With asserting jurisdiction problematic, Canadian surveyors arrived in 1869 in the Red River area of Rupert’s Land. Metis<sup>39</sup> settlers became concerned regarding security of title to their plots of land which extended several miles back from narrow river frontages. Little was done to alleviate these suspicions. The resultant Red River

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<sup>38</sup>Kennedy, M. A. *The Whiskey Trade of the Northwestern Plains, A Multidisciplinary study* (Peter Lang: New York, 1997) at p. 12.

<sup>39</sup> *Ibid.* at 17. Whenever and wherever the fur trade was active, children of European and Native mixed-blood ancestry appeared. The term ‘Metis’ is used to refer to all such mixed-blood people, although French ancestry was most common, English, Scottish, Irish, German, and other Europeans also took native partners.

Rebellion, led by Louis Riel, culminated in the *Manitoba Act*, 1870. The Canadian northwest, other than the provinces of B.C. created in 1871 and postage-stamp Manitoba carved out in 1870, was left as the North West Territories under federal suzerainty, until after the turn of the twentieth century. Treaties 1 and 2 signed by the Government of Canada in 1871 with the Indians of Manitoba,<sup>40</sup> were followed by others involving lands farther west. Scrip was issued to some Metis to extinguish their Aboriginal title, if they did not wish to accept treaty and live as Indians on reserves of land set aside for their use. However, unscrupulous land speculators were able to exploit many Metis for their scrip, leaving them landless and poor.<sup>41</sup> Some Metis sought a new life, moving to the North Saskatchewan River in the 1870's near present day Batoche, recreating their long river plots, and, as much as possible, the way of life of Red River.<sup>42</sup>

With the advent of steamers on the upper Missouri in the 1830's, transportation of large quantities of buffalo robes to eastern U.S. markets became for the first time

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<sup>40</sup> Morris, A., *Treaties of Canada with the Indians of Manitoba and the North-West Territories*, Facsimile reprint of the 1880 edition published in Toronto by Belfords & Clarke, (Saskatoon: Fifth House Publishers, 1991), at 313 and 316. Treaty No. 1 was signed on August 3, at Lower Fort Garry, with the Chippewa and Swampy Cree. Treaty No. 2 was signed on August 21, at Manitoba Post with the Chippewa.

<sup>41</sup> Giraud, M. "The Western Metis After the Insurrection," Vol. II, No. 2 Saskatchewan History, 1-15, at 2.4, translated by C. M. Chesney, from the book *Le Metis Canadien. Son role dans l'histoire des provinces de l'Ouest* (Paris: 1945). Giraud was a professor of history at the College de France in Paris. His book is based on exhaustive examination of Hudson's Bay Company materials, church archives, and public records in Canada, Great Britain, and France. In addition Professor Giraud visited all the chief Metis settlements in the Prairie Provinces, gathering information on social conditions as they existed before World War II.

<sup>42</sup> Giraud, M. "Metis Settlement in the North-west Territories," Vol. II, No. 1 Saskatchewan History, 1-16 at 1-11, translated by C.M. Chesney from the book *Le Metis Canadien. Son role dans l'histoire des provinces de l'Ouest* (Paris: 1945).

economically feasible.<sup>43</sup> The York boats and canoes of the Hudson's Bay Company oriented to the beaver trade via Hudson Bay could not compete well with these steamers.

Indeed, at first the Hudson's Bay Company had little desire to enter this trade in buffalo robes. It was when, contemporaneously, the popularity of silk hats reduced the demand for beaver felt for European hat production that all traders became oriented less to the beaver and more to the bison of the plains, away from the rivers and hills of the Shield and the western mountains, where the Hudson's Bay Company, as well as the American Fur Trade Company beaver posts, had been built. These changes in the fur trade meant overall that the position of the large, old companies deteriorated in the competition with the flexible, independent entrepreneurs termed "free traders."<sup>44</sup>

Taking advantage of the vacuum of authority left in the wake of the Hudson's Bay Company sale of its fur monopoly and its rights of governance in Rupert's Land, American traders, mobile, entrepreneurial, and in some cases unscrupulous, moved north from Fort Benton, Montana territory, in the early 1870s, glad to escape jurisdiction of American law.<sup>45</sup> Metis middle men from Red River and Montana roamed the plains of the N.W.T. in their Red River carts, either hunting themselves or trading

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<sup>43</sup> *Supra* note 38, at p. 5-6. (Margaret Kennedy)

<sup>44</sup> *Ibid.* at p. 8.

<sup>45</sup> *Ibid.* at p. 25 and 41. The U.S. government had passed the *Intercourse Act* in 1834, prohibiting the importation of liquor into Indian Country. In addition, the U.S. government did not want arms and ammunition traded to the Sioux, because of the hostilities between them and the latter's resistance to moving onto reservations. With both sides armed, the inevitable confrontation occurred at the Battle of the Little Bighorn in June of 1876, annihilating General George A. Custer and much of the 7<sup>th</sup> U.S. cavalry.



with Indians for cured buffalo robes. Trains of Red River carts, some several hundred to a thousand long, would form for the well-organized, biannual buffalo hunts of the Metis.<sup>46</sup> The late spring hunt of early origin was mainly for meat, the source of pemmican, although robes were also taken, whereas the robes were thicker and more valuable during the fall-winter hunt or *hivernenant*<sup>47</sup>. American veterans from the U.S. civil war turned to opportunities in this buffalo robe trade, as did groups of disappointed miners from the 1860s Gold Rush to Helena and Virginia City, Montana.<sup>48</sup> As Indian Treaties involving the Montana area had been made in 1855, 1865 and 1869, the confining of Indians to reservations was well underway there. Movement to reserves did not begin north of the 49<sup>th</sup> parallel (the Indian's proverbial "Medicine Line") until after the buffalo disappeared around 1879-80, though treaties contemplating reserves had been negotiated a few years earlier.<sup>49</sup> The focus of the traders, American and Canadian, then moved north to the Canadian plains where Indian hunters were more free-roaming, buffalo robes thicker and more numerous, and constraints of law largely non-existent.

Alcohol (often poisonously adulterated)<sup>50</sup> once again became a trading staple of both free traders and Metis. American traders tended to have better quality, variety, and prices of manufactured merchandise, direct from eastern U.S. factories, than did the Hudson's Bay Company and Canadian independents, including the Metis, relying on

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<sup>46</sup> *Ibid.* at 18-19.

<sup>47</sup> *Ibid.* at 18 and 44.

<sup>48</sup> *Ibid.* at p. 9 and 20. (Whiskey Trade)

<sup>49</sup> *Ibid.* at 17.

<sup>50</sup> *Ibid.* at 98.

stodgy, distant British suppliers. American traders had greater dependence on the Indians as hunters and hide processors than did their Canadian counterparts. As Indian women did much of the painstaking work of scraping, tanning and stretching the hides, polygamous practices, that facilitated Indian hunters having their kill efficiently processed, proliferated.<sup>51</sup> Such practices upset Christian missionaries, Fr. A. Lacombe, o.m.i, for example, already concerned over the horrendous impact alcohol was having on the Indians.<sup>52</sup>

Without much law and order in the area, whiskey forts had sprung up, such as Fort Whoop-Up, just north of the 49<sup>th</sup> parallel, at the confluence of the Belly (now the Oldman) and St. Mary Rivers, in what is now southeastern Alberta. Similar forts proliferated in the area that is now southwestern Saskatchewan. Liquor, the cheapest means of purchasing furs from the Indians, was used with abandon. The Indians, not used to distilled liquor, became, in many cases, very addicted to it. The results included increased drunkenness, death by freezing in the harsh winter climate, alcohol poisoning, family conflict, unruly tribal members that chiefs and elders could not subdue, inter-personal violence within families and communities, increased inter-tribal hostilities (especially between the Cree and the Blackfoot),<sup>53</sup> and inter-racial conflicts (especially between the Blackfoot and the white miner-traders), with consequent fatalities.<sup>54</sup>

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<sup>51</sup> *Ibid.* at 8-9. (Whiskey Trade)

<sup>52</sup> Hughes, K., *Father Lacombe, The Black Robe Voyageur* (Toronto: McClelland & Stewart, 1920) at 195-200.

<sup>53</sup> *Supra* note 38, at 14. (Whiskey Trade)

<sup>54</sup> *Ibid.* at 39. Jean L'Heureux, who lived and travelled with the Blackfoot as a kind of "priest," recorded in his 1872 census that 89 Indians died from drunken brawls in that year alone: three among the Blackfoot, 46 among the Blood, 13 among the North Peigan and 27 among the South Peigan.

Awareness of these troubles, notably the Cypress Hills massacre in 1873, where twenty members of an Assiniboine Band were ambushed and slaughtered by American whiskey traders and wolfers angered by theft of their horses, albeit by another tribe, gradually filtered to Ottawa. Prime Minister John A. MacDonald was prompted to create the North West Mounted Police (NWMP) and to send them on their long trek west in 1873-74.<sup>55</sup> MacDonald wanted peace in the west and treaties made with its Indians to free up the land. He planned to build a transcontinental railway, to unite Canada and hold the west, settle it with farmers, and prevent feared American “manifest destiny” expansionism north of the 49<sup>th</sup> parallel.

Indian leaders, in the main, although initially wary, soon accepted the NWMP in the hope of ending the whiskey scourge and its devastating effects upon their communities.<sup>56</sup> Fort MacLeod, with Indian acquiescence in its location, and then Fort Walsh, were established by the NWMP to take control of the border area frequented by the whiskey traders. That trade was soon eliminated. In 1876, Sitting Bull and his band, pursued by American Forces, were received peacefully by NWMP Commissioner Walsh at Fort Walsh. The victorious Sioux had slaughtered General Custer at the Little Bighorn, Montana, in June of that year. These additional mouths to feed, as the number of buffalo declined, did not improve the situation north of the 49<sup>th</sup> parallel where tight-fisted federal policies kept Indians impoverished and angry over broken promises of the federal government about land, farming and food.

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<sup>55</sup> *Ibid.* at 6 and 39-40. (whiskey trade)

<sup>56</sup> *Ibid.* at 40.

At the height of the whiskey trade and its perils, had come simultaneously both the smallpox plague and the rapid decline of the buffalo. Smallpox was brought by increased contact with traders,<sup>57</sup> and the decline of the buffalo through their all out slaughter. The rapacious demand for buffalo robes and hides in eastern American markets and in Europe,<sup>58</sup> combined with a desire in the United States to force nomadic tribes to reservations by eliminating their free roaming principal source of food, brought about this obscene slaughter. First Nations entered into Treaties with the Crown in an attempt to ensure their continued survival, to deal with the problems of the whiskey trade and sicknesses such as smallpox, and with the passing of the buffalo, to find new ways of life through agriculture and education.<sup>59</sup> Treaty No. 3 signed in 1873 at the North West Angle of the Lake of the Woods, had ceded 55,000 square miles of land to the Canadian Government.<sup>60</sup> Treaties four, five, six and seven, covering most of the

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<sup>57</sup> *Ibid.* at 31-22. In 1870, Oblates traveling across the plains to the south (in the South Saskatchewan Region) witnessed camp after camp of the dead and dying. It was estimated that 676 Blackfoot, 630 Blood, 1080 Peigan, 200 Sarsi, 123 Assiniboine, 468 Cree, 335 St. Albert metis, and 40 Ste. Anne metis had died by February, 1871, reducing native societies in the upper Saskatchewan by about 50% of their number. However, the smallpox outbreak led to an end of the Cree-Blackfoot hostilities; they made peace after some preceding confrontations.

<sup>58</sup> *Ibid.* at 46. Buffalo robe shipments out of Fort Benton between 1865-83 were in the tens of thousands per year, with 75,000 shipped in each of 1875, 1876 and 1878, indicative of the massive slaughter. By 1884 there were only 3000 robes to ship. Additional robes were also shipped from Red River to St. Paul, Minnesota.

<sup>59</sup> The alcohol ban, the pestilence and medicine chest clauses, and the provisions regarding agriculture and education (the school house clause) were negotiated as part of Treaty 6 at the insistence of the Indians.

<sup>60</sup> Savino, V. and Schumacher, E., "Whenever the Indians of the Reserve Should Desire it" An Analysis of the First Nation Treaty Right to Education," (1992) 21 Man. L.J. 476-497 at para. 17. Treaty No. 3, the North West Angle Treaty, included the Ojibway and the Saulteaux in the region north of the 49<sup>th</sup> parallel between Lake Superior, Lake of the Woods and Hudson's Bay. Also in *Supra* note 10 at 320-321. (Morris)

Canadian west, were signed in the years 1874, 1875, 1876, and 1877 respectively,<sup>61</sup> transferring some 400,000 square miles of land to the Canadian government.<sup>62</sup> Metis issues, including uncertainties over secure land tenure along the Saskatchewan River, remained largely unresolved. The reluctance of Prime Minister MacDonald to seek solutions to this land conundrum contributed to the Saskatchewan Rebellion of 1885, the execution of Louis Riel, and subsequently the gradual dispersal and social disintegration of the Metis people. It was not until the 1950's that the Metis were to begin formal reorganization, a painful process that is ongoing.<sup>63</sup>

For the Indians, 1885 accelerated their confinement to reserves and the marginalization of their way of life. Treaty implementation stalled, and they were made subject to the paternalistic *Indian Act*, which had been enacted in 1876.<sup>64</sup> Indian Bands were created and white Indian Agents appointed to administer reserves.<sup>65</sup> Enacted under amendments to the *Indian Act* in 1884,<sup>66</sup> anti-potlatch laws forbade many Indian

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<sup>61</sup> *Supra* note 40, at 320-375. Treaty No. 4, the Qu'Appelle Treaty, was signed at the Qu'Appelle lakes, with the Cree and the Saulteaux of that area. Treaty No. 5, The Lake Winnipeg Treaty, was signed at Berens River and Norway House with the Saulteaux and Swampy Cree. Treaty No. 6 was signed at Fort Carlton and Fort Pitt with the Plains and Wood Cree. Treaty No. 7, the Treaty with the Blackfeet, was signed in southern Alberta at the Blackfoot Crossing on the Bow River, with the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians of the east central range of the Rocky Mountains. Adhesions to Treaty No. 4 were signed in 1874 (2), including the Fort Ellice Adhesion with the Saulteaux, and 1875 (2). Adhesions to Treaty 5 were signed in 1875 (2). Adhesions to Treaty 6 were signed in 1877 (3), 1878 (4), 1879, 1882, 1889, 1944, 1959, 1954, and 1955. An adhesion to Treaty 7 was signed on Dec. 4, 1977. (Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories*, 1991)

<sup>62</sup> Morris, A., *The Treaties of Canada with the Indians of Manitoba and the North West Territories, 1880* (Coles Publishing Company: Toronto, 1971) at 320-375.

<sup>63</sup> *Supra* note 41, at 1 and 6 - 9. (Marcel Giraud, "The Western Metis After the Insurrection")

<sup>64</sup> *Indian Act*, S.C., 1876, c.18.

<sup>65</sup> *Ibid.* at s. 4 and s. 3(11).

<sup>66</sup> *An Act further to amend "The Indian Act, 1880."* S.C. 1884, c. 27, s. 3.

ceremonies in Canada for nearly seventy years, a prohibition ending only in 1951.<sup>67</sup>

Other repressive measures included a prohibition on raising money or retaining a lawyer to advance land claims,<sup>68</sup> the “pass” laws whereby Indians required the permission of the Indian Agent to leave a reserve for any reason,<sup>69</sup> an interdict on producing or selling goods without the permission of the Indian agent,<sup>70</sup> and loss of status and entitlements for such things as receiving a university education<sup>71</sup> or for a woman marrying a non-Indian<sup>72</sup> (the latter not repealed until Bill C-31 in 1985<sup>73</sup>). In addition, Indians, not considered citizens, but rather wards of the Crown, were not allowed to vote in Federal elections until 1960.<sup>74</sup> Prior to this enactment, they were subject to losing their tax exemption status as Indians if they voted.<sup>75</sup> In 1970, federal government prohibitions against the use of alcohol by Indians were repealed.<sup>76</sup>

The interplay of the intergenerational effects of alcohol and the treaty provisions continue today, and await full resolution. Aboriginal alcohol consumption patterns continue largely unabated from their origins during the whiskey trade.<sup>77</sup> Effects on health, accidents, mortality, including suicide, family breakdown, poverty, employment,

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<sup>67</sup> *Indian Act*, S.C. 1951, c. 29, s. 123.

<sup>68</sup> *Indian Act*, R.S.C. 1906, c. 81, s. 149A [en. S.C. 1926-27, c.32, s. 6].

<sup>69</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back*, vol. 1, “9.10 Pass System,” (Ottawa: The Commission, c1996) at 296, citing F. L. Barron, “The Indian Pass System in the Canadian West, 1882-1935,” 13 *Prairie Forum* no. 1 (Spring, 1988), p. 27-28. Although the pass system was official policy, there was never any legislative basis for it. It arose from a suggestion by the Deputy Superintendent of Indian Affairs to Prime Minister MacDonald in 1886.

<sup>70</sup> *Indian Act*, R.S.C. 1927, c. 98, s. 40 and 41.

<sup>71</sup> *Supra* note 64, s. 86(1).

<sup>72</sup> *Supra* note 70, s. 14.

<sup>73</sup> *Indian Act*, R.S.C., 1985, c. I-5, s. 6(1)(c) [en. R.S.C., 1985, c. 32 (1st Supp.) s. 4].

<sup>74</sup> *Canada Elections Act*, S.C., 1960, c. 39, s. 14.

<sup>75</sup> *Indian Act*, R.S.C., 1952, c. 23, s. 14(2)(e). Veterans were exempted from this harsh disqualification.

<sup>76</sup> *Indian Act*, R.S.C. 1970, c.I-6, s. 96 and 98.

<sup>77</sup> 1996 NWT Alcohol and Drug Survey, NWT Bureau of Statistics, retrieved February 10, 2003 from the World Wide Web: <<http://www.stats.gov.nt.ca/SWtatinfo/Health/alcdrug/report.html>>.

and alcohol teratogenicity such as fetal alcohol conditions are the results.<sup>78</sup> Since colonization, Aboriginal women have been particularly adversely affected by restrictive and sexist legislation and policy, which has tended to differentially exclude them from status, band membership and governance, and concomitant benefits.<sup>79</sup> As well, interference occurred with the exercise of their maternal function through residential schools and child protection policies. Such devaluation often rendered them subject to domestic violence at home and to racism and sexism in the larger community, leaving them traumatized and vulnerable to alcohol abuse and addictions.<sup>80</sup> Prevention, as addressed in treaty times through the alcohol ban, and continuing currently, to some extent, through such initiatives as education about responsible alcohol use, and treatment of addictions cognizant of those factors which lead women to addictions, is part of the solution. Resolution of the problems of those involuntarily affected *in utero* needs to be addressed through the establishment of multidisciplinary, community-based treatment for offenders with fetal alcohol conditions.

#### 1.4 The Treaty Alcohol Ban

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<sup>78</sup> Health Canada, *A Statistical Profile on the Health of First Nations in Canada* (Ottawa, Canada: 2003), retrieved January 30, 2003, from the World Wide Web: <[http://www.hc-sc.gc.ca/fnihb/sppa/hia/publications/statistical\\_profile.htm](http://www.hc-sc.gc.ca/fnihb/sppa/hia/publications/statistical_profile.htm)>.

<sup>79</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4, "Chapter 2: Women's Perspectives," (Ottawa: Supply and Services Canada, 1996) at 21-53.

<sup>80</sup> *Ibid.* at 62-71, and *Supra* note 148, retrieved October 25, 2003, from the World Wide Web: <<http://www.pwhce.ca/sharing.htm>>.

Treaty rights recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*,<sup>81</sup> particularly the alcohol ban, present potential solutions to acquiring access to interdisciplinary, community-based treatment for individuals with fetal alcohol conditions who are also beneficiaries of the relevant treaties containing this provision. The avenues of potential impact of constitutionally protected treaty clauses include: policy reform and legal redress, on their own merits, or as contextual factors in s. 15(1) *Charter*<sup>82</sup> analysis. The last avenue will be considered in Chapter Three of this thesis through a contextual analysis of s. 15(1) *Charter* rights. Other treaty rights, such as the medicine chest and the pestilence and famine clause (restricted to the text of Treaty No. 6) and the education clause (found in various forms in Treaties No. 1 through 10) may be applicable in terms of fashioning interdisciplinary treatment programs in health, social services and special education for individuals with fetal alcohol conditions who are beneficiaries of the relevant treaties containing these clauses. However, the full application of the medicine chest, pestilence and famine, and education clauses await significant adjudication as to their scope and extent.

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<sup>81</sup> Being schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

<sup>82</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11.



Because of the risks attending treaty litigation<sup>83</sup> and the paucity of explicit constitutional remedies provided,<sup>84</sup> it is deemed at this time more practical to pursue breach of relevant *Charter* rights, such as s. 15, to obtain noncarceral treatment remedies for offenders with fetal alcohol conditions. The broad, discretionary remedies provided in s. 24(1) of the *Charter* seem more effective for non-statutory breaches. Moreover, anyone (including Metis and non-Aboriginal claimants) whose rights under the *Charter* have been infringed or denied, may apply to a Court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances, whereas treaty rights under s. 35(1) of the *Constitution Act* are limited to those with treaty status under the relevant provisions. Section 24(1) *Charter* remedies in the past have included *inter alia*: stays, reduced sentences, costs, damages, declarations, directions, injunctions and mandamus. Treaty rights can be used as a point of negotiation, to fashion a policy argument, or to provide the context of a *Charter* analysis, but unless a statutory breach is involved, and a strong case exists, the risks of

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<sup>83</sup> *R. v. Badger* [1996] 1 S.C.R. 771 (the *Sparrow* doctrine of infringement-justification applies to treaty rights as well as aboriginal rights); *R. v. Marshall* [1999] 3 S.C.R. 456 (laws which define the extent of a right are not subject to justification, but rather are subject to unilateral Crown regulation: e.g. the right of the Mikmaq to fish was restricted in definition by the Crown to the right to fish commercially and that right was further limited in definition to a moderate level of livelihood); and *R. v. Mitchell* [2001] 1 S.C.R. 911; and *R. v. Benoit* [2003] FCA 236 (in both *Mitchell* and *Benoit*, the trial judges were found on appeal by the Crown to have misapprehended or overlooked material *viva voce* and historical evidence. Palpable and overriding errors of fact occurred and thus the decisions favouring First Nations were reversed for insufficient evidence). Even though oral evidence is admissible, it is to be subject to objective standards of reliability, corroboration and critical scrutiny, circumscribing the usefulness of the testimony of elders required to establish the full meaning of treaty rights such as the medicine chest, alcohol ban and school house clause.

<sup>84</sup> An explicit constitutional remedy is provided under s. 52 of the *Constitution Act* in the case of statutory breaches, where impugned statutory provisions are declared of no force and effect to the extent of their inconsistency with s. 35 rights. In the case of FASDS, however, no such statutory provisions are involved; rather, it is a matter of the Crown not applying positively the constitutionally protected treaty rights to provide community-based treatment for individuals with FASDS.

more restrictive court interpretation of a treaty right and paucity of remedies limit the usefulness of pure treaty litigation in the present judicial climate.

Notwithstanding the foregoing analysis, the alcohol ban is a broadly-based treaty clause which has been adjudicated recently at the appellate level (appeal to the Supreme Court denied), and is at the crux of the causal factor for fetal alcohol conditions. A similarly worded alcohol ban is included in the text of the numbered treaties one through six, inclusive, encompassing the geographic areas of Manitoba, the southern half of Saskatchewan, the midsection of Alberta, and the southwestern portion of Ontario.<sup>85</sup> However, by the signing of Treaty No. 7, Crown assimilative practices prevailed, and the alcohol ban in the treaty text was discontinued then and thereafter. Treaty No. 6 also included *inter alia* a medicine chest clause, relief in the event of famine or pestilence, and an education clause. This was part of the “bounty and benevolence” promised to the Indians of the Treaty 6 area, in order, not only to acquire their consent to surrender to the Crown 121,000 square miles of Aboriginal title land in present day Alberta and Saskatchewan, for the purposes of immigration and settlement, but also to ensure the peace and good will of the Indians in this territory when the settlers did arrive.<sup>86</sup>

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<sup>85</sup> Reiter, R. *The Law of Canadian Indian Treaties* (Edmonton, Alberta: Juris Analytica Publishing Inc., 1995), p. 29-212.

<sup>86</sup> *Ibid.* at 87. (Preamble to Treaty No. 6.)

In *R. v. Wolfe*,<sup>87</sup> Jackson J.A., had occasion, in the context of a sale of wildlife sting operation,<sup>88</sup> to examine the historical background to the alcohol ban on reserves enumerated under Treaty No. 6, as well as to rule on its current, substantive meaning.

The clause in Treaty No. 6 establishing the alcohol ban provides:

Her Majesty further agrees with Her said Indians that within the boundary of Indian Reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor should be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, *to preserve her Indian subjects inhabiting the reserves or living elsewhere within Her Northwest Territories* from the evil influence of the use of intoxicating liquors shall be strictly enforced.[Italics added.]<sup>89</sup>

An expert historical witness, Dr. John Elgin Foster, testified regarding relevant circumstances of the signing of Treaty No. 6, along the lines previously discussed in pages 10-20. When Treaty No. 6 was concluded in 1876, not only were its reserves to be “dry”, but Indians were not allowed to receive or to purchase alcohol in any form.<sup>90</sup> Whether this prohibition exists off-reserve, as well as on-reserve is not known, as the geographic scope of the treaty alcohol ban as yet has not been fully adjudicated. The issue was not squarely raised by the fact situation in *Wolfe*, which transpired solely on the Onion Lake Reserve. For the purposes of the present analysis, the conservative assumption is made, pursuant to the fact situation in *Wolfe*, that the treaty alcohol ban is limited to on-reserve consumption.

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<sup>87</sup> [1995] S.J. No. 502 (Sask. C.A.); [1995] S.C.C.A. No. 487 (leave to appeal dismissed). (*Wolfe*)

<sup>88</sup> In wildlife sting operations, undercover conservation officers attempt to induce Indian hunters to illegally sell their wild meat, and subsequently charge them. In *Wolfe*, alcohol was part of the sting or inducement used by the undercover agents.

<sup>89</sup> *Supra* note 40. Treaty No. 6 Between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River Adhesions. Treaty No. 6 was signed on August 23, 28, and September 7, 1876, with adhesions signed in 1877, 1878, 1879, 1882, 1889, 1944, 1950, 1954 and 1955 by the Cree, Assiniboine and Dene Nations.

<sup>90</sup> *Ibid.* at para. 40.

The Court of Appeal in *Wolfe* held that, regardless of changes in the *Indian Act* and the introduction of Band by-laws, there was no change in the Crown's treaty obligation regarding the alcohol ban.<sup>91</sup> It is not uncommon for a band in the Treaty 6 area (and other treaty areas) to enact a by-law under section 85.1(1) of the *Indian Act* in addition to the Treaty provision banning alcohol. Whatever effect the by-laws have and whether or not they are enforced, as Madam Justice Jackson held in *Wolfe*, such by-laws do not impair the full force and effect of the Treaty ban.<sup>92</sup>

Evidence was presented in *Wolfe* of the pandemic of alcohol problems among Indian people.<sup>93</sup> The alcohol abuse that led to the insertion in the nineteenth century of the alcohol ban provision continues to be significant, contributing to poor health, accidents, and criminogenic statistics.<sup>94</sup> Ryan Rempel, in his "1995 Survey of Decisions of the Saskatchewan Court of Appeal" at p. 25, commented as follows:

Given the history of the treaty obligation and the current conditions on the reserve, the treaty breach was a serious one. Alcohol had played a considerable role in the investigation. No major trafficking ring had been uncovered, and the fines imposed were likely to be served by time in jail. The Court concluded that this all amounted to an affront to fair play and decency that was disproportionate to society's interest in the prosecution of the cases.<sup>95</sup>

The Court decided, through the interaction of s. 35(1) of the *Constitution Act, 1982*, and Treaty No. 6, absent access to the *Charter* remedy under s. 24(1) of a stay of

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<sup>91</sup> *Ibid.* at paras. 43-44.

<sup>92</sup> *Supra* note 87 at para. 44. (*Wolfe*)

<sup>93</sup> *Supra* note 87 at paras. 45-46. (*Wolfe*)

<sup>94</sup> *Ibid.* at paras. 47-51. (*Wolfe*)

<sup>95</sup> (1996), 60 Sask. L. Rev. 1.

proceedings for the Indian hunter-traffickers, to grant a common law stay for charges under the *Wildlife Act*.<sup>96</sup> A similar common law stay had been used in the context a provincial wildlife act, in *R. v. Horseman*,<sup>97</sup> in a situation where serious unfairness otherwise would have resulted.

Applying *Wolfe*, the full implications of the Treaty No. 6 alcohol ban seem to imply that it would be illegal for the Crown to provide alcohol to the signatories of the Treaty or to their descendants on the reserve. However, Lt. Governor Morris at the signing of the Treaty 6 at Fort Carleton and Fort Pitt commented, without geographical limitation:

The police force were to prevent the selling or giving of liquor to the Indians. The Queen has made a strong law against the fire-water; . . .<sup>98</sup>

The treaty alcohol ban may apply, by policy at least, to all descendants of bands signatory to the Robinson and numbered treaties, even if not included in the treaty texts (not solely to Treaties No. 1 through 6 where the alcohol ban is explicitly mentioned in the treaty texts), as bands were to have been treated equally:

Another thing I want you to think over is this: in laying aside these reserves, and in everything else that the Queen shall do for you, you must understand that she can do for you no more than she had done for her red children in the East. If she were to do more for you that would be unjust for them. She will do no less for you because you are all her children alike, and she must treat you alike.<sup>99</sup>

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<sup>96</sup> S.S. 1979, s. W-13.1; and *Supra* note 87 at paras. 56-67. (Wolfe)

<sup>97</sup> [1990] 1 S.C.R. 901 at para. 73 . (Horseman) Mr. Horseman had shot a bear that was attacking him, and, later, when in need of money, sold the bear hide, presumably to buy food for his family, contrary to the *Natural Resources Transfer Agreement* (NRTA), *Constitution Act*, 1930, 20-21, Geo. V., c 26 (U.K.) and to the *Wildlife Act*, R.S.A., 1980, c. W-9.

<sup>98</sup> *Supra* note 40 at 218. (Morris, A., 1991, *Treaties of Canada with the Indians of Manitoba and the Northwest Territories*)

<sup>99</sup> *Ibid.* at p. 20 (Alexander Morris, *Treaties of Canada with the Indians of Manitoba and the North-West Territories*, 1991).

This assumption, however, is yet to be adjudicated, and remains a moot point, although one often honoured in practice, as with the extension of medicine chest benefits to all treaty beneficiaries, not solely to those of Treaty No. 6. For the purposes of this analysis, erring on the side of caution lest over-extension weaken the argument, it is assumed that the treaty alcohol ban applies to on-reserve consumption in the geographic area of Treaties No. 1 through 6. Particularly reprehensible in the fact situation analyzed is that agents of the Crown, held out as the champions of the alcohol ban at treaty signing, were those later engaged in breaking it.

A breach of the Crown's obligation in implementing and enforcing the alcohol ban treaty provision may qualify for a remedy in other contexts, including treatment and compensation to ameliorate the ravages of fetal alcohol conditions. The prime equitable remedy sought in Aboriginal rights and treaty litigation is a judicial declaration of existing rights. Other remedies include constructive trusts,<sup>100</sup> compensation,<sup>101</sup> and injunctions.<sup>102</sup> Judicial declarations of existing rights can have a beneficial effect in promoting "good faith" consensual negotiation between or among parties, sometimes serving to help resolve an issue without recourse to further litigation.<sup>103</sup> Parties,

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<sup>100</sup> The court could order that certain lands be transferred to Aboriginal people by way of a constructive trust, as suggested by Deane and Gaudron JJ. in dissent in *Mabo v. Queensland* (1992), 66 A.L.J.R. 408 at 453, and in a general context by La Forest J. in *Lac Minerals Ltd. v. Corona Resources*, [1989] 2 S.C.R. 574 at 676ff.

<sup>101</sup> *R. v. Guerin*, [1984] 2 S.C.R. 335. Compensation was awarded for the Crown's breach of fiduciary duty in their leasing of Musquem land to a Vancouver golf club.

<sup>102</sup> Roach, K. *Remedies in Constitutional Law* (Canada Law Book Inc. Aurora, Ontario, 2001) 15.590-15.850.

<sup>103</sup> *Dumont v. Canada (A.G.)* (1990), 67 D.L.R. (4<sup>th</sup>) 159 at 160 (S.C.C.). In this case, involving Metis land claims, the S.C.C. refused to strike out a claim for declaratory relief based on allegations that land grants between 1871 and 1886 violated the *Manitoba Act, 1870*. The Court recognized "that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case."

especially governments in Canada, have a tradition of voluntary compliance with judicial declarations.<sup>104</sup> Declarations may be delayed, or may involve transition periods,<sup>105</sup> but in the case of treatment for offenders with fetal alcohol conditions, as with the autistic plaintiffs in *R. v. Auton*,<sup>106</sup> where plaintiffs are vulnerable and time is of the essence due to narrow windows of opportunity for treatment, delays would be inappropriate. Equitable remedies contain a further benefit over more restrictive tort or contract principles, that of allowing greater flexibility in the calculation of damages. Greater financial awards may be obtained than would be granted under the common

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<sup>104</sup> *Mahe v. Alberta* (1990), 68 D.L.R. (4<sup>th</sup>) 69 at 106 (S.C.C.). *Mahe* dealt with s. 23 of the *Charter*, minority language rights. Like Aboriginal rights, what is required in every case in order to ensure that the minority language group has control over those aspects of education which pertain to its minority language rights and culture, is better dealt with by the parties involved, with the court describing in general terms the requirements mandated by s. 23. Negotiations between governments and communities can determine the best means to implement the general principles of the declarations. Courts can retain jurisdiction over a case to ensure that their declarations are in fact implemented; and in *Delgamuukw v. B.C. (A.G.)* (1991), 79 D.L.R. (4<sup>th</sup>) (B.C.S.C.) 185 and (1993) 104 D.L.R. (4<sup>th</sup>) (B.C.C.A.), the plaintiffs asked for a declaration of the scope of their Aboriginal rights to land and self-government, and the extent of restrictions to such rights that could be used by the province. The declaration was declined in [1997] 3 S.C.R. 1010, as a new trial was ordered to take into account and give proper weight to the oral evidence of elders, in order to determine the issue of rights.

<sup>105</sup> *R. v. Powley*, [2003] S.C.C. 43 at para. 52, did not reinstate the Court of Appeal's expired one-year stay or delay, reasoning that enough time had been allotted for collaboration, and that there was no pressing need for another stay. As background, in *R. v. Powley* (2001), 196 D.L.R. (4<sup>th</sup>) 221 (Ont. CA), the Metis hunters were acquitted and a one year stay of judgment granted to allow the province and the Metis Nation of Ontario time to consult and develop a new moose hunting regime consistent with s. 35 of the *Constitution, 1982*. In this way, the ruling was prospective in nature. The Court at para. 177, quoted Professor Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 2000) at 15.80 and 15.70:

In the first instance, courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests. The aim of this negotiation process should be consensual decision-making or treaty making. [15.80] [A] temporary transition period would allow the difficult and interconnected problems of devising a new relationship between the parties to be achieved through negotiation, a process that is much more flexible than adjudication. Governments would be given reasonable opportunities to comply with court's constitutional rulings. More importantly, First Nations would participate in the formulation of the remedy, something that is consistent with the purpose of aboriginal rights." [15.70].

<sup>106</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] BCCA 538.

law.<sup>107</sup> Nor are equitable claims subject to statutory limitation periods which can bar other claims; rather, the more flexible equitable doctrine of *laches* applies. In *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), the Court held under the doctrine of *laches* that any reason for delay must be considered with due regard to the historically vulnerable position of Aboriginal peoples.<sup>108</sup> Taking into account this historically vulnerable position, Aboriginal equitable claims would in all probability succeed notwithstanding lengthy delays. Declarations could be applied as an equitable remedy under a breach of treaty protected by s. 35, or under s. 24 pursuant to a breach of the *Charter*. Government thus is enabled to implement change in the most flexible manner to meet treaty or *Charter* obligations. Such flexibility is desirable as the Court is not in a position to know which administrative methods would be preferable and would serve best. The Court could, for example, make a declaration requiring government to provide holistic, community-based treatment for offenders with fetal alcohol conditions,<sup>109</sup> even though such conditions may have been discovered or diagnosed some considerable time before. It would then be the role of the government to design and implement appropriate ameliorative programs in the most effective and timely manner.

## 1.5 Present Day Consumption Patterns

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<sup>107</sup> *Supra* note 101. In *R. v. Guerin*, \$10 million in global damages was awarded to the Musqueam Band, for the Crown's failure to act in the best interests of the Band. The Crown had failed to consult the band about a change less favourable to it in the terms of a Crown lease of Musqueam land to a Vancouver golf club.

<sup>108</sup> 195 D.L.R. (4<sup>th</sup>) 135, 51 O.R. (3d) 641 (Ont. C.A.) at p. 722, para. 267; [2001] SCCA No. 63, Appeal dismissed. (Chippewas)

<sup>109</sup> Such a declaration based on the alcohol ban provision would apply only to affected individuals who were beneficiaries of Treaties numbered 1 through 6.



The Northwest Territories Bureau of Statistics completed the NWT Alcohol and Drug Survey in 1996. Along with financial support from Health Canada came access to national data such as the Canada Alcohol and Other Drug Survey conducted in the provinces in 1994. The NWT survey included information on the respondents' ethnic group, information which was lacking in national data. The percentage of the NWT population who had consumed alcohol during the twelve months prior to the survey was 71.5%, similar to the national rate of 72.3%, the rate in Nunavut being lower, 57.8%. For the NWT, when Aboriginal persons were considered, the rate was 60.1% compared to 85.2% for non-Aboriginals. When gender was considered, the rates were 74.5% for men and 68.2% for women. The rate of consumption was highest among persons 25-34 years of age (80.6%), somewhat above the national rate (77.3%). Only persons over 15 years of age were included in the NWT survey.

When the incidence of heavy drinking was considered, however, there was considerable difference between the NWT rate (25.6%) and the national rate (8.8%). Heavy drinking was defined as having five or more drinks on a day when alcohol is consumed. The rates of heavy drinking when gender was considered were 33.3% for men and 17.3% for women. When Aboriginal and non-Aboriginal respondents were compared, regardless of gender, the rates were 33% and 16.7% respectively.

Frequency of alcohol consumption (defined as drinking at least once a week) in the NWT was considerably below the national rate, 28.0% compared to 34.9%. Frequent

alcohol consumption was much lower for Aboriginals (18.5%) compared to non-Aboriginals (39.5%).

In conclusion, so-called binge drinking is more characteristic of Aboriginal peoples surveyed, at least in the NWT. Because the level of alcohol in the blood becomes higher during episodes of heavy consumption, this pattern of drinking is likely to be more toxic to a fetus than more frequent, but less heavy imbibing.<sup>110</sup> Notwithstanding the foregoing, no pattern of alcohol consumption is considered safe for fetal development.<sup>111</sup>

## **1.6 Fetal Alcohol Conditions<sup>112</sup>**

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<sup>110</sup> *Supra* note 12, Chapter 5: “Alcohol’s Impact on Children.” at 72-88.

<sup>111</sup> *Supra* note 77. (1996 NWT Alcohol and Drug Survey, NWT Bureau of Statistics, retrieved February 10, 2003 from the World Wide Web: <<http://www.stats.gov.nt.ca/SWtatinfo/Health/alcdrug/report.html>>.)

<sup>112</sup> Section 1.6 “Fetal Alcohol Conditions” pages 33-62. The original version of this section was submitted on January 8, 2003, to Professor L. Wason-Ellam for EdRes 800, as part of an unpublished paper entitled, “Qualitative Research Mini-Project Involving Holistic, Community-Based Treatment for FAS/E Individuals.” Significant editing, revision and additions have been made since then.

### 1.6.1 Definition

Fetal alcohol syndrome, FAS, is the diagnosis given to offspring who suffer at the severe end of a continuum of disabilities caused by the maternal use of alcohol during pregnancy. Fetal alcohol effects, FAE, has been the diagnosis given for the similarly caused condition when the physical symptoms are more variable and less extreme. The most recent diagnostic information from the U.S. Institute of Medicine (IOM), suggest the following multiple diagnostic categories: FAS with confirmed maternal alcohol use during pregnancy, FAS without confirmed maternal alcohol use during pregnancy, Partial Fetal Alcohol Syndrome (pFAS), Alcohol Related Neurodevelopmental Disorders (ARND), and Alcohol Related Birth Defects (ARBD).<sup>113</sup> FAE (largely replaced by the pFAS and ARND by the IOM) has been termed “the invisible disability,” because affected individuals though superficially normal, may suffer from central nervous system disabilities rendering them at risk for severe behavioral and cognitive problems. ARBD includes a range of congenital anomalies resulting from confirmed maternal alcohol exposure, which may include heart, skeletal, vision, hearing, and fine/gross motor problems. However, FAS and FAE are the terms referred to in the bulk of the literature on diagnostic criteria and prevalence studies.

Collectively, these two most commonly-used diagnostic categories are denoted FAS/E.

Furthermore, the total spectrum of disorders is included under the umbrella term, Fetal

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<sup>113</sup> Stratton, K.R., How, C.J. Battaglia, F.C., Institute of Medicine. *Fetal Alcohol Syndrome—Diagnosis, Epidemiology, Prevention, and Treatment*. (Washington, D.C.: National Academy Press, 1996).

Alcohol Spectrum Disorders (FASD).<sup>114</sup> The prevalence of FASDs is estimated at 1 per 100 in the population.<sup>115</sup>

FASDs are the leading cause of mental retardation, surpassing Down's syndrome and spina bifida. Brain damage occurs when the child is exposed to alcohol *in utero*; effects are not merely a matter of developmental delay, rather they are permanent and irreversible.<sup>116</sup>

## 1.6.2 Cause

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<sup>114</sup> Streissguth, A., and O'Malley, K. "Neuropsychiatric Implications and Long-term Consequences of Fetal Alcohol Spectrum Disorders." Vol. 5, No. 3 (2000) *Seminars in Clinical Neuropsychiatry*, p. 177-190; and 3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable (September 9, 2002), *FAS: When the Children Grow Up*, retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>.

<sup>115</sup> Sampson PD, Streissguth AP, Bookstein FL, Little RE, Clarren SK, Dehaene P, Hanson JW, Graham JM (1997) "Incidence of fetal alcohol syndrome and prevalence of alcohol-related neurodevelopmental disorder." *Teratology* 56: 317-326.

<sup>116</sup> *Supra* note 12 at 9. (Streissguth, *A Guide for Families*).

Since the cause of FAS/E is maternal alcohol use during pregnancy, it is *prima facie* a completely preventable condition. However, when underlying causes of alcohol abuse, such as poverty and marginalization are considered, a solution is not obvious. It is not simply a matter of education about the dangers of drinking while pregnant. Types of interventions used with pregnant mothers will be discussed under the heading, “1.6.6 Secondary Interventions.”

The earlier in the term of pregnancy in which alcohol is introduced, the more severe the damage to the fetus likely will be. The degree of damage depends on many factors including *inter alia*: nutrition, genetics of the mother and the fetus, amount of alcohol consumed, the mother’s metabolic rate, her blood alcohol content (BAC), pattern of consumption, timing of consumption, and general health. The fetus is more susceptible to alcohol than the mother, as the fetal system does not metabolize the alcohol as does the mother’s system; thus the alcohol accumulates to a higher concentration in the fetus.<sup>117</sup>

Mechanisms for alcohol teratogenicity are thought to involve ready absorption of low molecular weight alcohol across the placenta where it can affect developing fetal cell structures through induced chromosomal abnormalities and enzymatic malfunction, leading to malformation, dysmorphology and growth deficiencies. This mechanism is coupled with tendency of alcohol metabolism to induce oxidative stress. Cell

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<sup>117</sup> 3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable (September 9, 2002), *FAS: When the Children Grow Up*, retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>.

metabolism is altered by the presence of alcohol, which also functions as a vasoconstrictor particularly at the umbilical cord site. The combined effect of both processes is fetal hypoxia or oxygen deprivation, with subsequent organic brain damage. In fact, oxidative stress is the key mechanism of brain injury throughout the entire FASD spectrum.<sup>118</sup>

### 1.6.3 Incidence

The present estimate of the world incidence of FAS is 1.9 cases per 1000 live births.<sup>119</sup>

There are currently no national data for Canada. It does appear certain that the incidence of FAS/E is much higher among certain Aboriginal groups,<sup>120</sup> standing as high as 192 in 1000 live births in a community where alcohol consumption was high.<sup>121</sup>

Informal studies based on selected groups place the proportion of some carceral

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<sup>118</sup>Cohen-Kerem, R. and Koren, G. *Antioxidants and Fetal Protection Against Ethanol Teratogenicity, Review of Experimental Data*. (3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable, Sept. 9 2002, *FAS, When the Children Grow Up*, retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>)

<sup>119</sup>*Supra* note 8. Tait, C. "Fetal Alcohol Syndrome Among Canadian Aboriginal Peoples: Review and Analysis of the Intergenerational Links to Residential Schools," (Aboriginal Healing Foundation, 2002) at 91-117.

<sup>120</sup> Standing Committee on Health and Welfare, Social Affairs, Seniors and Status of Women, 34<sup>th</sup> Parliament, 3<sup>rd</sup> Session, No. 10-22, index 1992-1993, 1-29 at 4, "Foetal Alcohol Syndrome, A Preventable Tragedy," (Ottawa: Queen's Printer for Canada, 1988-1992).

<sup>121</sup> Robinson, G.C., Conry, J.L.O. and Conry, R.F. "Clinical Profile and Prevalence of Fetal Alcohol Syndrome in an Isolated Community in British Columbia," (1987) 137 *Canadian Medical Association Journal*, 203-207.

populations at 60-80% FAS/E.<sup>122</sup> Projected prevalence rates in the general population applied to total prison populations predict a much smaller proportion (~1%), which is likely indicative of the fact that carceral populations are not representative samples of the general population. Moreover, only one-third of the 1% expected cases from the above projection have been identified in the prison system. This fact is not surprising as none of the federal or provincial prisons or correctional centres studied reported having a screening program for FAS.<sup>123</sup> Access to diagnostic services is often a problem, rendering prevalence statistics in most populations serious underestimations.<sup>124</sup>

Waiting lists at diagnostic clinics across Canada range from 6 months to one year for children. National standards are being developed for the diagnosis, with a view to their potential inclusion in the DSM-IV.<sup>125</sup> There are many methodological problems, notwithstanding the diagnostic issues, in measuring incidence and prevalence rates. Estimates for Aboriginal incidence, in particular, must be assessed according to the context of the isolated reserve communities and specific clinical population samples in

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<sup>122</sup>Fast, D.K., Conry, J.L., and Look, C.A., "Identifying fetal alcohol syndrome (FAS) among youth in the Criminal Justice System, (1999) 20 (5) *Journal of Developmental and Behavioral Pediatrics*, 370-372; Zakreski, D. "Fetal Alcohol Syndrome Linked to Crime." March 10, 1998 *Saskatoon Star Phoenix*.

<sup>123</sup> Burd, L., Selfridge, R., Klug, M.G. and Juelson, T. "Fetal Alcohol Syndrome in the Canadian Corrections System," *J FAS Int* 2003: e14 September 2003, The Hospital for Sick Children.

<sup>124</sup> *R. v. Gray*, 2002 B.C.J. No. 428 (B.C.S.C.). Boland, F. J., Burrill, R., Duwyn, M. and Karp, J., *Fetal Alcohol Syndrome: Implications for Correctional Services*, (Correctional Services Canada, 1998), which recommends that the criminal justice system begin its own pre-sentence screening for FASDs.

<sup>125</sup> Cook, J. L. *FAS Diagnosis, Health Canada's Activities*, (3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Roundtable, Sept. 9, 2002, *FAS, When the Children Grow Up*, retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>); Cook, J. and Huffine, C. "It's Time Psychiatry's Diagnostic "Bible" Addresses FAS," *Iceberg: An Educational Newsletter for People Concerned about Fetal Alcohol Syndrome (FAS) and fetal alcohol effects (FAE)*, vol. 10, issue 2, 2000, p. 1-2. Note: The DSM-IV is the *Diagnostic and Statistical Manual of Mental Disorders* (Washington, DC: American Psychiatric Association, 1994).

which they were made, severely restricting the scope of generalization of these estimates. Moreover, FAS/E is a global problem, not solely an Aboriginal problem. Aboriginal incidence statistics are comparable to other marginalized populations where similar conditions abound: South Africa, Rumania, Russia, China and South America.<sup>126</sup>

Despite the lack of scientifically rigorous data, there is no denying that FASDs in Canada are prevalent among native populations:

FAS is not a problem unique to Canada's native peoples but it is particularly prevalent among them. The National Native Association of Treatment Disorders estimates that 80 per cent of aboriginal people in Canada are affected by alcoholism, either through being addicted themselves or through dealing with the addiction of a close family member (Fournier and Crey 1997: 174). A leading researcher in the field, Albert Chudley, asserts that every native child adopted in the last two decades has suffered alcohol damage in utero, and that this fact—rather than alienation from white society—is at the root of their difficulties later in life (*ibid.*). Chudley may or may not be overstating his case, but there can be no doubt that the consequences of FAS for Canada's native population have been severe. Records from medical institutions in Saskatchewan showed that in the past decade, out of 450 children born with FAS/FAE 75% were aboriginal (Fournier and Crey 1997: 178). (116).<sup>127</sup>

#### 1.6.4 Characteristics

The primary characteristics of fetal alcohol syndrome are:

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<sup>126</sup>*Supra* note 8 at 113-117 (Tait); and (Gibson, F., *Home is my Road*).

<sup>127</sup> Adams, J. *Our Son a Stranger, Adoption Breakdown and its Effects on Parents*, Montreal: McGill-Queen's University Press, 2002, at 136.



- General growth deficiencies (reductions in body weight, height and head circumference);
- Structural abnormalities which are primarily facial: short palpebral folds (small eye openings), epicanthic folds (extra skin folds close to nose), long and flattened philtrum (groove under nose), flattened maxilla (jaw and midface), shortened nose; and
- Central nervous system abnormalities associated with impairment of both cognitive abilities and behavioral or adaptive functioning (neurological abnormalities, behavioral dysfunctions, developmental delays and intellectual impairment).<sup>128</sup>

For individuals with FAE, the presence of the first two primary characteristics is more subtle, or may be absent; however, the presence of the last characteristic is pervasive throughout the FASD due to the ongoing effect of alcohol on the developing nervous system.<sup>129</sup>

Without appropriate intervention, FAS/E individuals are at risk of developing secondary disabilities, because of their cognitive and adaptive impairments. Secondary disabilities are not present at birth in individuals with FAS/E, and, in all likelihood, could be

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<sup>128</sup> Jones, K.L., & Smith, D. W., “Recognition of Fetal Alcohol Syndrome in Early Infancy” (1973) 2(836) *Lancet* 999-1001; and Smith, D. W. *Recognizable Patterns of Human Malformation: Genetic, Embryologic and Clinical Aspects* (3<sup>rd</sup> ed.) (Philadelphia: W.B. Saunders, 1982).

<sup>129</sup>Clarren, S.K. & Smith, D. W., “The Fetal Alcohol Syndrome” (1978) 298(19) *New England Journal of Medicine*, 1063-1067; Hanson, J.W., Streissguth, A. P., & Smith, D. W., “The Effects of Moderate Alcohol Consumption during Pregnancy on Fetal Growth and Morphogenesis” (1978) 92(3) *Journal of Pediatrics*, 457-460; and Smith, D. W, “Fetal Alcohol Syndrome and Fetal Alcohol Effects” (1981) 3 *Neurobehavioral Toxicology and Teratology*, 127.

attenuated as victims mature through ongoing, effective interventions. Streissguth and others identified the following secondary disabilities in their 1996 study that considered a cohort of over 400 individuals, ranging in age from six years to fifty-one years of age:

- over 90% of those 6 and over experienced mental health problems;
- 60% of those 12 and older were either expelled, or suspended or voluntarily dropped out of school;
- 60% of those 12 and over were charged and/or convicted of a crime;
- approximately 50% of those 12 and over were institutionalized or in in-patient treatment programs;
- 50% of those 12 and over had been involved in inappropriate sexual behavior; and
- 35% of those 12 and over experienced problems with alcohol and drugs.<sup>130</sup>

In the same 1996 study, Streissguth identified in her sample the following protective and risk factors that respectively attenuated or aggravated the development of secondary characteristics in her sample:

- Living in a stable, nurturing home;
- Receiving developmental disability services early;
- Being diagnosed before six years of age.

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<sup>130</sup> Streissguth, A. P., Barr, H.M., Kogan, J., & Bookstein, F.L. *Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE): Final Report to the Centres for Disease Control and Prevention on Grant No. R04/CCR008515* (Tech. Report No. 96-06) (Seattle: University of Washington, Fetal Alcohol and Drug Unit, 1996), cited in A. P. Streissguth, *Fetal Alcohol Syndrome: A Guide For Families* (Toronto: Paul H. Brookes Publishing Co., 2001) at 107-112.

- Not having frequent moves; and
- Not being a victim of violence;<sup>131</sup>

Surprisingly, Streissguth found higher rates of secondary disabilities in individuals who had FAE rather than FAS and who had an IQ higher than 70. She speculated that FAE individuals, lacking the obvious bio-markers, are not diagnosed as early, and do not receive developmental disability services to the same extent as FAS individuals, which may account for the higher rates of secondary disabilities developing in this FAE population. This finding underlines the importance of the protective factors in ameliorating secondary characteristics.<sup>132</sup>

Streissguth and O'Malley<sup>133</sup> recommend supports over the lifespan of affected individuals, including the following adult interventions: sheltered living, job training, ongoing employment supervision, assistance with money and life management, and positive role models. Interventions recommended for each stage of the life cycle are included in the statements of best practices articulated by Health Canada.<sup>134</sup>

### **1.6.5. Primary Prevention**

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<sup>131</sup> *Supra* note 12 at 110-111. (Streissguth, a Guide for Families)

<sup>132</sup> *Ibid.* at 111-112. (Streissguth, A Guide for Families)

<sup>133</sup> Streissguth, A. P. and O'Malley, K., "Neuropsychiatric Implications and Long-term Consequences of Fetal Alcohol Spectrum Disorders," (2000) Vol. 5. no. 3 *Seminars in Clinical Neuropsychiatry*. 177-190.

<sup>134</sup> Roberts, G. and Nanson, J. Health Canada, *Best Practices, Fetal Alcohol Syndrome/ Fetal Alcohol Effects and the Effects of Other Substance Use During Pregnancy* (Health Canada, Canada's Drug Strategy Division, 2000). Refer to "Best Practices Statements" 7.1.5 (infancy and early childhood), 7.2.5 (later childhood), 7.3.5. (adolescent interventions), and 7.4.5 (adult interventions).

Considering that an estimated 50% of women in childbearing years consume alcohol and that an estimated 50% of pregnancies are unplanned, a significant number of fetuses may be exposed to the risk of alcohol teratogenicity.<sup>135</sup> To deal with this risk, primary prevention focuses on the prevention of drinking, or, as an alternative, on the prevention of pregnancy. Product labeling, education, and assuring access to birth control are the strategies employed.

Hankin reports a decrease in antenatal drinking associated with warning labels on alcoholic beverages, albeit a decrease small in size and one that does not impact on the heaviest drinkers.<sup>136</sup> Product labeling (warning of birth defects and possible FAS) for alcoholic beverages was introduced in the U.S. in 1989 by passage of the *Alcohol Beverage Labeling Act*.<sup>137</sup> Subsequently, product warning labeling was considered in Canada with the introduction of a private members' Bill C-222, *An Act to Amend the Food and Drug Act*, April 25, 1996. Unfortunately, Bill C-222 was never enacted. Therefore, warning labels, not required in Canada for alcohol products, paradoxically,

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<sup>135</sup> *Supra* note 118. Cohen-Kerem, R. and Koren, G. *FAS, When the Children Grow Up: Antioxidants and Fetal Protection Against Ethanol Teratogenicity*, 3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable, 2002, retrieved September 30, 2002 from the World Wide Web: <<http://www.knowtv.com>>.

<sup>136</sup> Hankin, J.R., "Fetal Alcohol Syndrome Prevention Research," (2002) 26(1) *The Journal of the National Institute of Alcohol Abuse and Alcoholism* 58-65.

<sup>137</sup> PL 100-690; passed in 1988, came into effect in 1989. The *Act* mandates a warning on the label of each alcoholic beverage container sold in the United States: 1) *According to the Surgeon General, women should not drink alcoholic beverages because of the risk of birth defects* 2) *consumption of alcoholic beverages impairs your ability to drive a car or operate machinery and may cause health problems*. By 1981 the Surgeon General of the United States had advised women to avoid all alcohol during pregnancy. In 1970, Congress passed a law creating the National Institute on Alcohol Abuse and Alcoholism (NIAAA) to support research on alcohol abuse and alcoholism, including research on alcohol and pregnancy, including FAS.

must be placed on Canadian alcoholic beverage containers exported to the U.S.<sup>138</sup>

Warning labels should be used, as they do serve to reinforce, but do not replace, other strategies. They should be used, not in isolation, but as part of a comprehensive strategy including initiatives in: education (pamphlets, books, media advertisements, videos, speakers, curricula), public policy, and treatment services. In the Yukon and Northwest territories, since 1991-2, warning labels have been required on all alcoholic products, as well as responsible use labels being stamped on brown carry-out bags. In Saskatchewan, warning messages are stamped on the brown carry-out bags for products purchased at liquor stores, but not on the products themselves. The brown carry-out bags, however, can be out of stock, and often are removed before the consumer encounters the product.

In lieu of warning labels, the Saskatchewan Liquor and Gaming Authority (SLGA) provides support for social responsibility initiatives such as: anti-drinking and driving campaigns, programs aimed at educating the public on the dangers of drinking during pregnancy, the designated driver program, identification programs (“Please Bring your ID”), as well as other national awareness campaigns in conjunction with the Canadian Association of Liquor Jurisdictions (CALJ). In 2001-2, the CALJ sponsored a national media public awareness campaign focused on the importance of neither selling alcohol to nor purchasing alcohol for minors. SLGA is a member of the Provincial FAS Coordinating Committee, Chaired by the Saskatchewan Institute on Prevention of

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<sup>138</sup>*Fetal Alcohol Syndrome and Alcohol Policy, Policy Framework, Warning Labels Bills/Motion*, Apolnet (Alcohol Policy Network), retrieved February 14, 2003, from the World Wide Web: <[http://www.apolnet.org/actpacks/pf\\_fas.html](http://www.apolnet.org/actpacks/pf_fas.html)>.

Handicaps (SIPH), which SLGA funds to some extent. Various advertising campaigns and conferences have been sponsored, and liquor store product bags and till tapes display an FAS awareness message introduced in October, 1997, “Drinking Alcohol During Pregnancy Can Harm the Baby – We have Fetal Alcohol Syndrome in our Community – Let’s Find a Solution.”<sup>139</sup>

Although these initiatives are praiseworthy, it is important to consider the funding by liquor regulating authorities, breweries or liquor companies, of service agencies which may have as part of their mandate the prevention of handicaps such as FASDs. Full information is not available as to how the “arm’s length” nature of these arrangements is protected. While service agencies publicly do not appear to advocate for liquor product warning labels, it should be acknowledged that they, like the liquor companies, brewers, and regulators, do advocate for responsible use of alcohol. It is perhaps a characteristic of good corporate social responsibility for liquor companies, breweries, and their regulating authorities to fund prevention and treatment of FASDs, in order to mitigate some of the damage their products have caused and are causing over the generations.<sup>140</sup> The amount contributed, however, in no way has approached the costs of remedying the extent of the damages caused. Canada’s brewing industry spent,

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<sup>139</sup> *Saskatchewan Liquor and Gaming Authority 2002-2003 Annual Report*, at 9.

<sup>140</sup> *Ibid.* It is noted that SLGA increased its FAS public awareness initiatives to \$15,000 from \$10,000 in previous years. No other specific mention was made of any further contribution by SLGA to FAS or SIPH in the 2002-03 Annual report; According to an e-mail received from Motherisk on September 15, 2003, <[susan.santiago@sickkids.ca](mailto:susan.santiago@sickkids.ca)>, Motherisk receives \$150,000 annually from Canada Brewers’ Association (CBA) to help fund its toll-free Substance Use Helpline (1-877-FAS INFO) and to sponsor Fetal Alcohol Canada Expertise (FACE). According to the Motherisk website, retrieved Oct. 16, 2003 from the World Wide Web, <<http://www.mothersrisk.org>>, CBA also funds the FAS Resource Centre at the Canadian Centre for Substance Abuse. At the Motherisk web-site, CBA reports having spent over \$100 million in promotion of responsible drinking over a ten year period.

according to available statistics, about \$10 million in one year on “responsible use” campaigns; this expenditure must be viewed in the context of their \$ 4.6 billion in annual sales and the \$100 million they spent on advertising to promote use of their beverages.<sup>141</sup> The Standing Committee on Health and Welfare estimated that the entire alcoholic beverage industry in Canada in the same year spent \$250 million in advertising, promotion and sponsorships, out of total of \$9.6 billion in sales.<sup>142</sup> Increasing the amount contributed while controlling the “arm’s length” aspect of funding arrangements between the alcohol beverage industry and the service agencies is paramount, so that the advocacy, ethics, and programming of the funded group is not compromised in any way. Perhaps blind trusts could be established to promote substantial, fuller mitigation, ensuring that no “strings” would be attached. The *Olivieri Report*<sup>143</sup> contains recommendations for protecting research ethics in the context of corporate sponsorship. These recommendations may be of some relevance to the discussion at hand, particularly those regarding conflict of interest and the protection of academic freedom. The protection of academic freedom may be extended to similar forms of freedom of expression in other contexts.

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<sup>141</sup> *Supra* note 120 at 14-15. (Standing Committee on Health & Welfare).

<sup>142</sup> *Ibid.* at 1 and 15. (Standing Committee on Health & Welfare).

<sup>143</sup> *Report of the (CAUT) Committee of Inquiry in the Case Involving Dr. Nancy Olivieri, the Hospital for Sick Children and the University of Toronto, and Apotex Inc.* Recommendations 1, 10, 11, 12, 15, 16, 19, 20, 21, 22, 23, 24, 25, 27, 30, and 31. Retrieved on September 20, 2003, from the World Wide Web: <<http://www.caut.ca/english/issues/acadfreedom/Olivieri%20Inquiry%20Report.pdf>>.

The Frontier School Division in Manitoba has implemented an educational initiative in the way of fetal alcohol prevention curricula, “Making the Right Choices,” for grades 5-8.<sup>144</sup>

- The Grade 5 curriculum deals with awareness of alcohol and tobacco use and accompanying risks during pregnancy. Learning techniques used include: opinion polls, information sheets about FASDs, reading and discussing a short story entitled *Jocelyn’s Island* (the story of a young Aboriginal girl who becomes concerned about her pregnant sister who is going to parties), learning definitions of FAS and ARND and related vocabulary, the writing of imaginary letters to a pregnant friend explaining to her why she should stop drinking, and the making of posters about the risks of drinking during pregnancy to be displayed in the community.

- The Grade 6 curriculum expands upon the diagnostic terms FAS and ARND and other terminology, explores the reasons why some people drink, involves the students in research about FAS and ARND, and presents a short story entitled *Jeremy and Joey*, about step-brothers, one of whom has FAS, and how his brother, family and school learn to respond effectively to his needs.

- The Grade 7 curriculum reviews FASD, and examines the role of media advertisements and messages regarding alcohol and drug use. Appropriate responses to these media messages are drafted by the students.<sup>145</sup>

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<sup>144</sup> Teaching Units on FAS, <[lbraun@frontiersd.mb.ca](mailto:lbraun@frontiersd.mb.ca)>.

<sup>145</sup> Alcohol and Gaming Commission of Ontario, *Liquor Advertising Guidelines: Liquor Sales Licensees and Manufacturers* (Toronto: Alcohol and Gaming Commission of Ontario: August, 2003). The *Liquor Licence Act*, R. S.O. 1990, c. L-19, s. 38(1) states that no person shall advertise liquor except in accordance with the regulations enacted pursuant to this *Act*. Holders of liquor sale licences or manufacturers of liquor are responsible to ensure that the advertising carrying its business or brand name, or endorsed by it, falls within the parameters set out in the regulations and in these guidelines. Otherwise,



- The Grade 8 curriculum introduces the mechanism of how alcohol is transferred to the fetus and its mode of attack on the fetus at various stages of fetal development. The role of males in FASD causation is discussed. The culminating student activity is the development and preparation of brochures on fetal alcohol syndrome.

A sensitive approach to the curriculum is recommended, to avoid stigmatization or frightening of those involved, including adopting respectful language, tone and substance. Parents are to be informed in writing that the prevention curriculum will be taught. When discussing sensitive and confidential topics, teachers are to establish clear ground rules to prevent personal comments and hurt feelings. Individual students are to be allowed to skip sensitive sections and support is to be provided for these students as required.

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disciplinary proceedings under the Registrar of Alcohol and Gaming may result. “Liquor” means beer, wine and/or spirits or any combination thereof. All advertising must be consistent with the principle of depicting responsibility in use or service of liquor. Responsible advertising does not imply that consumption of liquor is required to obtain or enhance social, professional or personal success; athletic prowess; sexual prowess, or any other opportunity or appeal; or enjoyment of any activity; fulfillment of any goal; or resolution of social, physical or personal problems. It should not appeal, either directly or indirectly, to persons under the legal drinking age, and should not associate or depict the consumption of liquor with driving a motorized vehicle, or with any activity that requires care and skill or has elements of danger. Advertising that is beyond the permissible scope of the *Guidelines* may result in disciplinary proceedings under the Registrar of Alcohol and Gaming and/or the issuance of an order of cessation thereunder or may result in prosecution. No doubt this *Act, Regulations* and *Guidelines* are models for Canadian jurisdictions. For instance the *Liquor Advertising Rules of Conduct Regulation*, Man. Reg. 125/95 under *The Liquor Control Act*, C.C.S.M. c. L160, 1995, has been similar provisions to the above. In addition, *Saskatchewan Liquor and Gaming Authority Media Advertising Policy* requires prior approval from the Liquor Board of all related advertising. The criteria for approval are similar to those aforementioned.

An international, national, and provincial initiative has been to declare “Fetal Alcohol Syndrome Awareness Day,” to begin September 9 at 9:09 a.m. each year (the ninth minute, the ninth hour, of the ninth day, of the ninth month). At this time, people are requested to show respect for the nine months an individual spends in the womb.<sup>146</sup>

### **1.6.6 Secondary Prevention**

Secondary prevention focuses on harm reduction to the fetus during pregnancy.

Although in secular societies, termination of pregnancy may be an option, this is not usually consonant with traditional Aboriginal cultures which view children as a special gift from the Creator. The favoured option is to offer the expectant mother access to treatment for her addictions.

Pregnant women are screened for risk when they present themselves for medical care.

Risk factors related to potential alcohol consumption that are screened for include:

poverty, poor prenatal care, poor nutrition and health, poly-drug use, prostitution or other involvement in the sex-trade, parent-partner-peer problems, psychiatric concerns, and prior abuse.<sup>147</sup>

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<sup>146</sup> *The Fetal Alcohol Syndrome Awareness Day*, Chapter F-13.101, S.S., 2002.

<sup>147</sup> Philp, M. “Middle-class FAS: A Silent Epidemic?” *Globe and Mail*, February 1, 2003. Middle class women may avoid detection for these risk factors. However, they do have the economic wherewithal to consume considerable amounts of alcohol. Their affected offspring are more likely to be diagnosed as ADHD, rather than with one of the FASDs, and they are better able to afford private schools or tutoring

Carolyn Tait, commissioned by The Prairie Women's Health Centre of Excellence, authored *A Study of the Service Needs of Pregnant Addicted Women in Manitoba*<sup>148</sup>, which included the identification of barriers for pregnant women seeking addiction treatment. Barriers identified were:

- psychological barriers (shame, fear, alienation);
- barriers related to a woman's children (lack of childcare, fear of having children apprehended);
- barriers related to social support networks (after care services are required as a client may be isolated otherwise with an abusive, addictive partner upon termination of the treatment program)
- barriers related to socio-geographic factors (costs of travel to treatment)
- barriers related to stigma (the stigma associated with alcohol/drug use not under control, especially when involving a female)
- barriers related to treatment programs themselves (similar programs with which the client has had previous experiences may have been philosophically and culturally inappropriate).

A forgiving, welcoming, and helpful attitude manifested by service-providers is important in removing another possible barrier. Disadvantaged people sometimes

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and the kinds of supports and advocacy that affected children require. Retrieved February 3, 2003 from the World Wide Web: <<http://www.globeandmail.com>>.

<sup>148</sup>Prairie Women's Health Centre of Excellence, retrieved February 3, 2003 from the World Wide Web: <<http://www.pwhce.ca/epaw.htm>>.

perceive existing health, justice and social service agencies as judgmental, cold and intimidating. They may have hesitated to access services for fear of losing welfare benefits or of having their children apprehended.<sup>149</sup> In some cases, women have been forcibly detained,<sup>150</sup> even sterilized against their will, as has transpired recently among Indigenous women of Brazil,<sup>151</sup> and was performed on the mentally disabled in Alberta a generation ago.<sup>152</sup> In present day Afghanistan, in some areas, unmarried women face being apprehended, taken to hospitals, and coerced into enduring gynecological examinations to determine their chastity.<sup>153</sup> Examples such as these may render marginalized women wary of accessing services. Judgmental attitudes have been associated with maternal consumption during pregnancy. The presumption of personal autonomy of the expectant mother enabling her to abstain from alcohol use underlying these attitudes is a questionable one. Considering the use of an addictive, intoxicating substance, combined with social conditions such as poverty, abuse and racism, personal autonomy of such women may be greatly diminished. Furthermore, product warning labels, virtually the last line of defense before damage to a developing fetus, are absent.

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<sup>149</sup> Ridd, D. *Pregnant Addicted Women: Manitoba's Experiences*. (3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable (September 9, 2002), *FAS: When the Children Grow Up*, Retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>.)

<sup>150</sup> *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* (1997), 152 D.L.R. (4<sup>th</sup>) 193 (S.C.C.). An expectant, addicted mother was forcibly detained in a hospital to protect her unborn child. The Supreme Court held that such detention violated her *Charter* rights.

<sup>151</sup> Johnson, B. F., "Stolen Wombs: Indigenous Women Most at Risk." 2000 *Native Americas* 38-42; and CBC News, November 4, 2002, Forced Sterilization of the Indigenous Women of Brazil, Retrieved November 5, 2002, from the World Wide Web: <<http://www.CBC.ca>>.

<sup>152</sup> *The Sexual Sterilization Act, R.S.A.*, 1928, allowed for the sterilization of mentally disabled people confined to institutions within the province of Alberta (several other provinces and many states had similar laws at that time). In 1996, Leilana Muir was awarded \$1,000,000 in damages for wrongful confinement and wrongful sterilization; 700 other claimants are awaiting the dispositions of similar claims (*Muir v. Alberta* [1996] A.J. No. 37).

<sup>153</sup> Leopold, Evelyn (December 17, 2002). "Post Taliban Warlords Oppress Afghan Women," Reuters News Agency, Human Rights Watch Report, Retrieved January 5, 2003 from the World Wide Web: <<http://news.findlaw.com/international/s/20021217/afghanwomencd.html>>.

In addition to addressing listed barriers, the implementation of Aboriginal employment equity would go far towards promoting both primary and secondary prevention by addressing the underlying social conditions that perpetuate the problem.

Pharmacological intervention (antioxidant therapy) is another technique of harm reduction during pregnancy. Oxidative stress is an important mechanism in the prenatal brain injury of FAS/E fetuses. Antioxidant treatment strategies for preventing or attenuating ethanol-induced<sup>154</sup> oxidative stress in fetal life and its impact on brain functioning in postnatal life have been proven effective in studies involving cell cultures and animal models. In such studies, pharmacological doses of the antioxidants, vitamin C and E, were administered, along with varying doses of ethanol. Although an antioxidant protective effect against ethanol has been observed in animal studies, there are no data yet available as to whether this prophylactic treatment can benefit pregnant women. Antioxidant treatment during pregnancy is not a new concept, as antioxidants such as vitamins E and C have been used for the treatment of pre-eclampsia and were not found to be teratogenic. It follows that treating women who abuse alcohol during pregnancy with antioxidants such as vitamin supplements may have a protective effect against FAS/E. As well there is the benefit of addressing certain nutritional deficits that may be present, without concomitant negative effects.<sup>155</sup>

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<sup>154</sup> Ethanol is the chemical name for the alcoholic component of intoxicating beverages.

<sup>155</sup> *Supra* note 118. Cohen-Kerem, R. and Koren, G. and *Antioxidants and Fetal Protection Against Ethanol Teratogenicity*, (Fetal Alcohol Canadian Expertise (FACE) Roundtable, September 9, 2002, *FAS, When the Children Grow Up*, retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>.)

### 1.6.7 Tertiary Prevention

Tertiary prevention rests on early diagnosis of disorders along the FASD. Essential to the diagnosis of FAS/E is the confirmation of maternal alcohol consumption during pregnancy. This may be problematic. Maternal self-report is subject to denial because of stigma and guilt. When diagnostic issues arise for the first time in later life, the birth mother may be absent. A recent breakthrough has transpired in the field of meconium studies. Meconium is the first “stool” or bowel content passed by the neonate. A chemical analysis of the neonate’s meconium from the diaper can measure both gestational timing and magnitude of fetal ethanol exposure resulting from maternal drinking during the last two trimesters of pregnancy. An enzymatic reaction occurs between fatty acids in the mother’s body and the ethanol she consumes, to form reliable biomarkers of fetal ethanol exposure in the meconium. Characteristic patterns of fatty acid ethyl esters (FAEEs) form, wherever maternal alcohol consumption is more than minimal, and these patterns of FAEEs can confirm and elucidate prevalence of alcohol consumption by pregnant women. Such patterns of FAEEs can provide the objective, quantitative corroborative evidence of ethanol consumption required for positive diagnosis of FAS/E, together with the presence of other criteria required to confirm the diagnosis.<sup>156</sup>

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<sup>156</sup> Chan, D. *Neonatal Screening for Prenatal Alcohol Exposure* (3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable, September 9, 2002, *FAS, When the Children Grow Up*, retrieved September 30, 2002, from the World Wide Web: <<http://www.knowtv.com>>).

### 1.6.8 Prevention of secondary disabilities

Various programs have been designed and implemented to address the prevention of the development of secondary disabilities post-natally and beyond. The pioneers in this area were the P-CAP (Parent-Child Assistance Program) and its precursor the Birth to Age Three Program, both developed by Dr. A. P. Streissguth in Seattle, Washington.<sup>157</sup> A program in Canada modeled on the Seattle P-CAP-Birth to Age Three concept is STOP FAS, implemented in 1998, by Manitoba Health in four sites: Winnipeg (2 sites), The Pas, and Thompson. In addition, Norway House Cree Nation, a northern on-reserve Manitoba community, has its independent version of STOP FAS, which offers a Birth to Age 3 Program substantially modified to provide culturally appropriate supports. This program, called Steps and Stages for Mom and Baby, is run through the Health Division of the Norway House Cree Nation. Their PEER program (Parents as Early Education Resources) carries on into the school years, in conjunction with the Frontier School Division.<sup>158</sup> Such programs characteristically involve an intensive, paraprofessional mentorship over at least a three year period, for high-risk mothers with addiction problems, in order both to prevent their delivering children affected by alcohol and drug use, and to attenuate the development of secondary symptoms in those so affected. Community Round Tables are held to ensure that programming is meeting community needs.

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<sup>157</sup> *Supra* note 12 at 270-275. (Streissguth, *A Guide for Families and Communities*)

<sup>158</sup> <[DRidd@gov.mb.ca](mailto:DRidd@gov.mb.ca)>, Oct. 1, 2002, e-mail correspondence from Dawn Ridd, Child and Health FAS Consultant, Child Health Unit, Manitoba Health, Winnipeg, Manitoba; and <[lbrown@frontiersd.mb.ca](mailto:lbrown@frontiersd.mb.ca)>, September 30, 2002, e-mail correspondence from Lisa Braun, Library Services, Frontier School Division, 1402 Notre Dame Ave, Winnipeg, Manitoba.

Breaking the Cycle (BTC), in Toronto, does similar mentoring, as well as partnering with various prenatal, perinatal and postnatal service networks (housing, physical and mental abuse reduction, healthy babies programs, nutrition, and substance abuse recovery) in an attempt to facilitate and integrate the needs of both mother and child through a single access model. More specifically, BTC provides: childcare, mentoring, basic needs support (daily breakfast and lunch, transportation, clothing exchange), mental health counseling, family medicine, addictions medicine, (medically supervised withdrawal programs and methadone programs), as well as accompaniment to appointments.<sup>159</sup>

Motherisk, at Toronto Sick Children's Hospital, maintains a national hotline dedicated to the provision of free-of-charge information about the safety and risk, in terms of maternal-fetal toxicity during pregnancy and lactation, of drugs, environmental chemicals, infections (such as HIV), and disease. Motherisk also sponsors teleconference courses for medical doctors in the diagnosis of FAS/E and further assists in implementing telediagnosis.<sup>160</sup>

The magnitude of the problem is illustrated by experience with Immigrant Adoptions in Quebec. Some adoptive parents there are overwhelmed by problems involving FASD, as there are few community services to help them cope. As a result, some parents are

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<sup>159</sup>Leslie, M. "Breaking the Cycle: Measures in Progress." (3<sup>rd</sup> Annual Fetal Alcohol Canadian Expertise (FACE) Research Roundtable, September 9, 2002, *FAS, When the Children Grow Up*, retrieved September 30, 2002, from the world wide web: <<http://www.knowtv.com>>.)

<sup>160</sup>Motherisk, retrieved October 16, 2003, from the World Wide Web: <<http://www.motherisk.org>>.



returning children to Child and Youth Services. Many such children eventually end up institutionalized or in detention in the juvenile justice system.<sup>161</sup>

The David Livingstone Community School in Winnipeg, MB, provides a partial answer to some of the problems facing children with FASDs, through both integrated and segregated school programs. The staff employs strategies and practices which have been found to be effective in educating such children. The programs, from kindergarten to grade six, are organized around concepts of providing an *external brain*<sup>162</sup> and environmental adaptations and supports to assist the children in learning.<sup>163</sup>

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<sup>161</sup> Immigrant Adoptions, *The Current*, host Anna Maria Tremonti, January 24, 2003, retrieved January 28, 2003, from the world wide web: <<http://cbc.ca/thecurrent/logs.html>>.

<sup>162</sup> *External Brain*, retrieved September 12, 2003, from the World Wide Web: < <http://come-over.to/FAS/externalbrain.htm>>. *External brain*, in reference to FASDs, is a term coined by Dr. Sterling Clarren to refer to the use of responsible personal mentors and memory aids to help affected individuals compensate for their memory deficits and other mental gaps, as well as their lack of impulse control and poor judgment.

<sup>163</sup> Saskatchewan Institute on Prevention of Handicaps (SIPH), *Saskatchewan Institute on Prevention of Handicaps Resource Catalogue* (Saskatoon, Saskatchewan: SIPH, 2002-2003) at 21. Description of video, *ARND: A School Wide Approach, David Livingstone Community School, 2001*; School of Hope: Teaching Kids with Fetal Alcohol Syndrome, retrieved from the World Wide Web, September 12, 2003: <<http://www.come-over.to/FAS/schoolofhope.htm>>.

### 1.6.9 Several Qualitative Studies of Interventions to Prevent Secondary Disabilities

To attenuate the development of secondary characteristics, to deal with maladaptive behaviors arising out of untreated or treatment resistant secondary disabilities, and to prepare FASD affected individuals for life in the community (rather than acceptance of institutionalization or incarceration as inevitable), interventions and supports throughout the life cycle are considered necessary.<sup>164</sup> A qualitative study by Margaret Raymond and Joe Belanger in British Columbia is unique in focusing on community interventions for individuals with FAS/E.<sup>165</sup> Community supports studied (termed literacy-based as they emphasized communication skills used to organize and enhance behavior) were provided to young adults with FAS/E. Specific community supports selected for study by Raymond and Belanger were:

- Support circles which focus on life adjustments, termed *Wehman* transitions,<sup>166</sup> namely, employment, living arrangements, getting around the community, making friends, sexuality, self esteem, and having fun;<sup>167</sup>
- Cognitive compensatory tools designed to assist with everyday memory failure, disorganization, and social isolation problems experienced by FAS/FAE

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<sup>164</sup> *Supra* note 12 at 185-227 (Streissguth, 2001), and *Supra* note 129. (Best Practices)

<sup>165</sup> Raymond, M. and Belanger, J. *Literacy-Based Supports for Young Adults with FAS/FAE*, Prepared for the Province of British Columbia, Ministry of Advanced Education, Training and Technology, and Human Resources Development Canada, The National Literacy Secretariat. Retrieved Oct. 2, 2002, from the World Wide Web: <<http://www.nald.ca/fulltext/lbsupport/Doc/pdf>>.

<sup>166</sup> Wehman, P. *Life Beyond the Classroom, Transition Strategies for Young People with Disabilities*. (Toronto: Paul H. Brookes Publishing, 1996).

<sup>167</sup> *Ibid.* at 23-24.

individuals. The tools consist of such literacy-based devices as lists, calendars, a student tracker system, and homework book;<sup>168</sup> and

- Cognitive enhancement tools, including the Directions Personal Planning Tool, a program which focuses on dreams, goal setting, and implementation, as well as the use of an internet chat room to enhance communication, social, and technological skills.<sup>169</sup>

Raymond and Belanger contend that funding for support services should not be linked to IQ, as is often the case, but rather should be related to the level of dysfunction or maladaptivity exhibited by the client. Many FAE clients possess normal IQs, but are seriously dysfunctional, because of the neurotoxic effects of alcohol (to which they were exposed prenatally) on selective parts of their developing brains, resulting in organic brain impairment. Such dysfunction or maladaptivity is best measured by the Vineland Adaptive Behavior Scales and the Scales of Independent Behavior-Revised, rather than by any IQ test. A paradox arises because, at a superficial level, individuals with FAE may appear and sound normal, and test normal in IQ (or at least higher than the usual 70-IQ benchmark for receipt of government support services), but, be maladaptive, nevertheless, in their everyday functioning, to the extent of requiring intensive, ongoing supports.<sup>170</sup>

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<sup>168</sup> *Ibid.* at 47-52.

<sup>169</sup> *Ibid.* at 65-67.

<sup>170</sup> *Ibid.* at 18-19 and 24.

Using naturalistic methods, Raymond and Belanger's qualitative study through an ethnographic lens, describes the experiences and outcomes of five young adults with FAS/FAE and their parents utilizing various community-based interventions or supports. Data collection consisted of researchers' field notes taken during the support circles, as well as researchers' notes of interviews with subjects and their parents. The interviews were unstructured and open-ended, in order to give full voice to the experiences of the subjects and their parents. From this primary evidence, conclusions were derived inductively.<sup>171</sup> Previous findings (most significantly Streissguth et al's three longitudinal studies of the adjustment problems of a cohort of 661 FAS/FAE clients over a 22-year period)<sup>172</sup> are of a comprehensive, statistical nature. Raymond and Belanger wished to supplement Streissguth's landmark, extensive study of large groups of subjects over long periods of time, by in-depth, intensive study of relatively short-term interventions (one year in duration) with a small group of subjects. In essence, breadth in the Streissguth study is supplemented by depth in Raymond and Belanger's research, developed through the use of five case studies.

As the stories of the five subjects are told, from their own perspectives and those of their parents, the layers and diversity of experiences with the interventions are revealed. Problems with the interventions are noted, as well as more limited successes. Each kind of intervention utilized is personnel intensive, requiring much skill and attention, and ongoing modification by the care giver. Mechanistic devices like lists, calendars and

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<sup>171</sup> *Ibid.* at 5-6.

<sup>172</sup> *Supra* note 12 at 104-107. (Streissguth, 2001)

homework books require continuous monitoring, need external rewards as motivators (which can lose their value if over-used), and vary in success with the degree of compliance of those involved.<sup>173</sup> The effectiveness of support groups and circles varies with the skills, sensitivity, and commitment of volunteer participants. Some subjects refused to participate in activities in which they felt they might be considered as, or be labeled as, FAS/E.<sup>174</sup> Chat room interventions had to be discontinued because of safety concerns; a closed network for FAS/E clients was recommended but never implemented because of limited human resources.<sup>175</sup>

The findings of the study are presented as in-depth experiences of the five FAS/FAE subjects and their parents with the three types of community-based interventions. Biographies of the subjects and detailed descriptions of their experiences with the various interventions are included and it is left to the reader/practitioner to decide if these experiences can be generalized to the specific cases and contexts with which she is working. The authors attempt to avoid generalizations and, instead, demonstrate the multiple realities of FAS/E adults and their families. Further investigation of community interventions is needed, including systematic analysis of the data for common themes and patterns characteristic of effective interventions. The study under review, although not definitive, does contribute, via the genre of qualitative research, valuable insights for parents and professionals working with FAS/E individuals. Through qualitative research, one acquires the feeling of directly experiencing the lives,

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<sup>173</sup> *Supra* note 165 at 62-64.

<sup>174</sup> *Ibid.* at 39-42.

<sup>175</sup> *Ibid.* at 74.

challenges, and voices of these five young FAS/FAE adults and their parents. Their anecdotal positions effectively create the context for the reader. As an instance, hear the mother of 16 year-old Bert candidly give voice to her experiences with the use of the weekly reward-based calendar:

Everyday, Bert has certain jobs to do. He used to put a great deal of effort into avoiding them, often spending more time and energy avoiding the work than the work itself required. Sometimes, he resisted so vehemently that he would start yelling, throwing things or even punching holes in doors. It would have been much easier for me to do most of the jobs myself, but we think it is important that he learns to look after himself.

When we started to use this calendar, the change in behavior and attitude was immediate, especially between after-school and bed-time. He started doing his jobs, showering and brushing his teeth before bed, and we no longer had to get angry and force him to do what he was supposed to do. I think the magnetic calendar had a significant impact on our lives, quite remarkable for something so simple.

In large part, the secret to its success is the reward we used at the end of every day: email and chat room access. When his computer crashed, a few months after starting to use his magnetic calendar, his behavior crashed, as well, instantaneously. We were back to square one, trying to force him to get ready for bed. He reverted to lying and trying to sneak out of his showers. Two months later, he got a new computer, and the program began to work again.

I suppose the magnetic calendar will work as long as he is consumed by his interest in chat room, email and playing computer games over the modem, and as long as we can control his access to the internet. He can only get online when I unlock our bedroom door and plug him into that room's phone line.

He is now in Grade 11 and plans to leave home when he graduates. If he does, I doubt he will want to take the calendar with him and things will unravel for him. But for now, it is quite a God-send to our family. Maybe when he gets a lot older he will realize that he needs this kind of help to keep his life together.<sup>176</sup>

Raymond and Belanger's research, although qualitative, did focus mainly on fragmented, compartmentalized, and mechanistic community interventions involving

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<sup>176</sup> *Ibid.* at 73-74.

behavior modification. Randolph Mason describes the difference between such a compartmentalized approach to interventions and a holistic approach as follows:

The Western scientific paradigm is essentially reductionist in nature; it involves the breaking down of larger systems into smaller sub-systems so that these smaller components in turn can be analyzed in isolation (Duran and Duran, 1995). By and large, this approach has come to dominate most disciplines including the field of psychology. It is through the application of this basic scientific principle that psychology and other related fields determined the best way to understand the nature of man was to study each of his facets in isolation. To accomplish this task, it necessarily involved the separation of mind, body, and spirit.<sup>177</sup>

Holistic perspectives maintain that a “whole” cannot be completely inferred merely from an analysis of its parts, but rather possesses a synergy which makes the whole “greater than the sum of its parts”. As an illustration, studying the physical or mental component in isolation would be of limited value as each component is greatly influenced by the workings of other components. It is less a matter of deciding which component needs to be addressed, than of comprehending that if a state of imbalance among components exists, it can lead to illness, dysfunction, or even crime. The focus is on restoring the balance by engaging all of the components in a holistic way.<sup>178</sup> Implications for integrated and holistic delivery of education, health and social services follow from this premise. Coincidentally, population studies demonstrate that education level and income, among other factors, are empirical indicators of health and wellness.<sup>179</sup>

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<sup>177</sup> Mason, R. *The Healing of Aboriginal Offenders: A Comparison Between Cognitive-Behavioral Treatment and the Traditional Sweat Lodge Ceremony*, Unpublished Masters’ Thesis. (Saskatoon, Saskatchewan, Canada: University of Saskatchewan, 2000) at 31.

<sup>178</sup> *Ibid.* at 31-33.

<sup>179</sup> Institute of Aboriginal Peoples’ Health, retrieved from the World Wide Web, August 2, 2003: <[http://www.cihir-irsc.gc.ca/institutes/iaph/publications/strat\\_plan2002](http://www.cihir-irsc.gc.ca/institutes/iaph/publications/strat_plan2002)>.

In the holistic, qualitative genre, Mason<sup>180</sup> compared the use of the traditional Aboriginal sweat lodge ceremony to cognitive-behavioral treatment for Aboriginal Offenders (not identified as fetal alcohol *per se*, but consisting of sex offenders and violent offenders, with various degrees of acculturation) at the Saskatoon Regional Psychiatric Centre in Saskatchewan. The sweat lodge experience holistically engages one's physical, mental, emotional and spiritual components. One experiences intense heat, reflects on one's life, feels various emotions, and contacts the spirit world through prayer, singing, or vision, all simultaneously, in synergy. Some inmates reported that the sweat lodge ceremony made them more open and more responsive to other forms of treatment, including cognitive-behavioral treatment. Generally, they viewed the Elders in the Sweat Lodge Ceremony as less controlling, affording each inmate absolute control over his/her healing journey, whereas in the cognitive behavioral program they often felt coerced into areas of self-examination that they did not feel ready to address.<sup>181</sup> In the latter, some feared being written-up in files as uncooperative or defensive, which could impact adversely on their rehabilitation and release. For the kinds of transformative change required, holistic healing is an option to be considered further in community-based treatment, as well as in the institutionalized treatment noted by Mason.

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<sup>180</sup> *Supra* note 177. (Mason)

<sup>181</sup> *Ibid.* at p. 129-130.



## 1.7 Current State of Access to Treatment Across the Sentencing Spectrum

Aboriginal offenders comprise 17% of the federal and 16% of provincial admissions, while accounting for only 2.8% of the Canadian population. At 123 per 100,000, Canada has one of the highest incarceration rates among developed countries, but the Aboriginal incarceration rate is six times the national rate. In Saskatchewan, the incarceration rate for adult Aboriginals is 33.3 times higher than the rate for adult non-Aboriginals. In addition, Aboriginal offenders were more likely to be remanded in custody before trial, and less likely to be released on parole or mandatory supervision after sentencing.<sup>182</sup> Saskatchewan's Aboriginal youth make up 75% of secured custody admissions, while comprising only 15% of the youth population. Comparable statistics in Manitoba and Alberta, respectively, are 79% of secured admissions to 16% of youth population, and 35% of secured admissions to 5 percent of the youth population.<sup>183</sup> The majority of Aboriginal crime is considered alcohol-related, with 57% of inmates having substance abuse problems.<sup>184</sup> Also attributed to alcohol and its effects are 35% of Aboriginal deaths from such causes as alcoholism, accidents, cirrhosis, suicide, and homicide.<sup>185</sup>

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<sup>182</sup> Correctional Service Canada, *Aboriginal Offenders, and Aboriginal Peoples in Canada*, Canadian Centre for Justice Statistics Profile Series, 2001. Retrieved August 11, 2003, from the world wide web: >[http://www.csc-scc.gc.ca/text/pubed/feuilles/off-ab\\_e.shtml](http://www.csc-scc.gc.ca/text/pubed/feuilles/off-ab_e.shtml)>.

<sup>183</sup> Hendrick, D. *Youth Custody and Community Services Canada, 1999/00*, Canada Centre for Justice Statistics, Catalogue No. 85-002-XPE2001012.

<sup>184</sup> Correctional Service Canada, *Task Force Report on the Reduction of Substance Abuse* (1990), retrieved from the World Wide Web, September 10, 2003, <[http://www.csc-scc.gc.ca/text/pblct/forum/e024/e024i\\_e.shtml](http://www.csc-scc.gc.ca/text/pblct/forum/e024/e024i_e.shtml)>.

<sup>185</sup> *Supra* note 72. (A Statistical Profile on the Health of First Nations)

*The Corrections and Conditional Release Act*,<sup>186</sup> s. 86 requires:

86. (1) The Service shall provide every inmate with
- (a) essential health care; and
  - (b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community.

No treatment is provided unless the inmate voluntarily gives his/her informed consent to that treatment.<sup>187</sup>

*The Canada Health Act*<sup>188</sup> s. 3 states:

3. It is hereby declared that the primary objective of a Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

What essential mental health care consists of *vis a` vis* the non-essential, and what reasonable access is constitute significant questions. Little jurisprudence exists interpreting relevant sections of the cited *Acts*, except the following two cases. In *Kelly v. Canada*<sup>189</sup> the inmate plaintiff suffered from environmental sensitivity disorder (ESD) or multiple chemical sensitivity disorder. Symptoms such as fatigue, pain, concentration and memory problems, gastro-intestinal and sleep disorders occurred when Kelly was exposed to chemicals such as exhaust, tobacco smoke, waxes and polishes, printer's ink, and plastics. Kelly was twice referred to an outside physician,

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<sup>186</sup> R.S.C., 1992, c. 20.

<sup>187</sup> *Ibid.* at s. 88. (CCRA)

<sup>188</sup> R.S.C., 1985, c. C-6, s.3.

<sup>189</sup> [1996] F.C.J. No. 880. (Kelly)

whose resultant recommendations were followed up by Kingston Penitentiary. A charcoal mask was purchased as well as a small air filter for Kelly's cell. Alternate living arrangements proffered were rejected by Kelly, and Kelly was assigned outdoor duties away from the indoor pollutants to which he was sensitive. Accommodations noted were implemented, informed by the need to maintain the integrity and security of the institution. The Court ruled that Kelly, not the penitentiary, failed to make sufficient effort to deal with his condition within the realities of his lawful confinement in the penitentiary, and thus neither s. 86 of the CCRA, nor s. 7, 12 and 15 of the *Charter* were breached. As an example, while working outside, Kelly chose to loiter near the loading docks where exhaust fumes were prevalent, and he kept old newspapers in his cell as well as a computer and printer, contraindicated by his sensitivities.

In *Strykiwsky v. Stony Mountain Institution*<sup>190</sup> inmate Strykiwsky was a heroin addict applying on an exceptional basis for Phase I methadone treatment. Stony Mountain had introduced methadone treatment in two phases: Phase I to be reserved for those inmates who had been receiving such treatment in the community before committal, and Phase II which would incrementally offer methadone treatment to all confined heroin addicts. Though a consent order covering the plaintiff's situation had been reached before the case was heard, the plaintiff wished the case to be adjudicated for the benefit all heroin addicts so confined, waiting for access to treatment. The preliminary issue of extension of time for the filing of expert witness affidavits was the only substantive issue dealt

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<sup>190</sup> [2000] F.C.J. No. 1404. (Strykiwsky)

with in the cited judgment. Hopefully, the matter of access to methadone treatment was resolved otherwise in a manner satisfactory for inmates, as it has not been adjudicated.

Standards of Practice Policy Document 301 from Correctional Services Canada distinguishes among four types of essential health services: emergency health care (delay would endanger the life of the inmate), urgent health care (condition likely to deteriorate to an emergency or adversely affect the inmate's ability to carry on activities of daily living), mental health care (for disturbances of thought, mood, perception, orientation or memory that significantly impair judgment, behavior, the capacity to recognize reality or the ability to meet the ordinary demands of life, both acute and long term) and dental care (involving pain, trauma or preventative care). All other services are considered non-essential to which inmates are to have reasonable access, in keeping with community practice.<sup>191</sup>

As FAS/E offenders accumulate criminal records, they may receive sentences requiring incarceration, including penitentiary time, and possible Dangerous Offender or Long Term Offender designation.<sup>192</sup> For some offenders, conditional release, including long term supervision, may be required to facilitate access to treatment in the community.

As FAS/E offenders may be found throughout the sentencing spectrum from diversion to incarceration, access to appropriate treatment is also a concern throughout this spectrum. Alternatively, if mental disorder is established, treatment needs must be

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<sup>191</sup> Correctional Service of Canada, Standards of Practice Policy Document 301, retrieved from the World Wide Web, January, 2003, < [http://www.csc-scc.gc.ca/text/prgrm/fsw/hlthstds/healthstds5\\_e.shtml#1](http://www.csc-scc.gc.ca/text/prgrm/fsw/hlthstds/healthstds5_e.shtml#1)>

<sup>192</sup> *Supra* note 31, *Criminal Code*, Part XXIV/DANGEROUS OFFENDERS AND LONGTERM OFFENDERS, 1997, c. 17, s. 3.

addressed in the types of placement applicable, and considered as a factor when reviewing continued detention. In this context, a *Knoblauch* disposition<sup>193</sup> which is a hospital disposition through the back door by way of an optional term of a conditional sentence, was upheld by the Supreme Court, thereby expeditiously interfacing between the criminal justice and mental health systems, where appropriate facilities exist.

Without adequate access to appropriate treatment, FAS/E offenders may become institutionalized and more at risk to re-offend upon release. Their treatment, in addition to being community-based, should also be culturally appropriate, that is, for Aboriginals, restorative, rather than retributive. Bonds need to be established in the community, so that an FAS/E offender has a system of support to assist him/her in making positive adjustments in social, educational, psychological and occupational spheres. He/she will also require ongoing interdisciplinary treatment to facilitate adjustment in all aspects of life. Culturally appropriate traditional healing is an important option in any treatment plan involving Aboriginal peoples.

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<sup>193</sup> *R. v. Knoblauch*, [2000] 2 S.C.R. 780.

## 1.8 Retrospective and Prospective

Chapter One begins by introducing the contention on which the thesis is based, and presenting existing support for that contention. The contention that carceral treatment is inappropriate for offenders with fetal alcohol conditions, was supported by a consideration of the nature of FASD conditions involving organic brain impairment, and the secondary disabilities that can result without access to appropriate disability services. The Chapter then examined the ideological, historical, legal and policy issues that are impediments to implementing community-based treatment for such offenders.

Centralization of power and resultant breakdown of local community functions, the concomitant relativity of values and positivistic laws, coupled with the adoption of a retributive justice paradigm, have mitigated against community-based treatment.

The use of alcohol as a tool of domination and exploitation of Aboriginal peoples is as old as the history of colonization itself. Current consumption patterns of Aboriginal peoples indicate a trend towards binge drinking which produces high BACs contributing to FASDs.<sup>194</sup> Legislation and policy fall short of mandating community-based treatment to replace incarceration. Treaty or other legal remedies discussed in this respect are as yet untried; the delay, in part, is due to oppressive provisions of the *Indian Act* first enacted in 1876, and viewed by treaty beneficiaries as a colonial government's hedge to full treaty implementation. Colonialism introduced distilled alcohol to Aboriginal peoples, and has perpetuated its devastating effects

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<sup>194</sup> *Supra* note 77. (*NWT Statistics*)

intergenerationally. It has led to community, cultural, and family breakdown, FASDs, marginalization, alienation, and a disproportionately high crime rate.

Chapter two will examine the sentencing case law, attempting to illuminate what happens when individuals with organic brain impairment and largely untreated secondary symptoms, perhaps undiagnosed or inadequately diagnosed, offend and face the machinery of the criminal justice system, which remains mainly retributive in nature. Chapter Three will examine constitutional remedies which hold out promise for mandating community-based treatment for all offenders with FASDs, in lieu of incarceration.

## 2. CASE LAW

### 2.1 Mental Disorder

Whether the claim of insanity is characterized as a denial of *mens rea*, an excusing defence, or more, generally, as an exemption based on criminal incapacity, the fact remains that sanity is essential for guilt.<sup>195</sup>

These words of Lamer J., as he then was, can be construed as a logical extension of Hart's contention that, before punishment is justified, the offender must be responsible, must be acting voluntarily, and must possess the necessary mental element or moral culpability. Hart criticized Kant and Hegel for their implicit premise that individuals as rational, autonomous decision-makers, freely choose to commit the crimes for which they should be punished.<sup>196</sup> Disabled offenders, such as those with FASDs, often impulsive and irrational because of their organic brain impairment, may benefit from more generous understanding in the manner of Hart, of crime and responsibility. Some assert that offenders with FASDs lack full autonomy, rationality, responsibility, voluntariness and culpability, and express concerns about individuals with such disabilities being exposed to penal consequences in criminogenic environments.<sup>197</sup> Mechanisms exist in law to avoid punishing those who, because of mental disorder, lack the ability to stand trial. Alternately, measures exist for those found guilty of an offence and who suffer from a mental disorder to be excused from punishment. For mentally

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<sup>195</sup> *R. v. Chaulk* (1990). 62 C.C.C. (3d) 193 (S.C.C.) at 213 Lamer C.J.

<sup>196</sup> *Supra* note 29. (Hart)

<sup>197</sup> Green, R. G. and Healy, K. F., *Tough on Kids: Rethinking Approaches to Youth Justice* (Saskatoon: Purich Publishers, 2003), at 64-70.



disordered offenders not found unfit nor excused on the basis of their mental disorder, trial and perhaps punishment cannot be avoided altogether. For them, mental disorders may be considered a mitigating factor which may reduce their culpability, and qualify such offenders for a lesser sentence, including a treatment component. However, the latter is at curial discretion. No universal, formal mechanism exists to impose a rehabilitative rather than a penal disposition on the convicted mentally disordered youth or adult not found unfit or excused. At issue here is whether offenders with FASDs would qualify for any of these considerations for the mentally disordered, and, if so, in what circumstances.

## **2.2 Unfitness to Stand Trial Due to Mental Disorder (UST)**

A threshold inquiry in the case law considers whether an adult or youth offender with an FASD has the capacity to be charged and tried in our justice system.<sup>198</sup> The mechanics of such an inquiry and the consequences for the range of dispositions to which the accused is subject will be considered.

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<sup>198</sup> Section 51 of the *Young Offenders Act* and section 141 of the *Youth Criminal Justice Act* state the general rule that the *Criminal Code* applies to proceedings against young persons, unless there is an inconsistency with the youth act (*YOA* or *YCJA*) under which the youth has been charged. Relevant sections of the *Criminal Code* dealing with fitness to stand trial or not criminally responsible on account of mental disorder are not inconsistent with the *YOA* or *YCJA* and thus apply to young persons, as well as to adults.

*R. v. T. J.*,<sup>199</sup> a seminal case in the UST context, deals with T.J., a 22-year old Aboriginal man with FAS, who has the physical appearance of a 12-year old boy and who suffers from mental retardation. T. J. at the age of 15 was found unfit to stand trial on the charge of sexual assault contrary to s. 271 of the *Criminal Code*,<sup>200</sup> and has been detained under that jurisdiction ever since. Had he been fit to stand trial he would have been subject to a maximum disposition of two years under the *Young Offenders Act*.<sup>201</sup>

Unfit to stand trial (UST), a series of complex provisions regarding sections 2, 672.21, 672.12, and 672.54 of the *Criminal Code*, reads as follows:

#### Unfit to Stand Trial

2. “Unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
- (a) understand the nature or object of the proceedings,
  - (b) understand the possible consequences of the proceedings, or
  - (c) communicate with counsel;

#### Mental Disorder

“Mental disorder” means a disease of the mind.

#### Where Court May Order Assessment

672.12 (1) The court may make an assessment order at any stage of the proceedings against the accused of its own motion, on application of the accused, or subject to subsections (2) and (3), on application of the prosecutor.

- (2) Where the prosecutor applies for an assessment in order to determine whether the accused is unfit to stand trial for an offence that is prosecuted by way of summary conviction, the court may only order the assessment if:

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<sup>199</sup> [1999] Y.J. No. 57 (Terr. Ct.). (*T.J.*)

<sup>200</sup> *Supra* note 31. The incident was fairly innocent compared to most sexual assaults. T.J. and the victim, a 15-year-old girl, both resided in the same group home. On Nov. 21, 1992, T.J. lay on her bed on top of her, while wearing no pants. The victim was wearing night clothes and there may have been a bed cover between her and T.J. When the complainant protested, T.J. exited the room. No force was used, nor did T.J. attempt to fondle the victim.

<sup>201</sup> R.S.C. 1985, C. Y-1.

- (a) the accused raised the issue of fitness; or
  - (b) the prosecutor satisfied the court that there are reasonable grounds to doubt that the accused is fit to stand trial.
- (3) Where the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility, the court may only order the assessment if
- (a) the accused puts his or her mental capacity for criminal intent into issue; or
  - (b) the prosecutor satisfied the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.

#### Presumption of Fitness

672.22 An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

#### Verdict of Unfit to Stand Trial

672.31 Where the verdict on trial of the issue is that an accused is unfit to stand trial, any plea that has been made shall be set aside and any jury shall be discharged.

#### Prima Facie Case to be Made Every Two years.

672.32 (1) The court that has jurisdiction in respect of the offence charged against an accused who is found unfit to stand trial shall hold an inquiry, not later than two years after the verdict is rendered, and every two years thereafter until the accused is acquitted pursuant to subsection (6) or tried, to decide whether sufficient evidence can be adduced at that time to put the accused on trial.

#### Dispositions That May be Made:

672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely:

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate

672.72 (1) Any party may appeal against a disposition made by a court or Review Board, or a placement decision made by a Review Board, to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or mixed law and fact.

(2) An appellant shall give notice of an appeal against a disposition or placement decision in the manner directed by the applicable rules of court within fifteen days after the day on which the appellant receives a copy of the placement decision or disposition and reasons for it or within any further time that the court of appeal, or a judge of that court, may direct.

(3) The court of appeal shall hear an appeal against a disposition or placement decision in or out of the regular sessions of the court, as soon as practicable after the day on which the notice of appeal is given, within any period that may be fixed by the court of appeal a judge of the court of appeal, or the rules of that court.

Territorial Court Judge Lilles in *T.J.*,<sup>202</sup> in view of T.J.'s long detention, addressed the discrepancy between dispositions under s. 672.54 of the *Code* for USTs, compared to dispositions under the same section for an accused found not criminally responsible on account of mental disorder (NCRs). Where an NCR accused is considered not to be a significant threat to the safety of the public, she may be discharged absolutely under s. 672.54 (a). The UST accused, however, were she to present no similar threat, is subject to conditions and control of the court or review board, provided the Crown can establish a *prima facie* case against her every two years (s. 672.22 of the *Criminal Code*) or, for young offenders, every year (s. 13(2) of *Young Offenders Act*). The option of absolute discharge is not open to her under the *Code*. According to *R. v. Swain*,<sup>203</sup> in the context of an NCR accused (an insanity acquittee),<sup>204</sup> the pith and substance of s. 672 is the protection of the public from those who have engaged in criminal acts. Protection of

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<sup>202</sup> *Supra* note 199. (T.J.)

<sup>203</sup> (1991), 63 C.C.C. (3d) 481 (S.C.C.) at 525, Lamer C.J.C. (Swain)

<sup>204</sup> At the time of *Swain*, the term in the *Code* was insanity, rather than NCRMD.

the public is to be achieved through prevention of the recurrence of wrongful acts by means of supervision and treatment of the mentally disordered person, rather than through punishment, arbitrary confinement, and deprivation of liberty not in accordance with the principles of fundamental justice. Chief Justice Lamer in *Swain* held that automatic, indeterminate detention of those found not guilty by reason of insanity, without an enquiry as to whether they required confinement, was unconstitutional:

The detention order is automatic, without any rational standard for determining whether an individual insanity acquittee should be detained. The duty of the trial judge to detain is unqualified by any standards whatsoever. It is difficult to imagine a detention being ordered on a more arbitrary basis in violation of s. 9. Since s. 542(2) still requires a trial judge to automatically order strict custody based on no criteria or standards and before any kind of hearing can be conducted on the issue of present mental condition, the provision infringes ss. 7 and 9 of the Charter and cannot be saved under s. 1 of the Charter. While the objectives of this section, to protect the public and to prevent crime by detention of those insane acquittees who are dangerous, are objectives of pressing and substantial concern, this section cannot meet the proportionality tests. . . .

The indeterminate nature of the strict custody order under s. 542(2) infringes on the rights and liberty in a manner that is not in accordance with fundamental justice to an acceptable degree. The minimal impairment component of the proportionality test requires that insane acquittees be detained no longer than necessary to determine whether they are currently dangerous due to their insanity. Section 542(2), therefore, cannot be justified as a reasonable limit on the accused's rights under s. 7. As regards s. 9, while the effect on an accused of a period of automatic and arbitrary detention without consideration of any criteria may not be disproportionate to the importance of achieving the objective, the fact that s. 542(2) provides for a period of indeterminate detention renders the effect of the limitation disproportionate to the objective.<sup>205</sup>

Accordingly, once the mentally disordered accused recovers or proves less of a threat to society, she should fall outside the ambit of the criminal law power, and be absolutely discharged. But this option of exiting the system is not open to USTs. Terr. Ct. J.

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<sup>205</sup> *Supra* note 203 at p. 489-90. (Swain).

Lilles held that the same constitutional principles against arbitrary detention and unrestricted deprivation of liberty should apply to both types of mentally disordered accused, NCRs and USTs. T.J.'s permanent disorder, mental retardation caused by fetal alcohol syndrome, could not be improved through medication.<sup>206</sup> He would never be fit to stand trial and thus perhaps be acquitted, nor could he be found NCR and so subject to absolute discharge. Under the UST designation T.J. had been kept subject to criminal law jurisdiction for 6 ½ years, without being allowed to raise the issue of public safety. Terr. Ct. J. Lilles found the statutory regime established for accuseds who are UST was overbroad in this respect and infringed T.J.'s s. 7 and 15 rights under the *Charter*:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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.

Judge Lilles held that s. 672.54(2) was incapable of passing the minimal impairment branch of s. 1 justification under the *Charter*:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The minimal impairment branch of s. 1 was considered in *R. v. Heywood*

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<sup>206</sup> Many conditions such as psychoses or schizophrenia can be improved fairly quickly with medication, and the accused is then able to stand trial and exit the system.

In considering whether a legislative provision is overbroad, a court must ask the question: Are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, used means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis. (at. 523)<sup>207</sup>

The statutory scheme was considered arbitrary and disproportionate by Judge Lilles, limiting the rights of USTs for no reason, as in the case of T.J. Further, no UST accused has ever been found guilty, while NCR accused had been found guilty factually, although excused from guilt on the basis of mental disorder. Notwithstanding the absence of a guilty finding, if mentally retarded and incapable of recovery, the UST accused never can be found fit to stand trial with the concomitant possibility of escaping criminal jurisdiction. Neither can she escape criminal jurisdiction, either through acquittal or absolute discharge as can an NCR, by establishing that she is no longer a danger to public safety. The constitutional remedy employed by the Court in *T.J.* was to read down s. 672.54(a), declaring the words “a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and” of no force and effect. Subsection 672.54(2) would then read:

672.54(a) where, in the opinion of the Court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

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<sup>207</sup> (1994), 94 C.C.C. (3d) 481 (S.C.C.) at 523, as cited in *T.J.*, supra note 199, at 10-11. (Heywood)

making the disposition of absolute discharge applicable to both UST and NCR accused if neither were a threat to the safety of the public.

Thus, in Judge Lilles' court, USTs such as T.J., found not to be a risk to public safety, may, like NCR accused, be subject to an absolute discharge. Not yet clear is whether higher courts will uphold this conflation of UST and NCR dispositions under s. 672.54(a), making absolute discharge accessible to USTs not considered a threat to public safety. Judge Lilles concluded proceedings against T.J. with a *Charter* remedy of a judicial stay of proceedings, as T.J. was not considered, on current evidence, a significant risk to community safety. Until a higher court rules on the matter, in the interim, counsel for offenders with mental disorders may be leery of pursuing a UST designation for fear that it could result in indeterminate detention for their client.

As the case following illustrates, offenders who one way or another avoid the UST designation, may not, because of their untreated mental disorder, elude criminal jurisdiction for long, even after serving a sentence to avoid the indeterminate detention that could result from being found UST. Moreover, placement in criminogenic environments that could result if they are not designated UST are not appropriate for them and may lead to further deterioration.



Judge Turpel-Lafond, in *R. v. W.D.*,<sup>208</sup> recounts how an Aboriginal, young offender with FAS, aged 13, had been, since the age of 12, charged 12 times (for minor property offences and consequent breaches), and had made 25 appearances in court under five different defence lawyers while facing many prosecutors. Diagnosed at the age of 29 weeks with FAS, an expert witness described him this way to the Court:

His understanding of what happens around him and about basic society is limited. Equally his understanding of the court process was also relatively limited. For example, he was unable to explain what “making a plea” meant. He was unable to explain the role of the prosecutor, other than to say the prosecutor talks about the charges. His understanding of defence counsel was simply that they stood up and talked. Similarly, he did not seem to be able to define what “guilty” or “innocent” means.<sup>209</sup>

Despite perceptible inabilities, in his 25 appearances in court, no one involved in the court process had initiated an assessment and an UST inquiry for W.D. Obviously unfit, he ended up in youth jail many times, a vulnerable, mentally disabled young person exposed to antisocial peers. Concerns regarding the administration of justice led Judge Turpel-Lafond to order a stay of proceedings for charges against W.D.; probation was converted to intensive community supervision appropriate for a youth with FAS. The judge recommended that courts dealing with W.D. in future ascertain he is fit to stand trial. She concluded her judgment this way:

W.D. is in a difficult situation. There is no specific programming for him in the community, such as a school for children with Fetal Alcohol Syndrome, or a one-on-one coaching program for him to model good behavior. This lack of support means he cannot be protected from ongoing conflict with the criminal

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<sup>208</sup> *R. v. W.D.* [2001] S.J. No. 70 (Sask. Prov. Ct.), Youth Ct. J. Turpel-Lafond. Note: W.D. is the second of nine siblings, and is a twin. In a later case where fitness to stand trial is considered, W.D. is denoted as W.A.L.D.(1) and his twin as W.A.L.D.(2). Three of the siblings have been diagnosed with FAS. The mother is a single mother, in poor health, who tries her best with the children, but is somewhat overwhelmed by her circumstances.

<sup>209</sup> *Ibid.* at 7, quoting p. 2 report of B. McDonald, psycho-educational assessment, December 15, 2000. (W.D.)

justice system. He is now known in the law enforcement community. It may be only a matter of time until a more sophisticated youth or adult takes advantage of W.D. and some real harm is done to him or someone else.

It is a sad commentary on our society that a severely disabled boy, who is highly vulnerable to antisocial individuals, would end up in a youth jail so many times. One can only speculate on how this is preparing him to meet the challenges of adulthood, which in legal terms is a mere four years away, even if developmentally is many years in the future. One cannot but question what social policy is served by the use of the hard penal machinery of the criminal justice system to deal with the most chronic mentally disabled youth of our society.<sup>210</sup>

Given the urgency of a finding of UST for FAS offenders such as W.D., despite the pitfall of indeterminate detention, the discussion will now turn to the legal mechanism of such an inquiry. The analysis of a finding of UST *per se*, as modeled on the method used in *R. v. J.A.P.*,<sup>211</sup> *R. v. W.A.L.D.(1)*,<sup>212</sup> and *R. v. W.A.L.D.(2)*,<sup>213</sup> and included cases, is complex. That complexity may account in part for its omission, on occasion, in busy youth courts. In the analysis, the trial judge initially is to ascertain that the prosecution has a *prima facie* case against the accused. A finding of UST should not be made in the absence of grounds to try the accused.<sup>214</sup> Usually a *prima facie* case can be made to put an FAS accused on trial, in order to have the UST designation considered by the Court. Because of their impulsivity, poor judgment, inability to anticipate consequences, and susceptibility to negative peer influences, FAS individuals are prone to committing offences and their offences are easily detected as they are

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<sup>210</sup> *Ibid.* at 6-7. (W.D.)

<sup>211</sup> [2000] S.J. No. 260 (Prov. Ct.). (JAP)

<sup>212</sup> [2002] S.J. No. 221 (Prov. Ct.). (WALD1)

<sup>213</sup> [2002] S.J. No. 222 (Prov. Ct.). (WALD2) Note: W.A.L.D.(1) and W.A.L.D.(2) are twin, mentally impaired, FAS, young offenders, one being W.D. dealt with in [2002] S.J. No. 70 (Prov. Ct.), their middle initials later were used to distinguish them.

<sup>214</sup> *R. v. Taylor*, (1992) 77 C.C.C. (3d) 551 at 562 (Ont. C.A.).

neither capable of forethought nor of cunning concealment. This situation is more pronounced when the accused is also mentally retarded.

In *R. v. Taylor*,<sup>215</sup> where a *prima facie* case had been made against the accused, the Court considered in some detail the issue of fitness to stand trial and the concomitant ability to communicate in order to instruct counsel. The Court identified three points:

- the accused must not be acting (mentally disordered) out of malice;<sup>216</sup>
- whether she is capable of entering a plea; and
- whether she has sufficient intellect to comprehend the proceedings, so as to make a proper defence—to challenge the lawyers by making objections, or to understand the evidence in sufficient detail.

*Taylor* held in addition that “the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way,” although this threshold should not be too high. If the accused is able to understand the process, consonant with the principles of fundamental justice, she should be given the benefit of a speedy completion at trial, rather than declared unfit to stand trial.<sup>217</sup> A fitness threshold too high would militate against the benefit of a speedy trial for those who are more capable than accused like T.J. of understanding the court process.

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<sup>215</sup> *Ibid.* at 565.

<sup>216</sup> Taylor was actually a deaf mute and not mentally retarded, but the rule applies to the mentally disordered as well as the deaf.

<sup>217</sup> *Supra* note 214 at 566. (Taylor)

The meaning of fitness within the context of the *Criminal Code* was elaborated by the Court in *R. v. Steele*:

An accused is incapable of conducting the defence, within the meaning of s. 615 of the *Criminal Code*, if he or she:

- (a) cannot distinguish between available pleas;
- (b) does not understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel;
- (c) does not understand the personal import of the proceedings;
- (d) is unable to communicate with counsel, converse with counsel rationally or make critical decisions on counsel's advice; or
- (e) is unable to take the stand, if necessary.<sup>218</sup>

The Court in *R. v. M.S.R.*,<sup>219</sup> considering *R. v. Rabey*<sup>220</sup> and *R. v. Cooper*,<sup>221</sup> adopted the same definition of mental disorder in s. 2 of the *Code* as did Dickson J. in *Cooper*.<sup>222</sup> According to Dickson J. in *Cooper*, a mental disorder or disease of the mind is an illness, disorder, or abnormal condition of the mind that is neither self-induced nor transitory. Further, the Court in *M.S.R.* concluded that the term mental disorder includes mental retardation or impaired cognitive ability. The confession rule, the right to silence, and the right to counsel were considered in the context of UST by the Court in *R. v. Whittle*.<sup>223</sup> *Whittle* held that the fit accused need not be capable of exercising analytical reasoning, but rather must possess only the mental capacity of an operating mind as is required for the confession rule and the right to remain silent. As for the right to counsel, the fit accused must be able to instruct counsel, understand the function

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<sup>218</sup> (1991) 63 C.C.C. (3d) 149 at 181 (Que. C.A.). (*Steele*)

<sup>219</sup> (1996) 112 C.C.C. (3d) 406, (Ont. Ct. Gen. Div.) (*M.S.R.*)

<sup>220</sup> (1980), 54 C.C.C. (2d) 1 (S.C.C.), aff'g (1977) 37 C.C.C. (2d) 461 (Ont. CA). (*Rabey*)

<sup>221</sup> (1980), 51 C.C.C. (2d) 129 (S.C.C.). Note: Dickson J.'s definition in *Cooper* will be more fully considered under the NCR analysis. (*Cooper*)

<sup>222</sup> *Ibid.* at 244. (*Cooper*).

<sup>223</sup> (1994) 92 C.C.C. (3d) 11, (S.C.C.), Sopinka J. (*Whittle*)

of counsel, and comprehend that she can dispense with counsel.<sup>224</sup> Sometimes, as in *T.J.*, an FAS mentally impaired accused possesses a superficial understanding of the court process, and can parrot answers, but without understanding. For instance, T. J. was conscious that he was in the criminal justice system, but was not cognizant of the repercussions of the UST designation, apparently believing that he was to be placed on probation. Assessed by experts, he was found by them to be incapable of participating in the court process or of understanding the nature of the courtroom procedures.<sup>225</sup>

Like NCR, UST, although based on a medical condition, is a question of law for the courts to decide, on the balance of probabilities. They do resort to expert medical testimony to guide their decisions. According to s. 672.12 of the *Code*, the UST inquiry may be initiated at any stage of the proceedings, by the court itself, or on application of the accused or the prosecutor. The prosecutor may make such initiation if the accused raises the issue of fitness, or if the prosecutor satisfies the court that reasonable grounds exist to doubt the fitness of the accused.

Judge Whelan in *W.A.L.D.(1)*, after a UST inquiry, was convinced, on the balance of probabilities, that the accused was unable to pass the s. 2 fitness test. Guided by the opinions of experts and the *viva voce* testimony of the accused, she described the unfitness to stand trial of *W.A.L.D.(1)* as follows:

He was confused about the roles of the crown, defence and judge and had a very rudimentary understanding of the terms commonly used in a courtroom

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<sup>224</sup> *Ibid.* at p. 26-31. (Whittle)

<sup>225</sup> *Supra* note 199 at para. 1-3. (T.J.)

such as “guilty, not guilty and undertaking.” He recalled that he has had trouble with his curfew. He knows it was 9:00 p.m., but he acknowledged that he couldn’t tell time. He knew that if he was out till 10:00 he could be picked up by the “cops” because it was after his curfew. He thought that “remand” meant “going to Kilburn and doing your time.” He was unable to explain why he was at Court on this day. In answer to some questions he gave answers suggesting an understanding, however when asked to explain the meaning of the terms he used, he was unable to do so. He had no understanding of the adversarial nature of court proceedings.<sup>226</sup>

In summary, a situation similar to T.J.’s, absent a constitutional remedy, does raise doubts about the efficacy and advisability of UST dispositions which could leave an FASD accused subject to indeterminate detention in the mental health/criminal justice system. Alternatively, carceral dispositions are inappropriate for those with mental disorders, leaving them subject to the influence of negative peers, victimization and deterioration in their mental states. Before concluding that UST designations leave mentally disordered offenders in a dilemma, there is another specialized provision to consider when dealing with a mentally disordered offender. In addition to the front end UST disposition, there exists the possibility of a mentally disordered offender qualifying for an excusing mechanism during the trial process itself.

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<sup>226</sup> *Supra* note 212 at 10. [W.A.L.D.(1)]

### 2.3 Not Criminally Responsible on Account of Mental Disorder

If an accused cannot, or does not choose to and is not required to demonstrate, on the balance of probabilities, that she is unfit to stand trial,<sup>227</sup> the second inquiry, which occurs only after a guilty verdict or plea, may review whether she is or is not criminally responsible for her actions on account of mental disorder (NCR).

The NCR analysis proceeds as follows. The first question asked is whether the person suffers from a “mental disorder,” within the meaning of section 2 of the *Criminal Code*. Onus of proof rests on whomever raises the defence of NCR (including the prosecutor, who may raise the mental disorder defense in certain circumstances as considered in *R. v. Swain*<sup>228</sup>). Everyone is presumed not to suffer from a mental disorder which would exempt them from criminal responsibility, until the contrary is established on the balance of probabilities. Under the mental disorder inquiry one must consider first whether or not a specific fetal alcohol condition is a “disease of the mind” pursuant to section 2. A further inquiry is made whether the evidence supports, on the balance of probabilities, the conclusion that the accused suffers, in each case, from the specific fetal alcohol condition which was examined in the first phase of the test and found to be a mental disorder. If the accused from these tests is found to suffer from a mental disorder, one must ask, in addition, according to s. 16(1) of the *Code*, if that mental disorder rendered her, at the time of the offence, incapable of appreciating the nature

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<sup>227</sup> And neither the court nor prosecutor present reasonable grounds for such a finding.

<sup>228</sup> *Supra* note 203. (Swain)

and quality of her acts, or, in the alternative, if it rendered her incapable of knowing that these acts were wrong. Case law has much to say about the interpretation of each of these phases of inquiry, including *inter alia* what is a disease of the mind, what it means to be incapable of appreciating the nature and quality of acts because of a mental disorder, and what it means to be incapable, due to mental disorder, of knowing that these acts were wrong.

Pertinent provisions of the Criminal Code include:

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

2. “mental disorder” means a “disease of the mind.”

Dickson J. in *R. v. Cooper*, defined “disease of the mind” as:

Any illness, disorder, or abnormal condition which impairs the human mind, and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.<sup>229</sup>

Alcohol has impaired the mind of those with FASDs through involuntary exposure *in utero*, not through self-induced states. The effects of alcohol exposure *in utero* on the mental state are not transitory, but permanent. *R. v. Daviault*<sup>230</sup> held that self-induced,

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<sup>229</sup> *Supra* note 221 at 244. (Cooper)

<sup>230</sup> (1994), 93 C.C.C. (3d) 21 (S.C.C.) at 45-46. (Daviault)



extreme intoxication to the point of automatism is a defence. However, those with FASDs could not ordinarily be characterized, solely because of their FASDs, as being intoxicated by self-induced means nor as being automatons. *R. v. Rabey* characterized the internal and non-transitory aspect of a mental disorder, in the context of insane automatism, as a

malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some external factor such as, for example, concussion.<sup>231</sup>

Malfunctionings of the mind that result from internal states such as organic pathology are more likely to recur, than are malfunctionings resulting from transitory states produced by some external factor. Therefore, non-transitory, internally produced conditions justify subjecting the offender possessed of them to possible detention or treatment that can result from a finding of NCR. In contrast, transitory malfunctionings of the mind that result from extraordinary external causes, such as concussion or shock, may never recur, and do not justify subjecting the offender possessing of them to possible detention. FASDs fall under the category of malfunctionings of the mind that result from non-transitory, internal states, including permanent organic pathology. Consequently, those diagnosed with a particular FASD are likely to qualify as having a mental disorder, or disease of the mind, within the meaning of s. 2 of the *Criminal Code*. Though the various diagnostic categories included in FASD are not contained in

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<sup>231</sup> (1977), 37 C.C.C. (2d) 461 at 477-8 (Ont. C.A.), aff'd (1980), 54 C.C.C. (2d) 1 (S.C.C.), Martin J. (Rabey)

the *DSM-IV*<sup>232</sup> as specific categories of mental illness, they may still qualify as mental disorders under s. 2 of the *Criminal Code*. The situation of FASDs is analogous to epilepsy, arteriosclerosis, and diabetes, in that although these conditions neither are contained in the *DSM-IV* nor are they considered psychiatric illnesses, yet they have been found to be mental disorders.

It is a question of law (not medicine) whether a condition or state constitutes a disease of the mind under s. 2 of the *Code*, and it appears that FASDs would lie within this legal category. It is a question of fact whether evidence in a particular case discloses the existence of such a disease in the accused at the time the offence was committed, to meet the requirement that *mens rea* (or proof that it is lacking) and *actus reus* be coincidental. A court may thus find that FAS is a mental disorder pursuant to s. 2. Whether or not the disease existed in an accused at the time of an offence is a question of fact. This has to be decided by reference to the diagnoses of qualified expert witnesses, such as physicians and psychologists who practice in this area, to the testimony of the accused or other witnesses, and to other evidence. The issue of deciding among conflicting expert opinions is considered at length in *R. v. J.A.P.*,<sup>233</sup> in the context of a mentally handicapped youth, albeit one who is not FAS.

Once determined that the accused suffered from a mental disorder at the time of the offence, it remains to be decided if that mental disorder was of such severity as to

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<sup>232</sup> American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders, Volume IV* (Washington, DC: APA, 1994).

<sup>233</sup> *Supra* note 211. (JAP).

render her incapable of appreciating the nature and quality of her acts, or in the alternative, of such severity as to render her incapable of knowing that these acts were wrong. In most cases involving FASDs, this is the crux of the analysis. Although impulsive, individuals with FASDs usually do appreciate the nature and quality of their acts to the extent required. They are unable rather to fully control their actions or to understand the long term consequences of them. Moreover, such individuals know, superficially, that their acts are wrong. Though their moral sense be egocentric and immature, it is not sufficiently impaired to qualify under this second arm of the mental disorder test in s. 16(1). *R. v. R.F.*<sup>234</sup> and *R. v. S.L.P.*<sup>235</sup> are cases in point. Offenders with FAS who do qualify under the s. 16(1) test are those so mentally impaired by low intellectual ability that they are unable to appreciate the nature and quality of their acts, or do not know such actions are wrong. Cases in point under this category include *R. v. T. J.*<sup>236</sup> and *R. v. W.D.*,<sup>237</sup> *R. v. W.A.L.D.(1)*<sup>238</sup> and *R. v. W.A.L.D.(2)*.<sup>239</sup>

The difference between “knowing” and “appreciating” the nature and quality of an act was discussed for the majority by Dickson J. in *R. v. Cooper*. The context of the case was a psychotic individual choking another mental patient:

To “know” the nature and quality of an act may mean merely to be aware of the physical act, while to “appreciate” may involve estimation and understanding of the consequences of that act. In the case of the appellant, as an example, in using his hands to choke the deceased, he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest,

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<sup>234</sup> [2002] S.J. No. 742 (Sask. Prov. Ct.). (R.F.)

<sup>235</sup> [2002] S.J. No. 311 (Sask. Prov. Ct.) (SLP)

<sup>236</sup> *Supra* note 199. (T.J.)

<sup>237</sup> *Supra* note 208. (WD)

<sup>238</sup> *Supra* note 212. (WALD1)

<sup>239</sup> *Supra* note 213. (WALD2)

however, that in performing the physical act of choking, he was able to appreciate its nature and quality in the sense of being aware that it could lead or result in her death. . .

The true test necessarily is, was the accused person at the very time of the offence—not before or after, but at the moment of the offence by reason of “disease of the mind,” unable fully to appreciate not only the nature of the act but the natural consequences that flow from it: In other words was the accused person, by reason of “disease of the mind” deprived of the mental capacity to foresee and measure the consequences of the act?<sup>240</sup>

The word “appreciates,” then, connotes something beyond mere knowledge of the physical performance of the act. If an offender does not appreciate that the physical act of choking can lead to death of the victim, she does not possess the requisite *mens reas* for the offence, and should be excused as NCR. However, a finding of NCR does not apply when the accused merely lacks remorse for what she has done. The complex meaning of “appreciation” is considered further in *R. v. Abbey*.<sup>241</sup> Abbey’s delusion that he would not be caught or would possess special powers making him immune from prosecution, did not bring him under the first arm of the s. 16(1) test. The test is not one of appreciating punitive consequences (e.g. choking could result in jail), but rather one of appreciating logical consequences of an act (e.g. choking could result in death). Although Abbey thought he would not go to jail for his illegal act (importing narcotics), he knew the act was morally wrong according to the standards of society.

The second branch of the section 16(1) test requires that the offender suffer from a mental disorder that renders her incapable of knowing that her acts are wrong. She may understand the logical consequences of her act; the *mens rea* and *actus reus* may be

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<sup>240</sup> *Supra* note 221 at 146. (Cooper)

<sup>241</sup> (1982), 68 C.C.C. (2d) 394, at 403-406, (S.C.C.). (Abbey)

established in her case, nevertheless, she may be incapable of knowing that her acts are wrong because of a mental disorder, as in *R. v. Chaulk*.<sup>242</sup> “Wrong,” as used in the second branch, denotes more than legally wrong, against the law; the accused must also realize that the act is morally wrong, according to the standards of society. Young offenders in *Chaulk* killed under a delusion that they could rule the world. They perceived their act as justified to rid their world of “losers”. Under the power of their disease of the mind in the form of a delusion, they did not comprehend that their act was morally wrong by the standards of society. *Chaulk* engenders controversy, as critics posit that the offenders, whether or not they were acting under a delusion, were substituting their moral standards for those of society. However, the test is that the accused be aware that the act is wrong according to the moral standards of society; the defendants in *Chaulk* lacked this awareness and were thus excused under the NCR provision. The intention of the NCR provision is to prevent psychopaths, sociopaths, and antisocial personalities, who substitute their own standards for those of society, from eluding criminal liability. *Chaulk* is very close to the line on this issue. To benefit from an NCR defence, the offender, because of a mental disorder, must be unable to realize, at the time the offence was committed, that her act was morally wrong according to the standards of society. It is important to stress that such defence is open only to those who do have a mental disorder pursuant to s. (2) of the *Code* which renders them unable to make this distinction.

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<sup>242</sup> *Supra* note 195. (Chaulk)

It may not be difficult for an individual with an FASD condition to meet the legal threshold of having a mental disorder (given the generous interpretation of the legal meaning of mental disorder). However, it is not easy for such individual to establish that, as a consequence of that disorder she was incapable, at the time of the offence, of appreciating the nature and quality of an act or omission. This is especially true as the focus of the test is on immediate, rather than long term consequences:

As has been pointed out by the commentators, a narrow literal interpretation of this test [the first arm of the insanity test] is such that "nobody is hardly ever really mad enough to be within it" (Baron Bramwell quoted by G. A. Martin in "Insanity as a Defence" (1965-66), 8 Crim. L.Q. 240 at p. 243).<sup>243</sup>

Nor is it a simple process to establish that a mentally disordered offender did not know an act was wrong according to the standards of society.

Many individuals with FASDs, as well as possessing a mental disability, are delayed in moral development. This delay is characterized by egocentricity in making moral decisions, which in itself reveals a lack of understanding of the social contract and the common good:

In the early stages of moral reasoning, moral reasoning is--egocentric; it's organized around the individual's needs, perceptions, what you can get away with. It's in the latter three stages of moral reasoning that one comes to understand that the essence of a social contract, that morality is designed around—the common good. And that one follows the rules even when there is no consequence--...R., in my opinion, has not reached that stage of moral reasoning where she can understand following the rules for the common good as opposed to following the rules for R.<sup>244</sup>

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<sup>243</sup> *Supra* note 241 at p. 402. (Abbey)

<sup>244</sup> *Supra* note 234 at 19, expert testimony from Dr. J. Nanson, Psychologist. (R.F.)

However, another factor militates against mentally disordered FASD offenders being excused under the second arm of the s. 16(1) test. FASDs may possess some characteristics of the antisocial personality, which excludes them from this arm of the s. 16(1) defence. For instance, they may lack feeling for their victim due to lacunae in their mental functioning that render them incapable of empathizing with others:

I am troubled by Dr. Nanson's statement that she [R.] is unable to perceive her acts from the viewpoint of the victim.<sup>245</sup>

Thus, they are excluded under the second arm of the test as they usually do not commit their acts under a psychotic delusion that what they are doing is being done to satisfy a divine order or under some similar disturbance of thought. They are excluded under the first arm of the test because, while not always cognizant of long term consequences and implications, such offenders usually do appreciate the immediate consequences of their acts, which is all that is currently required in the case law to be sane under the first arm of s. 16(1). Also problematic is the establishment of the temporal requirement, that is, that at the time of the offence the offender did not realize either the consequences of her act or that her act was morally wrong. The temporal requirement is especially problematic when considering the situation of multiple offences involving an offender, and the frequent memory gaps of individuals with FASDs. Although mainly dealing with the first arm of the test, the same practical limitations apply to both arms as set forth in the finding below:

I am finally troubled because the discussion concerning R.F.'s appreciation of the nature and quality of her acts, was general in nature, not specific to the individual offences, certainly not in any systematic way and it was not focused on the specific day of the offence and R.F.'s thinking on that day. I appreciate

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<sup>245</sup> *Ibid.* at para. 76, quoting Judge Whelan.

well the practical difficulties in this regard, especially in a Hearing involving so many similar charges over a long period of time. I find that the evidence fails to meet this branch of the test...<sup>246</sup>

In conclusion, unless the fetal alcohol conditions of the offenders are so profoundly mentally disabling (many so affected are near normal in mental ability) that they do not appreciate the superficial nature and immediate consequences of their acts, or unless offenders suffer from some co-morbidity such as a psychotic delusion whereby they do not appreciate that an act was wrong according to the standards of society, the defence of NCR is not available to them. Such is the situation facing R.F. Limitations in this regard are consonant with public policy against allowing too many accused to escape criminal liability through the defence of NCR. However, FASD offenders are mentally disabled, notwithstanding that they may not meet the rather stringent requirements for UST or NCR. As a result of not meeting these requirements, they will enter the justice system without any formal and universal mechanism in place requiring that they be sentenced according to their reduced culpability arising from their mental disorder, and without a requirement to stream them away from criminogenic placements. Moreover, their mental disorder can work to their detriment in assessments of risk of future danger to the public, which may bar them from non-carceral options or release.

Considering those few for whom the defence of NCR is available, pursuant to s. 672.54 of the *Code*,<sup>247</sup> the least onerous or restrictive disposition is to be recommended, including absolute or conditional discharge, for those not considered a significant risk to

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<sup>246</sup> *Ibid.* at para. 76-77, Judge Whelan.

<sup>247</sup> Refer to page 74 of this thesis.



the safety of the public. Otherwise, NRC's are to be detained in custody, in a hospital, subject to regular reviews of that disposition by a Review Board. The concomitant risk assessment will be based largely on the recommendation of the mental health authorities.<sup>248</sup> Such indeterminate detention, without a capping mechanism as proposed in s. 672.64 of the *Code*, but never proclaimed, deters defence counsel from recommending the NCR defence to their clients.<sup>249</sup> Unless the offence is serious, counsel may deem it beneficial for the client to serve the time, although pitfalls of that option have been considered under UST.

A litany of disposition horrors occurred in *D. J. v. Yukon*.<sup>250</sup> D. J., a sex offender who suffered from FAS and ADHD, had been found NCR. The Review Board considered that it could not support a conditional discharge of D.J., under s. 672.54(b) of the *Code*. There were, in the Review Board's opinion, insufficient resources in the community to provide D. J. necessary treatment and supervision, without exposing the public to an unacceptable level of risk. Moreover, the Review Board deemed that there was no appropriate secure hospital facility available for his confinement and treatment according to the other alternative open to them under s. 672.54(c) of the *Code*.<sup>251</sup> Consequently, even after many appeals to a Review Board, D.J. remained detained in

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<sup>248</sup> Stuart, D. *Canadian Criminal Law: A Treatise* (Scarborough, ON: Carswell, a Thomson Company, 2001) at 376.

<sup>249</sup> Parliament in 1992 enacted caps on detention, such as life for first or second degree murder, 10 years for certain designated offences, and two years for other offences, however the capping provision was never proclaimed.

<sup>250</sup> (Review Board) [2000] YTSC 513. (D.J.)

<sup>251</sup> *Ibid.* at para. 14 -19. (D.J.)

administration segregation in a correctional facility.<sup>252</sup> Pursuant to the applicant's appeal under s. 672.72 of the *Code*,<sup>253</sup> Veale J. made an order of habeas corpus under s. 24(1) of the *Charter*, consequent upon a finding that by unduly depriving him of his liberty, D.J.'s section 7 *Charter* rights had been infringed.<sup>254</sup> Veale J. took this measure under the authority of *Winko v. British Columbia (Forensic Psychiatric Institute)*<sup>255</sup> which held that the legislative scheme for dealing with NCR's does not violate s. 7 of the *Charter*, except in cases where governmental actions operate to thwart the scheme's emphasis on the applicant receiving appropriate treatment. Administrative convenience, Veale J. found, did not constitute a justification under s. 1 of the *Charter*. Habeas corpus relief had been used in *Cardinal v. Director of Kent Institution*,<sup>256</sup> as relief against administration segregation where applicants had been denied the benefit of procedural fairness. Under the aegis of habeas corpus, Veale J. ordered D. J. into the care and custody of a secure hospital facility, with appropriate conditions and treatment. *D. J.* illustrates the use of a *Charter* remedy to mandate necessary treatment for NCRs.

However, *D. J.* is disquieting, as it provokes consideration of how many vulnerable NCRs, absent an advocate or an opportunity to be brought before a judge who will deem to remedy their situation, are languishing in inappropriate placements, not the least onerous nor the least restrictive, which may not provide necessary treatment for their mental disorders. Such individuals stand at risk of being forgotten, lost

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<sup>252</sup> *Ibid.* at para. 20. (D.J.)

<sup>253</sup> Refer to page 74 of this thesis for this provision of the *Code*.

<sup>254</sup> *Supra* note 250, at para. 50. (D.J.)

<sup>255</sup> [1999] 2 S.C.R. 625. (Winko)

<sup>256</sup> [1985] 2 S.C.R. 643. (*Cardinal v. Director of Kent Institution*)

indefinitely in the great maw of the justice system's penal apparatus. It was never an intention of the legislation to see such mentally disordered offenders warehoused in penal institutions for any extended period of time. It is no overstatement to conclude that the mentally ill, including those with FASDs, whatever the disposition, do not fare well in the justice system. For the most vulnerable members of society, in a post-*Charter* era, this state of affairs is not tolerable.

## **2.4 Sentencing**

If an accused is not UST, or if she does plead guilty or stands trial and is found guilty and is not excused under the rubric of NCR, the inquiry turns to the sentencing phase. Notwithstanding that the accused has a mental disorder, if not found UST nor NCR, she is, in law, criminally responsible for her actions. The sentencing judge does have the discretion to consider a mental disorder as a mitigating factor that could reduce culpability. As noted, such consideration is discretionary. Until recently the judge has not had the discretion of a hospital disposition for such offenders. Hospital dispositions are now a possibility but only in the limited context of probation or conditional sentence orders. Community-based sentencing options, such as diversion, probation and conditional sentences, may be imposed. However, dangerousness, or the assessment of

future risk, is a consideration in all non-conceral dispositions and forms of release, and a mental disorder may impact negatively on this assessment.

In the context of s. 718.2(e) of the *Criminal Code*<sup>257</sup> as interpreted by *R. v. Gladue*,<sup>258</sup> a related concern, since a large proportion of FAS/E offenders are Aboriginal, is the consideration of systemic factors in the application of restoration and restraint in the disposition of Aboriginal offenders. Systemic factors include alcohol use and its effects, including fetal alcohol conditions. Despite Bill C-41 (Part XXIII of the *Criminal Code*) enacted into law in 1996, containing goals of restraint, responsibility for the offender, reparation for the victim, and restoration, these, like s. 718.2(e), are placed in the larger punitive context of s. 718 and the rest of the *Code*:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objects:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offenders.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offenders, and, without limiting the generality of the foregoing:
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

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<sup>257</sup> *Supra* note 31.

<sup>258</sup> [1999] 1 S.C.R. 688. (Gladue)

- (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
- (iv) evidence that the offence was committed for the benefit of, at the direction or in association with a criminal organization

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) 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.

Each of the following sentencing principles, denunciation, deterrence, separation, proportionality and parity, are to receive equal weight where relevant; often they seem to overshadow restraint, reparation, restoration, and responsibility. Denunciation, separation, proportionality and parity, and consideration of mitigating and aggravating factors derive from just deserts or retributive roots. Specific and general deterrence, and estimates of future risk of harm derive from utilitarian or consequentialist concerns.<sup>259</sup> The sentencing landscape is characterized by a struggle of retributive-restorative-utilitarian paradigms, a veritable sentencing “star wars”. The attempts of

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<sup>259</sup> Roberts, J. V. & Verdun-Jones, S. “Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*,” (2002), 39 *Alta. L. Rev.* (No.4) 788-809 at para. 13; and Bentham, J. “Principles of Penal Law,” in J. Bowring, Ed., *The Works of Jeremy Bentham, How First Collected: Under the Superintendence of his Executor, John Bowring* (Edinburgh: William Tait, 1834), as cited in Blumoff, T. Y., “Justifying Punishment,” (2001) 14 *Can. J. L. & Jurs.* 161-211. Under the doctrine of utilitarianism, all actions were to be judged by their consequences. The greater good of the greater number in society requires punishment of any who threaten the greater good through crime. Pain would be inflicted on offenders in proportion to the amount of pleasure they derived from their crime, a calculus of pleasure and pain sufficient to deter immediate offenders, as well as others in the future.

the courts to interpret and balance these dichotomies or conflicting trilogies of the *Code*, case law, and policy will be analyzed and critiqued. From within the ramparts of a long tradition of retributive justice, it is difficult to shift paradigms and view justice in restorative terms. However, it is from the restorative vantage this writer chooses to comment, believing it to be the appropriate paradigm for mentally disabled offenders such as those with FASDs. The restorative perspective, with its emphasis on healing, overlaps to some extent with therapeutic jurisprudence; in the latter, the emphasis includes integrating understandings in psychology with those in the law,<sup>260</sup> as has been attempted here with FASDs and sentencing. Restorative justice would, in addition, integrate traditional healing and spirituality into the mix of law and psychology.<sup>261</sup>

Though recognition of fetal alcohol conditions had occurred in the medical literature by 1973,<sup>262</sup> the justice system, like many other institutions in society, had its proverbial head in the sand about this matter, a situation extending into the 1990's. Prov. Ct. J. Barnett comments to that effect in *R. v. Abou*:

FAS has been the subject of comment in only a few reported Canadian court decisions (*Joe v. Yukon Territory* (1986), 5 B.C.L.R. (2d) 267 and *R. v. R..B..M.* (1990), 54 C.C.C. (3d) 132) and it is not well understood by most judges, lawyers, probation officers, corrections officers, social workers or other persons likely to encounter it in the context of the justice system.

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<sup>260</sup> Wexler, D. B. "Putting Mental Health into Mental Health Law," 227-246 at 245-6. in Jill Peay (Ed.), *Criminal Justice and the Mentally Disordered*.

<sup>261</sup> Von Hirsch, A., (Ed), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*. (Oxford: Hart, 2003) at 240.

<sup>262</sup> Jones, D.L., Smith, D.W., Ulleland, C.N., Streissguth, A.P. "Pattern of malformation in offspring of chronic alcoholic mothers," *Lancet*, 2:1267-1271, 1973; Jones, K. L., Smith, D.W. "Recognition of the fetal alcohol syndrome in early infancy," *Lancet*, 2:999-1001, 1973; and Jones, K.L., Smith, D.W., Streissguth, A.P. Myrianthopoulos, N.C. "Outcome in Offspring of Chronic Alcoholic Women," *Lancet*, 1:1076-1078, 1974.

It is not a new notion that the taking of strong drink by pregnant women endangers unborn babies. People understood this truth in biblical times. But ancient wisdom was largely forgotten until about 20 years ago, when the first reports of modern studies were published. We have now come to understand that fetal exposure to alcohol is the leading cause of mental retardation in Canada. Moreover, fetal exposure to alcohol causes actual brain damage and the long term effects of fetal exposure to alcohol are more severe than those of other drugs, including heroin and cocaine.

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Mr. Justice David Vickers has recently spoken strongly about the difficulties FAS and other handicapped persons encounter in Canada. He says that our model of service delivery “is counter-productive, judgmental and nonsupportive.” (see *R. v. Williams*; Victoria SCBC No. 74093, 1994; transcript, page 13)

One real tragedy of cases like those of Victor Williams and Ida Abou is that nobody made any effort to provide meaningful help until it was, perhaps, too late. We must all pay a very real price for these and other similar failures. And persons whose handicaps might have been addressed are now stigmatized as criminals.<sup>263</sup>

And in *R. v. Baptiste*, Prov. Ct. J. Barnett observed further:

We have been incredibly remiss in failing to understand the damage done by drinking during pregnancy. Fetal alcohol syndrome (FAS) was not discussed in medical schools or textbooks until 1976.

But we now know that FAS is the most common and only known preventable cause of mental retardation. On a worldwide basis 1 to 3 of every 1000 live born infants are afflicted with FAS. The risk is a great deal higher for mothers from poverty stricken communities where alcohol abuse is prevalent. Unhappily, Canada has a great many such communities.

There has been very little discussion of FAS in judicial or other legal writing. In 1986 a Superior court judge considered that I had erred in taking judicial notice of FAS (*Joe v. Y.T.* (1986), 5 BCLR (2d) 267) but I believe that in 1992, FAS can properly be the subject of judicial notice.<sup>264</sup>

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<sup>263</sup> [1995] BCJ No. 1096 (B.C. Prov. Ct.), at para. 11, 12, 19 and 29. (Abou)

<sup>264</sup> [1992] B.C.J. No.2512 (B.C. Prov. Ct.), at p. 1. (Baptiste)

Similarly, in *R. v. E.L.J.*, Youth Ct. J. Faulkner commented, in the context of a case about a FAS offender, that:

This case is one more proof, if any were needed, of the terrible toll that alcohol abuse has taken in the Territory. We have failed to come to grips with this problem over a long number of years and now we are reaping the whirlwind.<sup>265</sup>

*R. v. J.*<sup>266</sup> is typical of earlier cases in which considerations of public safety were placed first in sentencing FAS/E offenders. Youth Court J. de Villiers compared the lack of empathy with or sympathy for their victims revealed by FAS/E offenders to the same characteristics among pedophiles. Correspondingly, he maintained that sympathy for FAS/E offenders should not outweigh concern for public safety, more than it does in offences involving pedophiles. Thus, he sentenced a 16 year-old FAS offender charged with his fourth vehicle theft, to one year closed custody, followed by two years probation. The context of the case was exceptional as there had been 190 such thefts in 1996 in the small city of Williams Lake, B.C.

An early case in which a restorative approach was taken is *R. v. R.B.M.*<sup>267</sup>. Daily training and supervision by qualified personnel was recommended for a 22 year old Aboriginal who functioned at the level of a 15-16 year old. It was noted that, although expensive, the costs of such program did not compare to the higher cost, which ranged around \$50,000.00 per year, of maintaining a prisoner in custody. Although many offenders are required to see an advisor only periodically, or merely to call in by telephone rather than having to appear in person, for the FAS/E offender such practices

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<sup>265</sup> [1998] Y.J. No. 19 (Yukon Youth Ct.) at para. 8. (E.L.J.)

<sup>266</sup> [1996] B.C.J. No. 2754 (Yukon Youth Ct.). (*R. v. J.*)

<sup>267</sup> (1990) 54 C.C.C. (3d) 132 (BCCA). (*R.B.M.*)



are of little use. FAS/E offenders require ongoing supervision and mentoring. In addition, drug or alcohol dependencies are common among them and need to be addressed through treatment.

According to *R. v. Williams*,<sup>268</sup> an important component in treating FAS/E is the necessity of addressing the learning of adaptive living skills, including *inter alia*: personal care, socialization, household organization, money-management, grocery shopping, cooking, and employment-related skills (getting up on time, arriving on time, dealing with the public appropriately, care and attention to job details, handling routine, and so forth).

An adoptive father of a son with FAS/E in *R. v. Steeves*,<sup>269</sup> testified for CBC television on the topic of FAS/E offenders. The father was a corrections officer with 23 years of service. Although before his experience with his son, the father had believed in the adage “if you can’t do the time, don’t do the crime,” he has come to understand that the emphasis should be on treatment for offenders with problems such as FAS/E.

Otherwise, he observed, prisons will continue to be revolving doors for such people who could become law-abiding were they to receive treatment.

*R. v. M.L.*<sup>270</sup> saw Youth Ct. J. Turpel-Lafond sentence to open custody an FAS young offender who impulsively started fires.<sup>271</sup> The Judge requested social services structure

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<sup>268</sup> [1994] B.C.J. No. 3160 (BCSC). (Williams)

<sup>269</sup> *Supra* note 1, at para. 22. (Steeves)

<sup>270</sup> *Supra* note 5. (M.L.)

a plan, to provide the intensive supervision and multi-disciplinary treatment that such an offender requires. This sentence was imposed in the face of the Crown's position, pursuant to *Proulx*,<sup>272</sup> that in the absence of appropriate community treatment facilities, an FAS/E offender should be incarcerated to ensure public safety. The ruling in *Proulx*, however, was not in the context of a disabled young offender. The sentence in *M.L.* was not appealed, but, as it was permissive, was not carried out.

Judge Turpel-Lafond, in *R. v. W.D.*,<sup>273</sup> cited, as a model of the treatment required, Guideline 647 of the College of Physicians and Surgeons of Manitoba on Fetal Alcohol Syndrome:

[T]reatment of affected children is individualized and multi-disciplinary, including diagnostic modalities, social services, counseling, rehabilitation therapy and educational support.<sup>274</sup>

She lamented that there was no equivalent guideline for Saskatchewan.

Some judges have begun responding with urgency to the needs of offenders with FASDs and other mental disabilities, and speaking out about such needs. Ontario

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<sup>271</sup> Cook P. and Proulx M., *Firesetting and Youth* (Brandon, MB: Office of the Fire Commissioner, 2002). This book is a resource for parents, educators and professionals to discuss firesetting with children and youth, particularly those youth with cognitive impairments and deficits, who may not realize the consequences of their actions. Youth with Attention Deficit Hyperactive Disorders (ADHD), FAS and other impairments related to impulsivity, hyperactivity, difficulty in understanding causal relationships, and who also may be susceptible to detrimental peer influences, may as a result be at a greater risk of firesetting behavior. The book is designed to meet the learning needs of these groups of children and youth, and to minimize through understanding the negative attitudes that can develop towards them.

<sup>272</sup> *R. v. Proulx*. [2000] 1 S.C.R. 61.

<sup>273</sup> *Supra* note 208 at para. 27. (W.D.)

<sup>274</sup> *Ibid.* at para. 27, citing para 3 of the Guideline. (W.D.)

Provincial Court Judge David Cole told a Law Union of Ontario conference in November, 1997,

What most of us are doing is a lot of routine processing of petty offenders—most of whom are mentally ill. We are tired of watching the parade.<sup>275</sup>

Similarly, Judge Turpel-Lafond in *R. v. W.D.*<sup>276</sup> asks,

What social policy can be served by the use of the hard penal machinery of the criminal justice system to deal with the most chronic mentally disabled youth of society?<sup>277</sup>

Yukon Territorial Court Judge Stuart, who deals daily with the problems of offenders, their families, and communities condemned the current approach, in the context of finding himself in the position of having no choice but to sentence a mentally disordered offender to a carceral term:

Stephens, the drafter of our *Criminal Code* believed that it was morally appropriate to hate criminals (Sir J.F. Stephen, *A History of Criminal Law of England*, vol 2, (London: MacMillan, 1883) at 81), a concept he embedded in the *Criminal Code*. This may partially explain the justice system's intractable propensity to punish. The advent of restorative justice principles holds the promise to move our practices from regarding all offenders as hateful to recognizing their potential if reconnected to family and community. Most offenders who pass through our courts are neither dangerous nor hateful; they have been marginalized or suffer from problems that punishment usually exacerbates.

As long as we continue to ascribe to ancient theories of punishment, we will continue to load our jails and spend money on institutions, as opposed to investing in families and communities. We will continue to spend money on symptoms, not causes, and will continue to place responsibility on professions

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<sup>275</sup> *Supra* note 14 at 9. Cayley, C. *The Expanding Prison* (Toronto: House of Anansi Press Limited, 1998) at 9.

<sup>276</sup> *Supra* note 208 at para. 35. (W.D.)

<sup>277</sup> *Ibid.* at para.35. (W.D.)

for matters that communities and families ought to, and can handle more effectively.

Our excess dependence upon punitive sanctions to change behavior reflects the lamentable “wooden-headedness” that Barbara Tuchman noted infects public decision-making. Her insightful analysis argues that large societies are irrationally committed to a “March of Folly,” as they persistently pursue policies contrary to their best interests. The wooden-headedness that propels this march of folly stems from taking a path proven to be counterproductive, instead of turning to alternatives known to be prudent and less prone to long-term risks (see Tuchman, B.W., *March of Folly* (New York: Ballantine Trade, 1995)).<sup>278</sup>

Rather than a punitive, retributive model of criminal justice, treatment of medical conditions in a healing, restorative, community-based environment is what Judges perceive increasingly as appropriate for offenders with FASDs.

The current trend is for courts to attempt actively to seek treatment and supervision for offenders with FASDs, rather than to sentence them to some sort of custody until such treatment becomes available. However, such reformist attempts on the part of the bench are sometimes frustrated. *R. v. L.E.K.*<sup>279</sup> exemplifies a proactive curial trend, culminating in a frustrating outcome. L.E.K. did not do well in either open or secure custody. Open custody was unworkable because he would not respect imposed conditions and would run (due to his organic brain impairment caused by *in utero* alcohol exposure); closed custody was inappropriate because he would associate with negative peers. Judge Turpel-Lafond discovered that there were available no youth workers trained to treat and supervise organic brain-impaired youth, and that existing

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<sup>278</sup> *R. v. Elias*, [2001] YKTC 501 at para. 97-99.

<sup>279</sup> [2000] S.J. No. 844 (SKCA). (LEK)

intensive supervision programs did not provide round-the-clock supervision which L.E.K. would require. In light of these circumstances, Judge Turpel-Lafond imposed a 30-day open custody sentence, to be followed by one year probation, with the condition that L.E.K. be assigned a youth worker with special training in, and understanding of, organic brain impairment. On L.E.K.'s release from open custody, a comprehensive case plan for him was to be in place, a plan which was to involve an in-patient treatment centre with an Aboriginal focus, special educational supports, and supports in terms of residence.<sup>280</sup>

As the services Judge Turpel-Lafond requested for the disabled youth were not in existence in Saskatchewan, the Court of Appeal held that her order was unconstitutional; it was the realm of the executive branch of government to allocate public funds as it saw fit in providing such programming. Correspondingly, the *Youth Criminal Justice Act* (YCJA),<sup>281</sup> proclaimed on April 1, 2003, in s. 42(3), stipulates that youth court judges can make orders for such restorative, rehabilitative and reintegrative options as intensive support and supervision, and attendance at a non-residential program, only “if the provincial director has determined that a program to enforce the order is available.” The Saskatchewan provincial director did not so determine. Similarly, orders under s. 42(2)(r), for intensive rehabilitative custody of the mentally disordered to be followed by a period half as long of supervision in the community, are subject to s. 42 (7), which restricts their use. Section 42(7) initially limits the use of

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<sup>280</sup> *Ibid.* at para. 8. (LEK)

<sup>281</sup> S.C. 2002, c.1. (YCJA)

intensive rehabilitative custody and supervision to cases where the young person has been found guilty of serious, violent offences.<sup>282</sup> However, in addition, the young person has to have been found to suffer from a mental disorder, for which a treatment plan has been developed that has reasonable possibility of reducing the risk of reoffence, and even then, only when “the provincial director has determined that an intensive rehabilitative custody and supervision program is available and that the young person’s participation in the program is appropriate.” Sanjeev Anand, in “Crafting Youth Sentences: The Roles of Rehabilitation, Proportionality, Restraint, Restorative Justice, and Race under the *Youth Criminal Justice Act*,” comments:

When the YCJA was first introduced into the House of Commons, the federal Government announced that it would transfer an extra \$400 million over 5 to 6 years to the provinces to help implement the new youth justice regime. These increased transfer payments still amount to less than half the cost of programming for the new youth justice regime. As a result, it seems likely that the only way that new non-custodial sentencing options will become available is if the provincial governments agree to pay for most of the costs associated with them. Given the current political climate in Canada, with the public simultaneously calling for deficit reduction, lower taxes, and increased government spending on health and education, the prospect of the provinces outlaying significant new funds for new non-custodial youth sentencing seems remote, especially in the absence of a pledge of fifty-fifty cost-sharing by the federal government.

There is little doubt that the YCJA provides much clearer legislative direction for judges on how to approach the youth sentencing enterprise than does the YOA. However, it is also readily apparent that if Ottawa truly wants to change the face of youth sentencing, it just do more than pass a statute.<sup>283</sup>

Governments need to take the long view, and appreciate the cost reductions over many years that implementing restorative, rehabilitative, and reintegrative options will

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<sup>282</sup> By serious, violent offences is meant: murder, manslaughter, and aggravated assault, or, in the alternative, two convictions for other serious, violent offences.

<sup>283</sup> (2003) 40 Alta. L. Rev. (No. 4) 943-963 at para. 47-48. (Sanjeev Anand)

achieve; government's perspective is, however, sometimes limited to the few years of a political mandate. Ultimately, when required treatment services are not forthcoming for either young persons or adults, legal ways of attempting to mandate community-based treatment orders (such as the order, which in *L.E.K.*, proved abortive) may be initiated, as will be discussed in Chapter Three.

In a constitutional challenge of the YCJA, *Reference Re Youth Criminal Justice Act*,<sup>284</sup>, released March 31, 2003, the Court of Appeal of Quebec held that sections 75 and 110(2) (b) of the YCJA were a violation of s. 7 of the *Charter of Rights and Freedoms* that could not be justified under s. 1. The impugned sections permit judicial discretion to operate in the matter of disclosure of names of offenders as young as 14 on the sole basis of their being eligible for, but not given, adult sentences. The Court of Appeal held that in no circumstances should the names of such young offenders be disclosed, until they were given actual adult sentences. In addition, sections dealing with so-called presumptive offences such as first and second degree murder, attempt to commit murder, manslaughter, aggravated sexual assaults, and certain other violent offences were declared a breach of s. 7 which could not be justified. By committing such offences, youth, even as young as 14, face the automatic presumption of being sentenced as an adult, and bear the reverse onus of refuting this presumption. Measures and procedures that lead to adult sentences, and, in addition, which elude youth publication bans, especially in the case of persons as young as 14, are contentious in Quebec. Objections arise because, rather than requiring the Crown to justify the need

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<sup>284</sup> [2003] J.Q. no. 2850 (Court of Appeal of Quebec).

for the imposition of an adult sentence or for the disclosure of the identity of minors, the impugned provisions place the burden upon the young offender of demonstrating why an adult sentence should not be imposed and why his or her identity should be protected.

## **2.5 The New Sentencing Regime, the YCJA, as Applied to Young Persons with FASDS**

The YCJA had as its purpose the reduction of incarceration for young offenders, who often had received longer carceral terms than adults, albeit mostly for system generated and property offences. The YCJA sought to emphasize more clearly and coherently sentencing principles of rehabilitation, restoration and reintegration, providing judges less leeway than did the *Criminal Code* to select punitive principles from which to sentence. Although reintegration, or supervision upon release, has been available to adults for some time, it had not been a requirement for youth upon release from custody prior to the coming into force of the YCJA. Extrajudicial measures in Part I of the YCJA require police to consider informal alternatives to the court process before laying charges. Such police-initiated extrajudicial measures include verbal warnings and cautions from police, informal diversion programs such as “family group conferencing”, referrals to community agencies, and formal programs requiring community service on



the part of the offender, or reparations, compensation and restitution to the victim or victims. Extrajudicial measures are promoted to keep youth out of the court system entirely, where possible. Restorative measures are promoted to keep youth out of custody when they do enter the court system. Fostering greater social justice by meeting the needs of young offenders, rather than punishing them and exacerbating their problems is the thrust. Ultimately, where custody cannot be avoided, rehabilitation should form an important component of the custodial portion of a sentence. As noted, intensive rehabilitative custody and supervision orders, although included in s. 42(2) (r) of the YCJA, are circumscribed in application by the provisions of s. 42(7), as are noncarceral rehabilitative measures in s. 42 (2)(l) and (m), by s. 42(3). The provincial director does have discretion whether or not to provide programs specifically designed for rehabilitation. When no funding for implementation is forthcoming from either provincial or federal coffers, avenues of mandating such programs become an issue.

Many of the concerns considered play out in *R. v. M. (B.)* [B.M.],<sup>285</sup> the first case heard under the YCJA concerning a young person with FASD. *B. M.* concerns a 16 year old Aboriginal young person with FASD (ARND) who committed gang-related robberies and an assault. A joint-submission by crown and defence counsel (with which judges do not interfere lightly) for a two year secure custody disposition, was held in abeyance by Judge Turpel-Lafond while a full review of the guiding principles of the YCJA was undertaken. She concluded this review by sentencing M.B. to 18 months probation

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<sup>285</sup> *Supra* note 3. [2003] S. J. No. 377 (Sask. Provincial Youth Court). (B.M.)

while residing with extended family, away from gang activity and substance abuse. B.M.'s unexpired time from a previous disposition for robbery was converted to probation on the same terms. In this groundbreaking application, Judge Turpel-Lafond attempted, under the aegis of the new *Act*, to design the type of restorative, rehabilitative, and reintegrative disposition that she was thwarted from creating several years earlier for the disabled youth in *L.E.K.*<sup>286</sup> Despite the presence of violent offences, robbery (including a prior offence of robbery), and an assault, and various aggravating factors such as gang involvement, obvious planning, and attempts at concealment through the wearing of masks, she nevertheless crafted a community-based disposition for B.M. On appeal, parity and proportionality concerns may give rise to a finding that the trial judge erred in principle, and that the sentence is demonstrably unfit,<sup>287</sup> notwithstanding that under the YCJA such principles are to be interpreted in a manner consistent with the greater dependency and reduced level of maturity of young persons.<sup>288</sup> Sections 38 and 39 of the YCJA puts forth the general rule that a court shall not impose a custody sentence, even if violence is present, unless the court has considered all of the alternatives to custody at the time of sentencing, and then only if the young person fails to comply with a previous sentence, or has a history of offences, or is an exceptional case where a non-custodial sentence would be inconsistent with the principles of the Act, which include *inter alia* parity and proportionality.

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<sup>286</sup> *Supra* note 279. (L.E.K.)

<sup>287</sup> *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; *R. v. S. (K.B.)*, [2001] 5 W.W.R. 259; and *R. v. (S.)M.*, (2003), 173 C.C.C. (3d) 526.

<sup>288</sup> S. 3(1)(b)(ii) and s. 38(2)(b) & (c) of the YCJA.

Judge Turpel-Lafond addresses these concerns in her analysis, considering five themes: the Aboriginal component; the consideration of special requirements of youth such as FASD, and specifically, ARND; the gang-related aspect of the offence; proper interpretation and application of the new YCJA, in the context of the youth crime situation in Saskatoon, Saskatchewan, and Canada; and limitations of infrastructure faced by the courts in attempting to implement fully the new *Act*.

The first theme is the Aboriginal component. Sections 3(c)(iv) and 38(2)(d) of the YCJA direct the Court to consider the needs of Aboriginal young persons, including the consideration, particularly for that group, of alternatives to custody, reasonable in the circumstances. These sections comprise an almost perfect conflation of the *Gladue* sentencing provision (s. 718.2(e) of the *Criminal Code*). Judge Turpel-Lafond pondered whether evidence of the background factors identified in *Gladue* will be required for each Aboriginal youth, or whether the overrepresentation of such youth in the criminal justice system will be sufficient to direct the Court to consider alternatives in each instance.<sup>289</sup> In B.M.'s case there was evidence of *Gladue*-type background factors: single-parenthood, maternal substance abuse (and the resultant FASD dimension) as well as B.M.'s own substance abuse, transience, and loss of culture and community. *Gladue* provided the following guidance to the Court with respect to systemic or background factors:

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<sup>289</sup> *Supra* note 258. *Gladue*, in the context of an adult criminal offence, held that judicial notice be taken of the history of colonization and repression faced by Aboriginal peoples.

How then is the consideration of s. 718.2(e) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfill their role and assist the sentencing judge in this way.

However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person.<sup>290</sup>

Although sentencing courts must take judicial notice of systemic and background factors facing Aboriginal offenders generally, they may also investigate where relevant specific background factors for a particular Aboriginal offender, with her consent.

Regarding the second theme, the FASD dimension, Judge Turpel-Lafond, pursuant to s. 34 of the YCJA, ordered a medical and psychological assessment, on reasonable grounds of belief that B.M. was suffering from a physical or mental illness or disorder, including a learning or mental disability. Consequently, two court-appointed experts, a pediatrician with experience in medical brain impairment screening, and a psychologist with a specialization in neuropsychology, diagnosed B.M. as suffering from ARND, a particular type of FASD. Hallmarks of this condition include: attentional and memory deficits, impulsivity, inability to appreciate consequences of actions, and lack of

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<sup>290</sup> *Ibid.* at para. 83-84. (Gladue)

executive functioning. Executive functioning includes the capacity to think in a flexible way, to use feedback to modify behavior, and to use higher level conceptual thinking. FASDs who lack executive functioning commonly persist with an unsuccessful strategy over a considerable period of time, even when facing frustration.

The Court viewed the gang-related aspect, the third theme of the case, not as a conventional aggravating factor, but as symptomatic of a vulnerable, disadvantaged, disabled youth seeking a sense of affiliation and achievement. B.M.'s capacity for critical thinking, empathy, and full accountability to victims might be diminished, and his susceptibility to peer influences increased, because of his disability. Consequently, B.M.'s participation in gang-related activities should be viewed in light of these factors, rather than in terms of justifying the fashioning of a more severe sentence which would expose him to further antisocial influences.<sup>291</sup> However, there was a recognition by all concerned that continued gang activity (from which it is almost impossible to extricate oneself) and involvement with anti-social peers would eventually result in B.M. serving penitentiary time.<sup>292</sup>

The guiding principles of the YCJA, set out in s. 3(1) of the *Act*, was the fourth theme analyzed by Judge Turpel-Lafond. These principles include *inter alia*: understanding

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<sup>291</sup> Two other cases under the YCJA have considered gang-related behavior: *R. v. S (B.R.)*, [2003] SKPC 84, and *R. v. G.(H.W.)*, [2003] SKPC 122. The latter case cites the Federation of Saskatchewan Indian Nations' study of youth gangs entitled, *Alter-Natives to Non-Violence Report, Aboriginal Youth Gangs Exploration: a community development process*. In neither of the cases were young persons with FASDs involved, so the need to respond to the special requirements of young persons in s. 3(1)(c)(iv) was not as fully engaged as in *B.M.*

<sup>292</sup> *Supra* note 3 at para. 60. (B.M.)

the circumstances or root causes of the offending behavior; rehabilitation and reintegration of the young person; ensuring meaningful consequences to the young person for the offence to promote long-term protection of the public; timely intervention that reinforces for the young person the link between the offending behavior and its consequence; fair and proportionate accountability consistent with the greater dependency and reduced level of maturity of young persons; reparation for harm done to victims; involvement of parents, family, community, and social agencies; and consideration of the needs and level of development of young persons, including in particular, response to the needs of Aboriginal young persons and of young persons with special requirements. In s. 39 there are restrictions on the use of custody, and an emphasis on consideration of alternatives. However, pursuant to s. 38 and 39, violence and aggravating circumstances can render a non-custodial sentence inconsistent with the purpose and principles of sentencing.<sup>293</sup>

To address these principles, two conferences were convened by the Court pursuant to s. 19 and 41 of the YCJA. The conferences were held in circle format, according to Aboriginal cultural tradition, and the young person, his family, community members, youth worker, police, and victims were invited. Although the victims did not attend, one victim had expressed the desire to do so, and a sincere attempt was made to accommodate that victim. The conferences attempted to delve into the root cause of the offending, and to design the best measure to reduce the offending behavior and to rehabilitate and reintegrate the young person, in order to promote long term protection

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<sup>293</sup> S. 39(1)(a) and (d) of the YCJA.

of the public. In the circle, B.M. addressed the causes of his behavior, as well as expressing a desire to change. An aunt and uncle in LaRonge, with whom he had lived for a brief period, were identified as pro-social resources. B.M. was able to re-establish contact with them; subsequently, they attended the circle and offered to have B.M. come to live with them, in order to remove him from antisocial influences in his current neighbourhood or in youth facilities, and to provide him supportive home and community resources.

The culminating theme of Judge Turpel-Lafond's sentencing analysis dealt with infrastructure and resources with which to implement the YCJA. Without the willingness of the aunt and uncle to have B.M. reside with them in La Ronge, the Court would have been without resources with which to fashion a community-based sentence. No option would have remained but a custodial sentence, as proposed in the joint submission. In addition to presiding over B.M.'s six court appearances, the Judge devoted much of her Chamber time to schedule and hold the series of conferences. Clearly, such arrangements may not be always available, and without sufficient community and institutional resources, courts will be circumscribed in the extent to which they can implement the new legislation. Their ability to address effectively root causes of offending, or to fashion rehabilitative dispositions likely to enhance community safety through provision of appropriate supports, as Judge Turpel-Lafond attempted in the unusual situation of *B.M.*, would be jeopardized. The immensity of the problem is illustrated by Saskatchewan court statistics, revealing there were over 100,000 appearances of young people in youth courts in 2002, with over 35,000 in

Saskatoon alone.<sup>294</sup> Without sufficient resources in place, an assembly-line process leading to revolving door custodies will be the likely outcome for youth, no matter what progressive legislation is enacted.<sup>295</sup>

## 2.6 Conditional Sentences

A relatively recent vehicle to provide holistic, community-based sentences for adult offenders is s. 742.1 of the *Criminal Code*, conditional sentences, and related case law interpreting its implementation. Section 742.1 of the *Criminal Code* provides:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court  
(a) imposes a sentence of imprisonment of less than two years,  
(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.  
the court may, for the purpose of supervising the offender's behavior in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

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<sup>294</sup> *Supra* note 3 at para. 27. (B.M.)

<sup>295</sup> *R. v. M.(B.)#2*, [2003] SKPC 133, was released shortly before the printing of this thesis. Because of lack of resources and illness in the extended family, B.M.'s placement with his aunt and uncle broke down. B.M., facing new charges, appeared before the Court in LaRonge, which deferred review of his probation order until he could appear before Judge Turpel-Lafond in Saskatoon. As there were no placements available of the kind recommended for B.M., he was left to serve out his order with his Mother, who still suffered from addictions and other problems, and still resided in Saskatoon near the gang influences. Without the special care and treatment B.M. requires due to his organic brain impairments, his future appears bleak. Judge Turpel-Lafond pursued every alternative with B.M.'s case worker, but no rehabilitative measures were available. The Judge concluded that it was very difficult to implement the YCJA without sufficient services available for disabled youth. Without sufficient support services and accommodation, such youth may be deemed as a safety risk in the community, and incarcerated by default, a practice which perhaps itself contributes to future safety risks.



Similarly, in the YCJA recently proclaimed, s. 42(5) provides for a similar disposition (except that it expressly precludes serious, violent offences) termed a Deferred Custody and Supervision order:

- 42(5) The court may make a deferred custody and supervision order under paragraph (2)(p) if
- (a) the young person is found guilty of an offence that is not a serious violent offence; and
  - (b) it is consistent with the purpose and principles set out in section 38 and the restrictions on custody set out in section 39.

No offences, including violent offences, are automatically precluded by s.742.1 of the *Criminal Code* as long as they are subject to a sentence of less than two years, and serving such sentence in the community would neither endanger the safety of the public, nor be inconsistent with the principles of sentencing found in the *Code*.

Community-based sentences, such as probation and conditional sentences, and now deferred custody and supervision orders for youth, are major vehicles used to provide the venue and treatment required for convicted offenders with mental disorders such as FASDs. Conditional sentences or community-based sentences are critical for offenders with FASDs for the following reasons:

- in closed custody situations the offenders with FASDs are unusually susceptible to the influence of negative peers;<sup>296</sup>
- they are often subject to victimization in institutional settings;<sup>297</sup>
- they lack the abstract thinking skills required to be able to transfer coping skills learned in carceral situations to community situations;<sup>298</sup>

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<sup>296</sup> *Supra* note 1 a para. 15. (Steeves)

<sup>297</sup> *Supra* note 4. (Conry & Fast)

- the deterrence principle does not function well because in many cases they do not appreciate consequences (inability to grasp cause-effect relationships), and because frequently they are impulsive which leads to their repeating acts without thinking beforehand; and<sup>299</sup>
- carceral options are culturally inappropriate for Aboriginal offenders, who comprise the majority of offenders with FASDs.<sup>300</sup>

At the end of the day, however, conditional sentences may be subject to the same limitation of services encountered by Judge Turpel-Lafond with regard to terms in probation orders. This possibility makes paramount the pursuit of alternate legal strategies to mandate treatment, the topic of Chapter Three.

Since the inception in 1996 of conditional sentences in Section 742.1 of the *Criminal Code*, and, in particular, since the landmark case, *R. v. Proulx*,<sup>301</sup> interpreting the application of 742.1, the use of conditional sentences, in a manner cognizant of the problems of FASD offenders has, in some respects, been curtailed. To increase the use of conditional sentences, the Supreme Court in *Proulx* incorporated various punitive upgrades to counter criticisms that conditional sentences as legislated were too lenient. These punitive upgrades include:

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<sup>298</sup> *Supra* note 3. (M.(B) citing Streissguth)

<sup>299</sup> *Supra* note 4 and 5. (Conry & Fast, and M.L.)

<sup>300</sup> *Supra* note 258 at para. 62. (Gladue)

<sup>301</sup> *Supra* note 272. (Proulx).

- making a conditional sentence longer than a corresponding carceral sentence for the same offence;<sup>302</sup>
- attaching more punitive terms to the conditional sentence;<sup>303</sup> and
- the presumption that breach of a term of a conditional sentence would result in serving the remainder of the sentence in jail.<sup>304</sup>

The negative effect of these punitive upgrades on offenders with FASDs is considered in *R. v. Elias*.<sup>305</sup> In *Gladue*,<sup>306</sup> *Proulx*,<sup>307</sup> and *R. v. Wells*,<sup>308</sup> the Supreme Court emphasizes two principal objectives for conditional sentences: to reduce the use of prison, and to expand the use of restorative justice. Unlike probation, conditional sentences have a punitive, as well as a rehabilitative component, rendering them hybrid in nature. Notwithstanding the punitive aspect, a breach of a term in a conditional sentence is not necessarily a criminal offence. Those who breach conditions bear the onus of establishing in court a reasonable excuse for their breach on a balance of probabilities. Failing this, options available in the legislation include:

- S. 742.6(9)** Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may
- take no action;
  - change the optional conditions;
  - suspend the conditional sentence order and direct
    - that the offender serve in custody a portion of the unexpired sentence, and
    - that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or

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<sup>302</sup> *Ibid.* at para. 102.

<sup>303</sup> *Ibid.* at para. 30.

<sup>304</sup> *Ibid.* at para. 39.

<sup>305</sup> *Supra* note 278. (*Elias*)

<sup>306</sup> *Supra* note 258. (*Gladue*)

<sup>307</sup> *Supra* note 272. (*Proulx*)

<sup>308</sup> [1998] 2 S.C.R. 517. (*Wells*)

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

The options in the legislation are flexible, ranging from doing nothing, to changing the optional conditions, to serving a portion of the unexpired sentence in custody, to serving all of the unexpired sentence in custody. If the presumption of jail is to govern, however, as *Proulx* prescribes, the offender, who cannot provide a reasonable excuse to the Court for a breach will serve the unexpired portion of her sentence in custody. This judicially created, automatically incurred consequence of a breach will result in offenders, originally sentenced to conditional sentences, serving longer carceral sentences than had they been sentenced initially to jail. This is so because of the holding in *Proulx*, that to make the sentences equally punitive, a conditional sentence for an offence should be longer than a carceral sentence for that same offence.

In *Elias*,<sup>309</sup> the adult offender breached a no contact term in her conditional sentence. Defence counsel requested that, contrary to *Proulx*, the offender be able to serve custodially a reduced portion of her unexpired term, as the full unexpired term would impose an unduly harsh sanction given the initial offence.<sup>310</sup> Because of the ruling in *Proulx*, Territorial Court Judge Stuart was not able to accede to defence counsel's request.<sup>311</sup> Nonetheless, he did dwell on significant problems punitive upgrades were causing. Elias has FAS/E, as do an estimated half of offenders in Yukon courts.<sup>312</sup> Because of disabilities, such offenders often experience difficulty complying

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<sup>309</sup> *Supra* note 278. (Elias)

<sup>310</sup> *Ibid.* at para. 1. (Elias)

<sup>311</sup> *Ibid.* at para. 2 and 10

<sup>312</sup> *Ibid.* at para. 39.

consistently with conditions. When they fail, they require, in general, that conditions be fine-tuned to meet their needs, rather than receiving a lengthy jail term to serve. “A breach may be a simple misstep along a demanding path that calls upon offenders to change their friends, habits, and lifestyles, and to work through the demands of treatment.”<sup>313</sup> An alcoholic, for instance, sober for many weeks, may fall off the wagon. This reveals a need to persevere in efforts at rehabilitation, not a reason to be incarcerated.

Another watershed case, *R. v. Knoblauch*,<sup>314</sup> following on the heels of *Proulx*,<sup>315</sup> tempered, in some respects and for some situations, the implications of *Proulx* for mentally disabled offenders. *Knoblauch* does not impact on the punitive upgrades in *Proulx* analyzed in *Elias*, including their negative impact on mentally disordered offenders. However, extrapolating from *Proulx*, *Knoblauch* has implications for hospital dispositions via probation orders and conditional sentence orders for offenders, who, while mentally ill, like individuals with FASDs, are neither UST nor NCR. Arbour J., writing for the majority of the Supreme Court, situates *Knoblauch* “at the often ambiguous crossroads between the criminal justice and the mental health care systems.”<sup>316</sup> *Knoblauch*, who had a long history of mental illness and of dangerous handling of explosives, pleaded guilty to unlawful possession of explosive substances and to possession of a weapon for a purpose dangerous to the public peace.

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<sup>313</sup> *Ibid.* at para. 58. (Elias)

<sup>314</sup> *Supra* note 193. (Knoblauch)

<sup>315</sup> *Supra* note 272. (Proulx)

<sup>316</sup> *Ibid.* at para. 1. (Knoblauch)

Knoblauch's mental illness involved long term obsessive compulsive personality difficulties and depression, fantasies about violence, preoccupation with weapons and explosives, and included attempts to actualize these fantasies, all rendering him potentially dangerous.<sup>317</sup> However, to this point he had caused minor injury only to himself. He had a history of treatment as an out-patient, as well as of civil committal<sup>318</sup> in the Alberta Hospital Edmonton. The trial judge, Alta. Prov. Ct. J. Chrumka, imposed a conditional sentence of two years less a day, followed by three years probation, including a novel condition under the aegis of s. 742.3, a section of the *Code* which deals with compulsory and optional conditions of conditional sentence orders. Pertinent sections of the *Code* include:

742.3(1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:

- (a) keep the peace and be of good behavior;
- (b) appear before the court when required to do so by the court;
- (c) report to a supervisor
  - (i) within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and
  - (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;
- (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- (e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

(2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:

- (a) abstain from
  - (i) the consumption of alcohol or other intoxicating substances, or
  - (ii) the consumption of drugs except in accordance with a medical prescription;

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<sup>317</sup> *Ibid.* at para. 6. (Knoblauch)

<sup>318</sup> *Mental Health Act*, S.A. 1988, c. M-13.1.

- (b) abstain from owning, possessing or carrying a weapon;
- (c) provide for the support or care of dependents;
- (d) perform up to 240 hours of community service over a period not exceeding eighteen months;
- (e) attend a treatment program approved by the province; and
- (f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

(3) A court that makes an order under this section shall

(a) cause to be given to the offender

(i) a copy of the order,

(ii) an explanation of the substance of sections 742.4 and 742.6, and

(iii) an explanation of the procedure for applying under section 742.4 for a change to the optional conditions; and

(b) take reasonable measures to ensure that the offender understands the order and the explanations given to the offender under paragraph (a).

The novel, salient condition imposed, in consultation with forensic psychiatrists who qualified as expert witnesses, and with the consent of the accused, was a secure hospital disposition at the psychiatric treatment unit at Alberta Hospital Edmonton, under s. 742.3(2)(f) of the *Code*. A term of his three year probation order required that Knoblauch continue to reside at that facility and to follow any treatment prescribed by his forensic psychiatrist.<sup>319</sup>

The Court of Appeal of Alberta reversed the trial judge's conditional sentence and ordered that Knoblauch be incarcerated in a correctional institution for two years less a day. Seven months after commencing the carceral sentence, Knoblauch was granted full parole and moved to the Alberta Hospital Edmonton as a condition of his parole. He was eligible for leave with permission from the psychiatrist on duty, or his delegate, and in consultation with his parole officer.<sup>320</sup> As Arbour J. notes, the carceral

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<sup>319</sup> *Ibid.* at para. 2, and 9-12. (Knoblauch)

<sup>320</sup> *Ibid.* at para. 12. (Knoblauch)

disposition substituted by the Court of Appeal necessitated Knoblauch's earlier release, with fewer safeguards, and less therapeutic preparation, than did the trial judge's non-carceral hospital disposition under s. 742.3(2)(g).<sup>321</sup> At the Supreme Court appeal of this reversal of the conditional sentence order, the Crown argued that the conditional sentence imposed by the trial judge was contrary to the statutory regime in s. 742.1 of the *Code*. The sentence was contrary to this regime, according to the Crown because of the danger Knoblauch presented, and because the sentence required that he be kept in custody in an institution, rather than in the community.<sup>322</sup>

Section 742.1 of the *Code* is a core provision in terms of the sentencing reforms of 1996, the two principal objectives of which were to reduce the use of imprisonment and to increase recourse to restorative justice principles. It is linked to other provisions of the *Code*: to restraint in s. 718.2(d) and (e), to the fundamental purpose of sentencing in s. 718, that is respect for the law and the maintenance of a just, peaceful and safe society, and to principles in s. 718(d), (e) and (f) respectively of rehabilitation of the offender, reparations to the victim, and promotion of a sense of responsibility in the offender.

Knoblauch met statutory conditions precedent for the imposition of a conditional sentence under s. 742.1. There was no minimum term of imprisonment for the offences charged, and no dispute that two years less a day was a fit and appropriate term for the

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<sup>321</sup> *Ibid.* at para. 29-31. (Knoblauch)

<sup>322</sup> *Ibid.* at para. 13 and 33. (Knoblauch)



offence. The more contentious issue of dangerousness was resolved by the majority of the Supreme Court through reference to *Proulx*. Lamer C.J. in *Proulx*, for the majority, held that s. 742.1 does not exclude any class of offenders, including dangerous offenders. Rather, dangerousness is to be assessed in reference to the risk of re-offence and the gravity of damage that could thus ensue. In Knoblauch's case the gravity of damage that could ensue was extreme. However, Lamer C.J. held that the risk of re-offence should be assessed in light of the conditions tailored for the sentence.<sup>323</sup> Arbour J., accordingly, in *Knoblauch*, for the majority, held at the crux of the case, that, considering the conditions tailored by the trial judge, the risk of Knoblauch re-offending in a secure, psychiatric hospital was no greater than his risk of re-offending while incarcerated:

In my view, if the conditions contemplated by the trial judge are taken into account in evaluating the risk that the appellant would re-offend while serving his conditional sentence, that risk is reduced to a point that is no greater than the risk that the appellant would re-offend while incarcerated in a penal institution. The sentence fashioned by the trial judge provided that the appellant would be in a locked, secure psychiatric facility, in the care and custody of forensic psychiatrists who were well aware of his history, and who by no means minimized his dangerousness. They would have been vested with the authority to determine the pace and method of his gradual release and reintegration [page 800] into society, ultimately through the probation order.

In contrast, his incarceration in a penal institution, subject as it is to the provisions of the Corrections and Conditional Release Act, S.C., 1992, c.20, could require his earlier release, or, in any event, would most likely leave him considerably less well prepared for facing his renewed liberty. Therefore, it seems to me that whether the appellant is incarcerated in a penal institution, subject to the release power of the Parole Board, or whether he is made to reside in a locked secure psychiatric facility, subject to the supervisory authority of a consensus of psychiatrists, it cannot be said that he would be a greater danger to the community during that time under one regime rather than the other.

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<sup>323</sup> *Supra* note 272 at para. 69-72. (*Proulx*)

The dangerousness of the appellant is a product of the combined effect of his mental illness and his ability to acquire and make use of explosive materials and devices. Incarceration precludes the latter, but does little to address his mental illness.<sup>324</sup>

The sentence imposed by the trial judge was perceived as fostering potential for long term therapeutic benefits, addressing the underlying cause of Knoblauch's dangerousness, his mental illness. On the other hand, incarceration would likely aggravate his mental condition, according to the testimony of Knoblauch's psychiatrist. He described the macho, abusive, hostile and competitive culture of penitentiary inmates, as well as the authoritative institutional atmosphere. Both, the psychiatrist concluded, would trigger destructive feelings of revenge in Knoblauch, rendering him more dangerous.<sup>325</sup>

As for the community aspect of the disposition, Arbour J., for the Court, commented that the issue had not been squarely raised in the fact situation of *Proulx*, as it had in *Knoblauch*. Arbour J. determined that s. 742.1, as an alternative to incarceration, is essentially an alternative to the regime of the *Corrections and Conditional Release Act* (CCRA),<sup>326</sup> and not merely an alternative to a particular place or building, whether secure or not.<sup>327</sup> In Knoblauch's case, there was no involuntary element in his confinement as there is in confinement under the *CCRA*, although the requirement for

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<sup>324</sup> *Supra* note 193 at para. 28-30. (Knoblauch)

<sup>325</sup> *Ibid.* at para. 31. (Knoblauch)

<sup>326</sup> *Supra* note 187. (CCRA)

<sup>327</sup> *Supra* note 193 at para. 37. (Knoblauch)

consensus under ss.742.3 (2) (f) or (g) has not as yet been adjudicated.<sup>328</sup> One can speculate that non-voluntary confinements would be unlikely to facilitate the healing process.

Although not referenced by the Supreme Court in *Knoblauch, Proulx's* holding that deference be shown to trial judges may have influenced the Court's affirmation of the sentence imposed by the trial judge. Deference is perceived as due the trial judge as he views offender, witnesses, and evidence first hand, and is in a position to have immediate knowledge of the community, the context of the offence, as well as the impact on any victim. Such deference gives empathetic trial judges a window of opportunity to fashion therapeutic dispositions in the community. Such dispositions have the benefit of lowering the risk of dangerousness for the offenders, as the risk of re-offence is to be assessed in light of therapeutic conditions tailored for the offender in his sentence order. Carefully crafted therapeutic conditions have the potential of preserving, even enhancing, the initial mitigating effect of mental disorders in sentencing considerations, preventing their conversion to aggravating factors where risk of re-offence is not addressed.

A landmark decision, *Knoblauch* addresses serendipitously, rather than by obvious legislative fiat, the dearth of hospital or other treatment dispositions for those mentally ill offenders neither UST nor NCR. A specific "Hospital Order" provision, s. 747 of the

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<sup>328</sup> *Ibid.* at para. 36 and 40-43. (Knoblauch)

*Criminal Code*, drafted for the 1996 revisions,<sup>329</sup> but not yet declared in force, provides for consensual detention<sup>330</sup> in a treatment facility for offenders suffering from mental disorders. One may speculate that insufficient infrastructure may have been the reason for indefinite deferral of the proclamation of this provision. Hospital orders proposed under s. 747.5 would be made only at the time of sentencing and only for a period not exceeding 60 days, after which the accused would be sent to prison to serve the unexpired term of the sentence.

In contrast to this proposed “Hospital Order” under s. 747, the *Knoblauch* innovation was implemented through the conditional sentence regime, from the perspective of an unusual fact situation, absent the restrictions of s. 747.5. Consonant with *Gladue*<sup>331</sup> and restorative justice emphases, healing and treatment, including hospital treatment in some cases, are essential for the ultimate goal of restoration and reintegration. Prison is a setting not conducive to the process of healing.<sup>332</sup> In the wake of *Knoblauch*, there is potential for the number of mentally disordered prisoners serving sentences in correctional facilities to be reduced.<sup>333</sup> Other creative treatment dispositions may

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<sup>329</sup> For ease of reference, refer to the proposed provisions, provisions not yet declared in force, in Appendix 2.

<sup>330</sup> Section 747.3 of the proposed “Hospital Order” requires the consent to the order of both the offender and the person in charge of the treatment facility where the offender is to be detained. *Criminal Code*, S.C., 1995, c. 22, s. 6 (unproclaimed).

<sup>331</sup> *Supra* note 258. (Gladue)

<sup>332</sup> Drugs, gangs and a violent culture prevail: March 2, 2003 Inquest of Sonja Keepness who died of an overdose of contraband methadone sold to her by fellow inmates the day before her death in the Pinegrove facility, at the Prince Albert Penitentiary; and the Second Interim Report of the Commission on First Nations and Metis Peoples and Justice Reform, “Gangs and the Saskatchewan Experience,” vol. 7 No. 4 (Winter 2002), *Justice as Healing*, p. 8.

<sup>333</sup> Julian V. Roberts and Simon Verdun-Jones, “Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*,” (2000) 39 *Alta. L. Rev.* (No. 4), 788-809 at para. 61 and 66.

evolve in response to the *Knoblauch* model, including declaring in force a less restrictive modification of the s. 747 “Hospital Orders” provision. The s. 747 hospital disposition, consensual as it is, need not be restricted to 60 days, nor be limited in availability to the time of sentencing. Were these changes effected, hospital dispositions under s. 747 would become available to a broader range of convicted, mentally disordered offenders, not merely those who meet the conditions precedent for conditional sentences or probation. In addition, such hospital dispositions could serve as an alternative to prison in the event of a breach of a conditional sentence, pursuant to *Proulx*<sup>334</sup> and *Elias*.<sup>335</sup> However, hospital dispositions may not be applicable to all mentally disordered offenders and will be feasible only where and when there are suitable facilities available, which raises again the spectre of mandating access to treatment. Notwithstanding the hospital disposition, however, the complete gamut of community-based dispositions is the essence of restorative justice initiatives:

There has to be more than lip service recognition that the solutions for the great majority of mentally disordered offenders do not lie in psychiatric wards and special hospitals, but in local support of a low-key nature provided by a combination of health, housing and social services at the ground level. Establishing structures which are properly resourced in terms of both personnel and material benefits is what will prevent more mentally disturbed people from acquiring the role and status of “disordered offender”. Ironically, as things stand at present, for many a court appearance may be the only way that their needs will become apparent.<sup>336</sup>

Increased home care recommendations and funding included in and resulting from the Royal Commission on Health Care (2002)<sup>337</sup> may assist in providing properly resourced

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<sup>334</sup> *Supra* note 272. (Proulx)

<sup>335</sup> *Supra* note 278. (Elias)

<sup>336</sup> Burney, E. and Pearson, G., “Mentally Disordered Offenders: Finding a Focus for Diversion,” 291-249 at 245, in Peay, Jill, (Ed.), *Criminal Justice and the Mentally Disordered*, (Dartmouth: Ashgate, 1998).

<sup>337</sup> Romanow, R. Commissioner, Royal Commission on Health Care, *Building on Values: The Future of Health Care in Canada*. (Ottawa: Privy Council of Canada, 2002).

“health, housing and social services at the ground level” through primary care agencies and early intervention, precluding the reliance on the justice system solely to meet the unaddressed needs of the mentally disordered. In this context, Health Canada’s *Best Practices: Fetal Alcohol Syndrome/Fetal Alcohol Effects and the Effects of Other Substance use During Pregnancy* recommends, on the basis of consensus among experts, specialized lifespan supports in many areas of daily living, including, *inter alia*, education, employment, residential, money-management, substance abuse treatment, mental health therapy, dealing with the justice system, and basic living skills.<sup>338</sup>

Some jurisdictions have resorted to or are contemplating the implementation of specialized, therapeutically oriented mental health courts that would possess the expertise in mental health law issues to address the needs of mentally disordered and disabled offenders. In sparsely populated areas, the cost of maintaining a parallel court system may prove prohibitive. A suggested compromise is the provision of mental health counselors to assist judges in youth and criminal courts screen offenders that have mental disorders such as FASDs and develop coordinated treatment plans for them. Such initiatives are to be applauded, but they are dependent for their success on the availability of treatment resources and facilities.<sup>339</sup>

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<sup>338</sup> *Supra* note 134 at p. 89-91. (Health Canada’s Best Practices)

<sup>339</sup> Chartrand, L. and Forbes-Chilibeck, E., “The Sentencing Of Offenders with Fetal Alcohol Syndrome,” 2003 Health Law Journal, publication pending.

### 3. MANDATING TREATMENT

#### 3.1 Hurdle of Positive State Obligation

The problem in mandating and thereby accessing community-based treatment for FASDs, is, as in *L.E.K.*,<sup>340</sup> one of overcoming the hurdles of judicial legitimacy and institutional competence in order to impose an obligation on the state to fund and provide treatment. Courts traditionally have avoided trenching on the legislative and executive policy roles of allocating scarce, budgetary resources among publicly-funded programs. A curial policy-operational dichotomy precedent plays a role in this deference. The decision whether to fund or not to fund community-based treatment programs is, then, more likely than not, to be construed by the courts as a policy decision, and a proper exercise of executive discretion, as long as that decision is undertaken by the government in good faith and is not patently unreasonable.<sup>341</sup>

As well, there is the conundrum of the constitutional federal-provincial division of powers with which to contend. For instance, the federal government introduces community-based sentences under its powers over the criminal law conferred by s. 91

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<sup>340</sup> *Supra* note 279. (*L.E.K.*)

<sup>341</sup> *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, Cory J.; *Anns v. Merton London Borough Council*, [1978] A.C. 728 Lord Wilberforce; and *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, Wilson J, as cited in C. Jones “Fixing to Sue: Is there a Legal Duty to Establish Safe Injection Facilities in British Columbia?” (2002) 35 U.B.C.L. Rev. 393-454.

of the *Constitutional Act*, 1867, but s. 92 of the same *Act*, institutes a provincial responsibility to implement such sentences.<sup>342</sup> Community-based provisions tend to fall through such jurisdictional cracks.

As in *L.E.K.*,<sup>343</sup> concerns of judicial legitimacy and institutional competence may militate against courts requiring governments to provide benefits.<sup>344</sup> Alternatively, *Charter* and other Constitutional rights might, in some cases, trump structural factors and disentangle Gordian Knots in the division of powers and judicial competence. As an example, enforcement of *Charter* rights overcame these concerns in *Eldridge v. British Columbia (Attorney General)*,<sup>345</sup> and *Mahe v. Alberta*,<sup>346</sup> with respect to accommodating the deaf and to implementing second language rights pursuant to s. 15 and 16 of the *Charter*, respectively.<sup>347</sup> The courts compelled the appropriate branch of government under the division of powers to fund the relevant services. As Cory J. noted in *Vriend v. Alberta*,<sup>348</sup>

The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny.

To illustrate, the ratio decidendi in *Okimow v. R.*,<sup>349</sup> that s. 7 and 15 of the *Charter* cannot be used to defeat executive action (in particular, decisions regarding accessibility

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<sup>342</sup> S. 91(27) and s. 92(14) & (15), *Constitution Act, 1867*, (U.K.), 30 & 31, Vict., c.3..

<sup>343</sup> *Supra* note 279. (L.E.K.)

<sup>344</sup> Macklem, P. "Aboriginal Rights and State Obligations," (1997) 36 *Alta. L. Rev.* (No. 1) 97, at 14 and 18 (QL).

<sup>345</sup> [1997] 3 S.C.R. 624. (Eldridge)

<sup>346</sup> *Supra* note 104. ([1990] 1 S.C.R. 342. (Mahe)

<sup>347</sup> Notwithstanding that the wording in s. 16 of the *Charter* is significantly stronger than in s. 15.

<sup>348</sup> *Vriend v. Alberta* [1998] 1 S.C.R. 493, para. 54.

<sup>349</sup> [2000] S.J. No. 449. (Okimow)



to alternative measures programs), under the principle of *stare decisis* was conclusively settled otherwise in *Operation Dismantle Inc. v. Canada*.<sup>350</sup> *Operation Dismantle* held that executive decisions are reviewable by the courts under s. 32(1)(a) of the *Charter*, and that the executive branch of the government bears a general duty to act in accordance with the dictates of the *Charter*. However, the facts alleged in *Operation Dismantle* did not constitute a violation of s. 7 of the *Charter*. More specifically, the cabinet decision to allow the United States to test cruise missiles in Canada did not constitute a s. 7 violation as the applicants did not establish a causal link between the tests and the risk of nuclear war. Conversely, the facts of *Okimow* do constitute a violation of s. 15 rights, albeit a violation that may have been justifiable under s. 1. Nevertheless, the blanket holding in *Okimow* that the *Charter* cannot be used to defeat executive action is in error.

Iacobucci J., in *M. v. H.*,<sup>351</sup> emphasized the circumscribed aspect of judicial deference to the legislature, affirming *Vriend*. He noted that the introduction of the *Charter* redefined our system of government in such manner as to create a “dialogue of mutual respect between the courts and legislatures.”<sup>352</sup> The courts do defer to legislative policy choices when convinced that the legislature is in the best position to make these choices, (such as the difficult policy judgments regarding claims of competing groups not involving a *Charter* aspect, or in the evaluation of complex and conflicting social science research) although such deference will not immunize completely certain

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<sup>350</sup> [1985] 1 S.C.R. 441 at paras. 28 and 50. (*Operation Dismantle*)

<sup>351</sup> [1999] 2 S.C.R. 3. (M.H.)

<sup>352</sup> *Supra* note 348 at para. 134 (*Vriend*), as cited in *Ibid.* at para. 78 (M.H.).

decisions from *Charter* scrutiny. Under s. 1 of the *Charter*, the burden of proof rests on the legislature to justify the infringement or denial of a right; the legislature must then provide the court with evidence and arguments to support its claim of justification of policy choices, confirming that there were reasonable in the circumstances. Courts must exercise caution in not overstepping the bounds of institutional competence in reviewing such choices. However, the question of deference must be resolved by considering the nature of each particular claim and the relevant evidence. Deference is not a threshold s. 1 decision to be dispensed with at the outset of the analysis. An examination of context must be undertaken to determine whether or not deference is appropriate.<sup>353</sup>

More recently in *Gosselin v. Quebec (Attorney General)*,<sup>354</sup> McLachlin, C.J., writing for the majority, did not preclude that, in an appropriate fact situation (which *Gosselin* was not) s. 7 of the *Charter* could be used to obligate governments to provide the basic necessities of life to people who could not provide these for themselves, and that this right should develop incrementally:

It does not follow, however, that courts are precluded from entertaining a claim such as the present one [s.7]. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation - questions of how much the state should spend, and in what manner - this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. As indicated above, this case raises altogether a different question: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concern, this is a question about what kinds of claims individuals can assert against the state. The role of courts as interpreters of the Charter and

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<sup>353</sup> *Supra* note 351 at para. 78-80. (M.H.)

<sup>354</sup> [2002] S.C.J. No. 85. (Gosselin)

guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a Charter right exists - in this case, to a level of welfare sufficient to meet one's basic needs - without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.<sup>355</sup>

Such a tentative, but seminal holding required first that the Court interpret s. 7, the right to life, liberty, and security of the person, to extend beyond the realm of the administration of justice into other realms, in particular, the realm of the administration of welfare benefits, construed in the lexicon of substantive equality as equitable resource distribution.<sup>356</sup> Further to this, *Gosselin* does not preclude a positive state obligation arising in a suitable fact situation that involves state inaction which infringes s. 7. Through not precluding such obligation, *Gosselin* affirms the potential for the existence of positive rights under s. 7 of the *Charter* and the concomitant state obligation to uphold them, even if incrementally:

This concludes my interpretive analysis of s. 7. In my view, the results are unequivocal: every suitable approach to Charter interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension. (para. 357)

By not precluding s. 7 rights, *Gosselin* opens slightly the Pandora's Box of economic rights (a component of the rights to life, liberty and security), first affirmed in the *Canadian Bill of Rights*.<sup>357</sup> However, in view of the Court's 5:4 decision against

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<sup>355</sup> *Ibid.* at para. 332. (*Gosselin*)

<sup>356</sup> Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 *Queen's L. J.*, 299-318 at para. 8.

<sup>357</sup> *Canadian Bill of Rights*, R.S.C. 1985, App. III.

including a positive obligation under s. 7 rights in the context of the facts of the case, the opening is slight indeed.

Madam Justice Saunders discusses a similar Pandora's Box in *Auton v. B.C.*, in the context of mandating treatment for autistic children. She comments that the courts have not yet addressed the possibility of a positive state obligation to fund treatment for a gravely disabled child, in the context of a universal health program. Justification for not funding such treatment may be more difficult:

Nor do I consider that a decision in favour of the petitioners will open Pandora's Box. While there has been debate as to whether the *Charter*, in application, can impose a positive duty to ameliorate pre-existing and non-state caused conditions of disadvantage, for example *Ferrell v. Ontario (Attorney General)* (1998) 42 O.R. (3d) 97 (C.A.) and *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 (C.A.), the discussion has not addressed a failure to provide treatment to a child, in the context of a universal program, to ameliorate a gravely debilitating affliction. In this circumstance, it is appropriate for the Court to look both to the past and to the present for assistance in determining whether the underinclusiveness of the Province's health care scheme, creating a gap for treatment of children with autism or ASD, is reasonable and justified in a free and democratic society.<sup>358</sup>

More common has been the court's enforcement of negative rights, that is, of striking down discriminatory laws, for instance, laws that prohibit the use of an official language. Mandating accommodation of disabilities or access to instruction in an official language is a positive state obligation. However, such action may be viewed by the courts as encroachment on executive powers. Accordingly, the legislative decision or executive action under review will not be overturned lightly; rather, the Crown will attempt to justify its actions through a Section 1 *Charter* justification. Nor will

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<sup>358</sup> *Supra* note 106 at para. 59. (*Auton*, 2002, BCCA).

infringement of a right (such as failure to treat a disabled child) survive a Section 1 justification without compelling supportive reasons. A proposed constitutional remedy mandating a positive state obligation to provide community-based treatment may require, *inter alia*: a favourable cost-benefit analysis, evidence of effectiveness of the treatment, as well as a “gate-keeping” mechanism, for example a medical practitioner’s referral, as a requirement to qualify for state-funded treatment. Lamer C.J. in *Schachter* emphasized that at issue was not whether courts can, but rather, the degree to which courts can make decisions that impact on a legislature’s budgetary policies, and the context in which such decisions occur (e.g. treatment for disabled children) that would be the determining factors behind acceptance or rejection.<sup>359</sup>

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<sup>359</sup> *Schachter v. Canada*, [1997] 2 S.C.R. 679 at 709.

## 3.2 Charter of Rights and Freedoms<sup>360</sup>

### 3.2.1 *R. v. L.E.K.*

In *R. v. L.E.K.*,<sup>361</sup> because of inappropriateness of either an open or a closed custody disposition for an FAS/E young offender, Judge M. E. Turpel-Lafond imposed a minimal 30-day open custody sentence, followed by one year probation, with the following condition:

It is the direction of the court that there be a youth worker with special training and understanding in organic brain impairment who is assigned to his [L.E.K.'s] file, and that a comprehensive plan be prepared for the day of his release, and I want him brought back before me, Judge M.E. Turpel-Lafond on [the day of this release] and which should include an in-patient treatment centre with an aboriginal focus, should include special educational supports, and special supports in terms of residence. (para. 14)

The Court of Appeal showed sympathy for the plight of FAS offenders and acknowledged the genuine concern of youth court judges who wish to “break the insidious cycle of in/out as exemplified by this young offender who, at 16 years of age, has a string of at least 45 convictions.”<sup>362</sup> Nevertheless, the Court had no option but to overturn the impugned probation condition, due to concerns about the judicial and institutional competence of courts to impose obligations on the legislative and executive branches of government:

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<sup>360</sup> This topic was dealt with as part of an unpublished paper submitted to Professor N. Zlotkin for Advanced Native and Aboriginal Law 801.3, “*Charter, Treaty and Constitutional Solutions Proposed as Remedies to Obtain Interdisciplinary, Non-Carceral Treatment for FAS/E Offenders.*” The topic has been significantly altered, revised and expanded in the present form.

<sup>361</sup> *Supra* note 279 at para 14. (SKCA) (L.E.K.)

<sup>362</sup> *Ibid.* at para. 35. (L.E.K.)

The portion of the probation order directing the provincial director to assign a youth worker with specialized training in organic brain impairment went beyond the competence of the youth court judge. The jurisdiction of the youth court to make specific orders must be conferred expressly or by necessary implication from the provisions of the Young Offenders Act, R.S.C., 1985, c. Y-1. The Act defines the powers and duties of the youth court judge, the provincial director, the offenders, and the Attorney General. The statement of general principles in s. 3 of the Act does not confer jurisdiction that is not specifically conferred elsewhere. It is the responsibility of the province to provide the programs and facilities necessary to enable the terms of the statute to be carried out, but s. 3(1) does not impose a mandatory duty on the provincial director to create specific types of programs. The youth court's jurisdiction is also limited by the fundamental constitutional principle that it is the judiciary that imposes sanctions and it is the executive that administers them. The effect of the judge's order in this case was to order the government to engage a specific kind of person with certain qualifications and to order that person to be assigned to work with the accused.<sup>363</sup>

The Court of Appeal in *L.E.K.* cited a somewhat similar case, *R. v. R.J.H.*,<sup>364</sup> in the context of a young offender requesting, rather than the existing publicly funded program, more extensive and specialized private addiction treatment:

A question relating to the extent of the implied powers contained in s. 3(1) [of the Young Offenders Act] was dealt with by the Alberta Court of Appeal in *R. v. H.(R.J.)*. . . In that case the young offender was ordered to attend an existing private care program "as directed by his probation officer" and the government was explicitly ordered to pay the \$1,250 monthly bill for such treatment. Madam Justice Fruman on behalf of the Court noted that s. 3(1)(c.1) imposes no mandatory duty on the court. The words "whenever possible" in s. 3 do not empower a youth court judge to force the government to hire or create a program where one does not exist. There is nothing in the Act that gives a youth court judge power to order governments to create programs no matter how badly they are needed. Moreover, to read a federal act as giving a youth court judge the power to determine how a province will spend its money goes against the division of powers set out in the Constitution. We agree with both the reasons and the results of *H.(R.J.)*.<sup>365</sup>

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<sup>363</sup> *R. v. L.E.K.*, (2000), 153 C.C.C. (3d) 250 at 252 as cited in *R. v. S.L.P.* [2002] SKPC 52 at para. 31.

<sup>364</sup> [2000] ABCA 111. (*R.J.H.*)

<sup>365</sup> *Supra* note 279 at para 26. (*L.E.K.*)

As Judge Turpel-Lafond's probation order trenched on the power of the provincial government to administer justice under s. 92(14) of the *Constitution Act*, 1867, the SKCA repealed it, replacing the offending portion with the following less prescriptive form:

He [L.E.K.] shall report to the designated youth court worker as directed and at the time specified for the purpose of receiving inpatient treatment with an aboriginal focus for his organic brain injury and substance abuse; and, he shall report to the designated youth court worker as directed and at the time specified for the purpose of the establishment of a long term plan of rehabilitation which takes into account his special education and residential needs.<sup>366</sup>

This order appears to meet the *R.J.H.* test of a recommendation rather than a binding order by the court to the provincial government:

The Provincial Court judge made a heart-felt determination that the A.A.R.C. [Alberta Adolescent Recovery Centre] private treatment program is R.J.H.'s best chance for rehabilitation. There is little doubt that R.J.H. requires drug treatment, and the Alberta government may well choose to send him to A.A.R.C. While it was open to the judge to recommend the A.A.R.C. program, she did not have the jurisdiction to order the government to pay for it.<sup>367</sup>

A notice under the *Constitutional Question Act*,<sup>368</sup> pursuant to sections 7 and 15 of the *Charter*,<sup>369</sup> was declined by the Court of Appeal in *L.E.K.* because the notice was not initiated at the trial level.<sup>370</sup> However, *Charter* challenges, properly initiated, may be a means of acquiring the necessary treatment. Sanjeev Anand in "R.J.H. and the Power

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<sup>366</sup> *Ibid.* at para. 49 (L.E.K., SKCA)

<sup>367</sup> *Supra* note 364 at para. 38. (R.J.H.)

<sup>368</sup> R.S.S., 1978, C. C-29.

<sup>369</sup> *Supra* note 72. (Charter)

<sup>370</sup> Telephone interview of April 21, 2003, with Katharine Grier, Legal Counsel for L.E.K. at the Court of Appeal and Director of Legal Aid, Saskatoon. As the Judge had taken the initiative to create the special order and programs for L.E.K., there was no *Charter* breach at the trial level. It was not until after trial when the Crown launched their appeal of the sentence, that action under the *Charter* became relevant, and was initiated by the defense at the Court of appeal.



of Courts to Order Provincial Governments to pay for Young Offender Treatment,”<sup>371</sup> concludes that provincial courts are not courts of competent jurisdiction, citing *R. v. Mills*,<sup>372</sup> a decision respecting the nature of courts of competent jurisdiction under s. 24 of the *Charter*:

For those reasons, and to summarize, I am of the view that:

- A court of competent jurisdiction in an extant case is a court that has jurisdiction over the person, the subject matter and has, under the criminal or penal law, jurisdiction to grant the remedy;
- As a general rule, the court of competent jurisdiction is the trial court;
- A judge presiding at a preliminary inquiry is a court of competent jurisdiction to determine whether there has been a violation, but only if the order sought is the exclusion of evidence under s. 24(2).<sup>373</sup>

Professor Anand reasons further that, according to s. 24, anyone whose *Charter* rights have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy, concluding that the Court of Appeal was such a court of competent jurisdiction for cases like *R.J.H.*, had a *Charter* application been made. Although *R.J.H.* does not deal with a *Charter* application *per se*, Professor Anand speculates about a remedy under s. 7 of the *Charter* that would mandate the specialized addiction treatment the provincial court judge had attempted to order for R.J.H. However, a thorough study of *Mills* indicates that while preliminary inquiry judges are excluded from the category of courts of competent jurisdiction under s. 24 (except for powers of exclusion of evidence), neither trial courts at the provincial level, nor trial courts *qua* trial courts at

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<sup>371</sup> (Feb., 2001) 12 NCLJ 309-314.

<sup>372</sup> [1986] 1 S.C.R. 863. (Mills)

<sup>373</sup> *Ibid.* at para. 53. (Mills)

any other level of jurisdiction are excluded from this category.<sup>374</sup> Presumably, sentencing courts would be considered trial courts, as sentencing is the culminating phase of the trial function.<sup>375</sup>

Notwithstanding the foregoing, the respondent *L.E.K.* argued that his *Charter* rights were not infringed at the trial level; not until the trial court was *functus officio* did the infringement arise. Therefore, L.E.K. anticipated that the Court of Appeal would have been able to entertain the *Charter* question.<sup>376</sup> The reasons the Court of Appeal did not are set forth in *Mills*. A trial court, at any level, is a court of competent jurisdiction, according to *Mills*. The trial court, including a provincial trial court, has been entrusted by law to adjudicate the matter, and has jurisdiction to grant the remedy. Furthermore, the trial court is in a position to hear viva voce evidence and examine exhibits first hand; the appeal court, on the other hand, might have to deal with conflicting affidavits or with resulting delays if cross-examination of deponents is warranted to resolve conflict. For the workings of the supervisory or appeal court, it is preferable that the matter be considered on the basis of the entire record in the trial court, where all issues may be considered in one forum, rather than have it litigated piecemeal between the two levels of courts.<sup>377</sup> Appellants like L.E.K. should seek remedy before the trial court, in L.E.K.'s case the provincial youth court, which being a trial court, is a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter*.

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<sup>374</sup> *Ibid.* at para. 26-57. (*Mills*)

<sup>375</sup> Both R.J. H. and L.E.K. plead guilty before a provincial court judge and were then sentenced by that judge.

<sup>376</sup> Telephone Conversation of April 21, 2003, with Kathy Grier, Counsel for L.E.K.

<sup>377</sup> *Supra* note 372 at para. 74. (*Mills*)

### 3.2.2 *Auton v. British Columbia*

In *Auton v. B.C.*,<sup>378</sup> a *Charter* challenge analogous to *L.E.K.*, but outside the criminal law context, was successful in acquiring treatment for autistic children. The appellants in *Auton* alleged discrimination against the mentally disabled, an enumerated ground in s 15(1):

**15(1)** Every individual is equal before and under the law and has the right to 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.

The appellants claimed discrimination because they were denied funding for medical treatment necessary to alleviate symptoms of their disability. Medical treatment necessary to ameliorate a wide range of health-related conditions normally is available to members of the public. Furthermore, there is a *Charter* obligation to supply treatment to those such as the mentally disabled who, without adequate accommodation, risk affront to their human dignity through stigmatization, disadvantage, and exclusion.

Section 15(1) of the *Charter* expresses a commitment to the equal worth and dignity of all peoples and “entails the promotion of a society in which all are secure in the knowledge that they are recognized as human beings equally deserving of respect.”<sup>379</sup>

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<sup>378</sup> [1999] B.C.J. No. 718 (BCSC); [2000] B.C.S.C. 1142, [2001] BCSC 220; aff’d [2002] BCCA 538; [2002] S.C.C.A. No. 510 (Notice of appeal filed June 16, 2003. Appeal not yet inscribed for hearing.) (*Auton*)

<sup>379</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171.

It represents a desire to rectify extant and to prevent future discrimination against particular groups, “suffering social, political and legal disadvantage in our society.”<sup>380</sup>

Moreover, *Charter* rights are to be interpreted generously and purposively.<sup>381</sup> The analysis must be contextual, always bearing in mind protection of human dignity.<sup>382</sup>

People with both autism and autism spectrum disorders (ASDs),<sup>383</sup> and fetal alcohol spectrum disorders (FASDs), belong to an enumerated group under s. 15(1), the mentally disabled. The determination of whether the law is discriminatory against them,<sup>384</sup> being a contextual exercise, it is important to look at the larger social, political and legal milieu.<sup>385</sup> La Forest J. in *Eldridge v. British Columbia (Attorney General)* describes the stigmatized, marginalized context for disabled people:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, “A Report Card on the Charter’s Guarantee of Equality to Persons with Disabilities after 10 years – What Progress? What Prospects?” (1997), 7 N.J.C.L. 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) demands.

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<sup>380</sup> *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333.

<sup>381</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 156.

<sup>382</sup> *Law v. Canada*, [1999] 1 S.C.R. 497.

<sup>383</sup> *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2000] BCSC 1142 at para 2-3. Autism or autism spectrum disorder (ASD) is a neurobehavioral syndrome caused by a dysfunction in the central nervous system, which leads to the onset, within the first three years of life, of the following three general categories of symptoms: impairments in social interaction; impairments in communication; and restricted repetitive and stereotyped patterns of behavior which can be destructive to both self and others. Unless their condition is treated, many will be locked a world of silence and isolation, unable to relate to others emotionally or through language, with eventual institutionalization the likely outcome.

<sup>384</sup> As in *Auton* and *Eldridge*, there is no legislation that prohibits necessary medical treatment for ASD children, for the deaf, or, by extension, for FASDs. However, the law is interpreted and applied in a manner that has the effect of discrimination by denying the necessary treatment to certain disabled groups by not funding the special programs they require.

<sup>385</sup> *Supra* note 380, at p. 1331. (*Turpin*)

Instead they have been subjected to paternalistic attitudes of pity and charity, and their entrance into social mainstream has been conditional upon their emulation of able-bodied norms; see Sandra A. Goudry and Yvonne Peters, “Litigating for Disability Equality Rights: The Promises and the Pitfall” (1994) at pp. 5-6. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed; see “Minister of Human Resources Development, Persons with Disabilities: A Supplementary Paper (1994), at pp. 3-4 and Statistics Canada, “A Portrait of Persons with Disabilities” (1995), at pp. 46-49.<sup>386</sup>

For offenders with FASDs, who, in addition, may be victims of racial discrimination, being disabled renders them further marginalized, both economically and socially, and consequently subject to disproportionately high rates of incarceration, the most adverse form of institutionalization. Profoundly socially isolating as ASD can be, the condition often lacks the racial dimension of discrimination. Furthermore, although, individuals with ASD, too, are often subject to institutionalization in group homes or hospital settings, they are not subject to incarceration with its harsh, penal consequences.

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<sup>386</sup> *Supra* note 345 at para. 56. (Eldridge)

### 3.2.2.1 *Law v. Canada* Analysis

#### 3.2.2.1.1 Section 15(1)

*Law v. Canada*<sup>387</sup> introduced a uniform approach to s. 15(1) analysis, a general framework synthesized from earlier cases,<sup>388</sup> but possessed of its own characteristic synergy. The *Law* approach has been adopted and, at least partially applied, in subsequent cases,<sup>389</sup> such as *Granovsky v. Canada*,<sup>390</sup> in the context of an adult's short-term disability. Speaking for the majority of the Court in *Law*, Justice Iacobucci emphasized that the central concern is whether an impugned law or government action violates the overall substantive purpose of s. 15,<sup>391</sup> which is to protect essential human dignity and freedom.<sup>392</sup> He outlined three broad determinations a court should make under a s. 15(1) analysis: (1) in purpose or effect, the impugned law must create a distinction between the claimant and others; (2) the distinction must be made on the basis of an enumerated ground under s. 15(1) or on an analogous ground; and (3) in purpose or effect, the distinction must constitute discrimination which undermines the

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<sup>387</sup> *Supra* note 382. (*Law*)

<sup>388</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 62; *Miron v. Trudel*, [1995] 2 S.C.R. 418; and *Egan v. Canada*, [1995] 2 S.C.R. 513.

<sup>389</sup> However, the full application and articulation of some aspects of the *Law* analysis has not as yet been made clear. For instance, there is controversy about whether some aspects of the analysis are part of the s. 15 analysis, or whether they more properly belong in the s. 1 analysis. Some question the likelihood of agreement on a firm definition of dignity, which underlies the s. 15 analysis. Some of the stages of the tests, including analysis of contextual factors, have not been fully articulated by the Court, and all of the contextual factors listed in *Law* may not be relevant in every case. Moreover, since the list is not exhaustive, factors not as yet articulated could be relevant in future cases.

<sup>390</sup> [2000] 1 S.C.R. 703. (*Granovsky*)

<sup>391</sup> *Supra* note 370 at para 25 (*Law*); *Supra* note 336 at para. 81-2 (*Vriend*); *Supra* note 333 at para. 60-61 (*Eldridge*).

<sup>392</sup> *Supra* note 382 at para 83. (*Law*)

presumption of the equality guarantee that each individual is of equal worth and dignity, regardless of the group to which she belongs.<sup>393</sup>

The first and second stages of the *Law* inquiry require that a distinction made under legislation (or under statutory authority) must be based on enumerated or analogous grounds. However, not every distinction made based on enumerated or analogous grounds will constitute discrimination under s. 15(1). Only those distinctions based on enumerated or analogous grounds that detract from essential human dignity will be considered discriminatory under s. 15(1). At the third stage, to assess if the distinction demeans human dignity and is accordingly discriminatory, the court will examine contextual factors. Four contextual factors identified, but not considered exhaustive, by Justice Iacobucci in *Law* include:

- pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the claimant's group;
- relationship between the ground upon which the claim is based and the actual characteristics and circumstances of the claimants; and
- the ameliorative purpose or effects of the impugned law or action upon a more disadvantaged group or person in society;<sup>394</sup> and
- the nature and scope of the interest affected by the impugned law or action.<sup>395</sup>

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<sup>393</sup> *Ibid.* at para. 8. (Law)

<sup>394</sup> As in s. 15(2), affirmative action initiatives.

<sup>395</sup> *Supra* note 382 at para 88. (Law)

As the claim in *Auton* is based on the enumerated ground of disability, the four contextual factors play a significant role in determining whether the dignity of the claimants is demeaned, and therefore the distinction is discriminatory. Considering the first contextual factor, ASDs, due to their mental disability, have suffered pre-existing, historical disadvantage through stigmatization, marginalization and exclusion from mainstream society. Untreated, their fate may be life-long institutionalization,<sup>396</sup> with attendant loss of liberty, and the denial of opportunity to participate in mainstream society through involvement in the labour force and other avenues of social, educational, economic and political discourse. There is, thus, no question as to the seriousness of the grounds upon which their claim is based, as addressed by the second contextual factor. Further, pursuant to the third factor, the Crown made no specific claim as to the ameliorative purpose or effects of the impugned law on a more disadvantaged group. They did, however, express general concerns regarding the skewing of resources away from other special needs children,<sup>397</sup> but not necessarily more disadvantaged children. Regarding the fourth contextual factor, the nature and scope of the interest affected, the petitioners' claim for funding of treatment involves comprehensive health care, one of the most important values in Canadian society and immense in scope. Decision-making in the health care arena, by necessity, does involve complex balancing of the interests and needs of various groups and individuals.<sup>398</sup> Application of the four contextual factors points towards upholding substantive equality for the disabled claimants in *Auton* through provision of the special treatment they

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<sup>396</sup> *Supra* note 383 at para. 4 (*Auton*, 2000, BCSC)

<sup>397</sup> *Supra* note 106 at para. 134. (*Auton*, 2002, BCCA)

<sup>398</sup> *Ibid.* at para. 56.



require, subject to balancing processes incorporated to fairly distribute health-care funding in compliance with *Charter* principles.

Under the three broad enquiries of the *Law* analysis, claimants first must establish that, because of the distinction the impugned legislation or action under statutory authority has drawn between them and others, they have been denied “equal protection” or “equal benefit” of the law, which constitutes differential treatment on the basis of at least one of the enumerated or analogous grounds. Further, claimants must establish, using the contextual factors, that the distinction demeans their dignity, compared to other groups, and is, accordingly, discriminatory within the substantive meaning of s.15(1). In *Eldridge*, the deaf (which can be held to be a group analogous to both ASDs and FASDs) were entitled, along with the general population, to have equal access to and to receive medically necessary, effective treatment of their health problems.<sup>399</sup> *Eldridge* generalizes to all situations where lack of funding for treatment or services renders some disabled individuals unable to benefit from the provision of medical services to the same extent that persons without their disability benefit. Under s. 15(1), it is not necessary to find a discriminatory purpose in the legislation, policy, or action; it is sufficient if the effect is to deny someone the equal protection or benefit of the law. The main consideration is the impact of the law, policy or action upon the individual or group concerned.<sup>400</sup> Adverse effects discrimination is particularly relevant in the case of disability; governments rarely single out disabled persons for direct discriminatory

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<sup>399</sup> *Supra* note 345 at para. 95-96. (*Eldridge*)

<sup>400</sup> *Supra* note 379 at p. 165. (*Andrews*)

treatment, more commonly, laws or policies of general application will have a disparate impact on the disabled:

[T]he government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.<sup>401</sup>

The Court in *Auton* concluded that the discrimination was in the form of a socially constructed handicap.<sup>402</sup> Acting under statutory authority, a health care administrator had decided not to fund certain treatment, perceiving the needs of ASD children as less worthy of treatment than the needs of other children requiring medical treatment, or less worthy than the needs of adults requiring mental health care.<sup>403</sup>

The crux of the *Law* analysis is the third stage, where the court must inquire whether the differential treatment brings into play the purpose of s. 15(1). The process must “engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant.”<sup>404</sup> To do so, the analysis must “identify differential treatment as compared to one or more other persons or groups.”<sup>405</sup> Such inquiry must ask whether the impugned legislation or action taken under statutory authority violates the essential human dignity of the disabled group, through promoting the view that persons with disabilities are less worthy of dignity than a comparator

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<sup>401</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p. 549.

<sup>402</sup> *Supra* note 106 at para. 51. (*Auton*, 2002, BCCA)

<sup>403</sup> *Ibid.* (*Auton*, 2002, BCCA)

<sup>404</sup> *Supra* note 382 at para. 55. (Law)

<sup>405</sup> *Ibid.* at para. 56. (Law)

group, thereby demeaning the sense of dignity of disabled claimants. The question posed by the third stage must be answered from the perspective of a hypothetical reasonable person, in the same situation as the disabled claimants, who takes into account the relevant contextual factors.<sup>406</sup> Whether this contextual process based on an objective/subjective standard resolves the underlying ambiguity of the meaning of dignity is yet to be demonstrated.

The appropriate comparator groups selected by the claimants in *Auton* were two: the group of non-mentally disabled children, and the group of mentally disabled adults.<sup>407</sup> The Court determined that the infant autistic claimants had been discriminated against in comparison to both comparator groups on the enumerated grounds of mental disability and age, respectively.<sup>408</sup> The comparator groups were selected to avoid pitting a group of autistic children against another group of disabled children in a “race to the bottom.”<sup>409</sup> ASD claimants are doubly vulnerable being children and mentally disabled, both groups having faced pre-existing disadvantage, stereotyping, or prejudice.

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<sup>406</sup> *Ibid.* at para 55. (Law).

<sup>407</sup> *Supra* note 106 at para. 28. (*Auton*, 2002, BCCA)

<sup>408</sup> *Ibid.* at para. 33-42. (*Auton*, 2002, BCCA)

<sup>409</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at para 69. (Lovelace) Iacobucci J. coined the term, “race to the bottom,” in the context of ostensibly rejecting a relative disadvantage approach among Aboriginal groups, all of whom have been affected by a legacy of stereotyping and prejudice.

In the context of health legislation and policy,<sup>410</sup> the early IBI therapy sought by the claimants is entirely consistent with an ameliorative purpose which includes the provision of necessary medical services. The claimants had been denied necessary treatment compared to the treatment provided children without mental disability and compared to the treatment provided adults with mental disability. Differential denial of treatment distinguished the autistic claimants from the comparator groups, constituting underinclusiveness.<sup>411</sup> Such differential denial of treatment, from the perspective of a hypothetical reasonable person in the same situation as the claimants, would be deemed to promote the view that ASDs are less worthy of dignity than non-mentally disabled children and mentally disabled adults, thus constituting discrimination.

On the basis of underinclusiveness, *Auton* can be distinguished from *Granovsky*. In the latter case, the claimants were less disadvantaged than some of those in the comparator groups; the reverse is true in *Auton* where the autistic claimants are more disadvantaged than the comparator groups. Without treatment, the claimants in *Auton* face the prospect of remaining greatly disadvantaged for the duration of their lives. The needs of the claimants in *Auton* are great, existing in the context of a severe condition, ASD, which absent treatment at an early stage of life, may consign them to subsequent isolation and institutionalization. The urgent needs of ASD claimants must be considered in the context of an existing treatment method which holds a realistic

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<sup>410</sup> *Ministry of Health Act*, R.S.B.C. 1996, c. 301, s.3; *Canada Health Act*, R.S.C., Chap. C-6, ss. 3, 5, 7, 8, 9, 10, 11, and 12; *B.C. Mental Health Care Plan*, 1998; and *The Medicare Protection Act*, R.S.B.C., 1996, c. 286..

<sup>411</sup> *Supra* note 106 at para. 33 and 49. (*Auton*, 2002, BCCA)

possibility of substantial improvement in the their communication and behavior skills.<sup>412</sup>

As stated by McIntyre J., “the accommodation of differences . . . is the essence of true equality.”<sup>413</sup> To elaborate, the essence of s. 15(1) is not only to prevent stereotyping related to immutable conditions such as sex and race, but also to ameliorate the disadvantage suffered by those, such as the disabled, who have been excluded from mainstream society. The essence of the discrimination the disabled face does not lie so much in the attribution to them of untrue or irrelevant personal characteristics, as it does in the failure to make reasonable accommodation to their actual characteristics so that they can fully participate in society. By ignoring her disability, society forces such an individual to sink or swim in the mainstream. The central purpose of s. 15(1) is to recognize the actual characteristics of a disabled person and to reasonably accommodate them.<sup>414</sup>

Sign Language Interpretation, SLI, is the means in *Eldridge* by which deaf persons are to receive access to the same quality of medical care enjoyed by the hearing population.<sup>415</sup> Thus it is for ASD or FASD claimants and the ameliorative treatments they require, whether it be to expedite access as in *Eldridge* or to provide treatment services *per se* as in *Auton*. Necessary, effective, medical treatment is a benefit generally available to members of the public, and post-*Charter*, cannot be denied to the

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<sup>412</sup> *Supra* note 106 at para. 49. (*Auton*, 2002, BCCA)

<sup>413</sup> *Supra* note 379 at p.169. (Andrews)

<sup>414</sup> *Eagan v. Canada*, [1995] 2 S.C.R. 513 at paras. 66-67.

<sup>415</sup> *Supra* note 345 at para. 71. (*Eldridge*)

disabled. Anything less “bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court’s equality jurisprudence.”<sup>416</sup>

Government policy not to fund certain treatment denies disabled persons who require such treatment the benefit of the law, and discriminates against them in comparison with persons not so disabled.

#### **3.2.2.1.2 The Case for FASDs Under S. 15**

The preceding analysis from *Auton* could be applied, with minor modifications, to individuals with FASDs. Without treatment for the secondary symptoms of their disabilities, such individuals remain seriously disadvantaged for the duration of their lives. Their needs, too, are great, and, if unmet, may consign them not only to institutionalization, but also to incarceration with its loss of liberty and harsh, penal consequences. Many individuals with FASDs suffer under, not a double, but a triple jeopardy of being vulnerable due to age, disability, and race.<sup>417</sup> Cost benefit analyses illustrate the economic folly of continuing to incarcerate rather than acting to intervene early with treatment of their secondary symptoms.

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<sup>416</sup> *Ibid.* at para. 77. (Eldridge)

<sup>417</sup> Ferguson, L.G. (1997). *Deconstructing Fetal Alcohol Syndrome: A Critical Inquiry into the Discourse around Alcohol, Women, Ethnicity, Aboriginals and Disease*, Unpublished Masters’s Thesis, Carleton University (Canada).

Although no scientifically proven method of treating individuals with FASDs exists, ameliorative practices are recommended by experts in the field of organic brain impairments and FASDs.<sup>418</sup> Evidence of the efficacy of such practices may well follow implementation, but first there must be programs in place to review. Even Crown experts in *Auton* conceded that treatment of the ASD claimants should not be delayed while awaiting replication of the Lovaas study.<sup>419</sup> Like ASDs, FASDs are permanent conditions that cannot be cured, but symptoms can be treated allowing affected individuals to lead fuller lives in the community.

Unlike the situation for ASDs, the Crown's role as a causal contributing factor to FASDs, through its regulation and sale of alcoholic products, is direct, and possibly in breach of constitutionally protected treaty rights. The Crown, therefore, may have a greater duty under s. 15 of the *Charter* to provide and fund services for FASDs. Such services would be directed at the amelioration of a disadvantage the Crown was and continues to be instrumental in creating and furthering, in the face of a constitutionally protected treaty promise to the contrary.

For a majority of FASDs, pre-existing disadvantage has been canvassed in the historical analysis surrounding the excesses of the whiskey trade, and current consumption patterns, demographics, socio-economic factors, and health indicators.<sup>420</sup>

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<sup>418</sup> *Supra* note 134. (Health Canada, *Best Practices*)

<sup>419</sup> *Supra* note 383 at para. 52. (*Auton*, 2000, BCSC)

<sup>420</sup> Refer to Chapter One of this thesis for a discussion of these factors.

Great disparities in health status persist between Aboriginal and non-Aboriginals in Canada, on almost every health indicator, including: diabetes, tuberculosis, heart, lung and kidney disease, addictions and fetal alcohol, youth suicide, infant mortality rates, longevity statistics, mental health, injuries, environmental health, communicable and infectious diseases, education, employment, and others.<sup>421</sup> These disproportionate burdens upon Aboriginal peoples stem from systemic causes attributed to the legacy of colonization. This legacy includes, in addition to the whiskey trade, residential schools and their intergenerational effects, perpetuated by the Sixties Scoop<sup>422</sup> and subsequent child protection policies. The consequence is far too many Native children left rootless in foster homes and custodial placements.

Positive initiatives beyond medical care, comprehensive health services, and hospitalization, have been and are being attempted. These include *inter alia* the *Royal Commission on Aboriginal Peoples*, the Aboriginal Healing Fund (AHF), the National Aboriginal Health Organization (NAHO), health research initiatives such as CIHR-IAPH and ACADRE,<sup>423</sup> Fetal Alcohol Canada Expertise (FACE), the Suicide Prevention Advisory Group, and the National Network for Aboriginal Mental Health

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<sup>421</sup> *Supra* note 72. [Health Canada, *A Statistical Profile on the Health of First Nations in Canada* (Ottawa, Canada: 2003), <http://www.hc-sc.gc>]

<sup>422</sup> Olesen, M. and Williams, D. *Living in Limbo*, 2003, [www.geocities.com/adoption\\_dallas\\_mavis](http://www.geocities.com/adoption_dallas_mavis). In the late 1960's government practice expedited the adoption of First Nations and Metis children into non-Aboriginal homes, in line with the policy of assimilation. The genuineness of the need, in all cases, for removal of the children from their birth homes is questionable.

<sup>423</sup> Canada Institute of Health Research--Institute of Aboriginal Peoples Health (CIHR-IAPH) and Aboriginal Capacity and Developmental Research Environments program (ACADRE).



Research (NNAMHR). Much more remains to be done, particularly at the grassroots level.

In the context of the treaty alcohol ban and the whiskey trade that occurred contemporaneously with, as well as prior to the treaties, it would be a hypocritical travesty for the courts not to accommodate FASDs, particularly considering the huge profits made by colonizers, including the Crown, and the continuing role of the Crown in the regulation and sale of alcohol.

As the treaty alcohol ban is a significant contextual factor for the s. 15 analysis, it has been considered in some detail in Chapter One, Section 1.4. Although there is debate as to whether, on its own merits, breaches of the constitutionally protected treaty alcohol ban could be successfully litigated, the topic in its fullness, from such a strong underpinning in history and constitutional law, is introduced in this *Charter* discussion solely as a critical contextual factor under the *Law* analysis. The written text of the treaty alcohol ban provision is strictly limited in area and scope; it applies solely to those affected beneficiaries of Treaties numbered 1 through 6, who were exposed to alcohol *in utero*, through maternal consumption on their respective reserves. The power of its implications, however, may resonate beyond these boundaries.

The alcohol ban is relevant to the following contextual factors identified in *Law*: pre-existing disadvantage experienced by the claimant's group; the relationship between the circumstances of the claimants and the ground on which the claim is based; and the nature and scope of the interest affected by the impugned law or action. The first

contextual factor, pre-existing disadvantage, has been well canvassed in this thesis, starting from the days of the whiskey trade, continuing to current alcohol consumption patterns, and resultant incidence of FASDs.

The second contextual factor, the relationship between the circumstances of the claimants and the ground on which the claim is based, also must be considered in relationship to the treaty alcohol ban. Contrary to the alcohol ban, a group of potential Aboriginal claimants, through no fault of their own, were exposed to the teratogenic effects of alcohol *in utero*. FASDs resulted, for which funding for accommodation of disabilities may be claimed. The alcohol ban was included in the treaties, at the insistence of treaty signatories and their advocates, as a safeguard against the damage caused by alcohol during the whiskey trade and its anticipated intergenerational impact thereafter. Consequently, it was included, with all treaty rights, in s. 35 of the *Constitution, 1983*, to be recognized and affirmed. Complicity of the Crown in breaching the treaty alcohol ban, leading to incidences of FASDs in relevant Aboriginal populations, would constitute a significant contextual factor in a s. 15 *Charter* analysis.

In view of the constitutional protection afforded by the treaty alcohol ban, the third contextual factor, the interest affected by the impugned law or action, is considerable in both nature and scope. Lack of accommodation in the form of funding of treatment for relevant, affected individuals fails to ameliorate the damages caused not merely by a moral or statutory breach, but, more significantly, by a constitutional breach. A constitutional breach is of the highest order of importance, representing as it does a

breach of the supreme law of Canada. A *Charter* analysis would consider the gravamen of such a breach, in both s. 15 substantive equality analysis and in a s.1 infringement-justification analysis. Openly disregarding a constitutionally protected treaty right certainly demeans the dignity of the treaty signatories and their descendants, virtually declaring that they are not worthy of having promises made to them honoured and their constitutional rights protected. It is doubtful that the Crown could either deny existence of such a right under s. 15, or justify infringement of it under s. 1, in order to elude responsibility for funding treatment that would ameliorate the damage caused by FASDs. The Court, in a contextual, *Charter* analysis, is less likely to constrain the ban's implications to strict geographic, site, and treaty boundaries, than it would in treaty litigation on its own merits.

The etiology of ASD is a matter of speculation, ASD being a pre-existing and non-state caused condition.<sup>424</sup> Thus, the request to fund intensive behavioral intervention (IBI)<sup>425</sup> services for ASDs was not directed at the amelioration of a disadvantage created by the law, except in the interpretation of the medicare provisions so as to exclude such

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<sup>424</sup> *Supra* note 106 at para 59 (Auton, 2002, BCCA); and *Supra* note 339 at para. 10. (Auton, 2000, BCSC)

<sup>425</sup> *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [1999] B.C.J. No. 718 at para. 8-14. The form of early intensive behavioral intervention (IBI) requested by the petitioners was the Lovaas Autism Treatment (LAT). Numerous jurisdictions, including Alberta, Prince Edward Island, England, and a number of states in the United States, have recognized the LAT as an appropriate therapy for autism. The treatment is based on the work of Ivar Lovass, a psychologist at UCLA in California; he developed his method in the seventies and published the results of his research in 1987. The basic premise of his treatment is that people with autism can be taught, on a one-to-one basis, the skills that they lack, primarily through rewarding appropriate behaviors. The treatment is very intensive, about 40 hours a week, and to be effective, must be employed early in the child's life. Although the treatment costs \$45,000.00 - \$60,000.00 per year per child, Dr. Lovass estimated (1987) that the savings for each child would be \$2 millions U.S. in care over the course of his or her life. Without effective treatment, the majority of autistic children are severely impaired in intellectual, social and emotional functioning, and require extensive care throughout their life span.

funding.<sup>426</sup> Conversely, the epidemiological aspect of *in utero* transmission of FASD is well documented, and attributable, in part, at least, to Crown action or inaction. Product warning labels for alcohol have not been instituted in Canada, nor have warnings through other means been put in place until fairly recently. Their effectiveness has not been tested. Programs for the prevention and treatment of the FASDs are either in their infancy, or non-existent; this is especially true for treatment of existing conditions.

In addition, courts may find stronger grounds for FASDs than for ASDs to use the ancient *parens patriae* jurisdiction, based on the underlying thesis that the law works for the protection and advantage of children.<sup>427</sup> Such jurisdiction could justify intrusive intervention of the courts on behalf of children or disabled adults with FASDs, particularly in view of the large number of Aboriginal children, and children with FASDs, who are, or have been, subject to child protection orders.<sup>428</sup>

The essence of the s. 15 substantive “dignity” analysis is the marginalization and exclusion from society that both ASDs and FASDs would suffer, absent adequate accommodation of differences through provision of funded health-care treatment. As acknowledged by the Court in *Auton*, not all refusals to fund health-care would be

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<sup>426</sup> *Supra* note 106 at para. 52 (*Auton*, 2002, BCCA)

<sup>427</sup> *Ibid.* at para. 61. (*Auton*, 2002, BCCA)

<sup>428</sup> Greschner, D. and Lewis, S., “Medicare in the Courts: *Auton* and Evidence-Based Decision-Making,” publication pending in the Canadian Bar Review, page 22. Only 25.6% of children with FAS/E lived with their biological parents when last seen at a provincial child development centre [B.F. Habbick et al, “Foetal Alcohol Syndrome in Saskatchewan: Unchanged Incidence in a 20-year period” (1996) 87 Can. J. Public Health 204-207], and 88% of hospitalized people with FAS/E were Aboriginal [E.A. Loney et al, “Hospital Utilization of Saskatchewan People with Fetal Alcohol Syndrome” (1998) 89 Can. J. Public Health 333-336].

viewed as discriminatory.<sup>429</sup> However, those refusals that violate the substantive equality provisions of s. 15, by failing to attenuate the marginalization and exclusion of groups like ASDs and FASDs who are subject to differential treatment on the basis of enumerated or analogous grounds, would be discriminatory. Although the reverse could not be justified, funding could be diverted from other Crown sources to meet the needs of a more disadvantaged individual or group, such as those with ASD and FASD. For instance, funding allocated for institutionalization and incarceration could be diverted to funding IBI and similar treatment for FASDs. The proceeds from the tax on alcoholic products could be diverted to the treatment of FASDs. Significant portions of profits made by distilling and brewing companies, as a condition of their licensing, could be allocated to the mitigation of damages caused by the role of alcohol in contributing to conditions such as FASDs.

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<sup>429</sup> *Ibid.* at p. 18. As a consequence of scarce resources, the health care system cannot address all medical needs. For instance prescription drugs, hearing aids and spectacles are, in many cases, not funded through medicare. Sometimes the health care system does not fund treatment unless it is shown to be effective, and even if effective, may not fund it if its effectiveness does not justify the cost. The authors express the concern that the potential amount of the order in *Auton* may skew resources away from other children with special needs. Allocation of health funding may become captive to various advocacy groups, or groups with sufficient means to mount a *Charter* case. Groups like FASDs are not likely to be in such position, due to their prevalence in the child protection system, and the poverty and marginalization of other sources of advocacy for them in the family or community. (Greschner, D. and Lewis, S. “Medicare in the Courts: *Auton* and Evidence-Based Decision-Making”)

### 3.2.2.1.3 Section 1 Test

Once a *Charter* right to treatment is established for ASD claimants (or by extension for individuals with FASDs), it is subject to limitation under Section 1, which reads:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrated in a free and democratic society.

In *R. v. Oakes*,<sup>430</sup> the Supreme Court set out a test for determining whether a law (or its effects) constitutes a reasonable limit on a *Charter* right. The crux of the *Oakes* test, applied to disability cases such as *Auton*,<sup>431</sup> and *Eldridge*,<sup>432</sup> and by extension to FASD claimants, focuses on whether or not the denial of treatment or ameliorative services constitutes only a minimum impairment of the right. A minimum impairment would qualify as a reasonable limitation of the right. To constitute a minimum impairment, the government must make reasonable accommodation of the appellants' disability to the point of "undue hardship."<sup>433</sup> Governments are given wide latitude by the Courts to allocate scarce resources, especially when choosing between or among disadvantaged groups, but no latitude where the choice is between a disadvantaged group and the general population, and no latitude where reasonable accommodation has not been attempted.<sup>434</sup>

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<sup>430</sup> [1986] 1 S.C.R. 103. (*Oakes*)

<sup>431</sup> *Supra* note 106. (*Auton*, 2002, BCCA)

<sup>432</sup> *Supra* note 345. (*Eldridge*)

<sup>433</sup> *Ibid.* at para. 94. (*Eldridge*)

<sup>434</sup> *Ibid.* at para. 85. (*Eldridge*)

The Crown contended in *Auton* that the expenditure of funds and allocation of other scarce resources among myriad competing demands requires a balancing of interests on a comprehensive and systematic basis, which only the executive branch can do, rather than, a balancing, as in *Auton*, on a case by case basis by the Court.<sup>435</sup> The Court responded by reference both to *Eldridge*,<sup>436</sup> where the Crown was required by the Court to pay for translation services for the deaf, and to *Tetrault-Gaudoury*,<sup>437</sup> where UIC back benefits were to be payable after a *Charter* remedy of “reading in” those who had been previously excluded on the basis of age. According to Chief Justice Lamer in *Schachter*:

The question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.<sup>438</sup>

Madam Justice Saunders of the B.C.C.A. did not consider the expenditure of funds contemplated for the treatment of ASD claimants in *Auton* to be so extraordinary as to be subject to reasonable limitation under s. 1.<sup>439</sup> The treatment at issue was ordered only where it had been requested before the Court and where it had been recommended by an appropriate health care practitioner. Considering the particular facts of *Auton*, and the significant place of children in the law,<sup>440</sup> the B.C.C.A. affirmed and extended<sup>441</sup> Madam Justice Allan’s B.C.S.C. holdings in this respect.

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<sup>435</sup> *Supra* note 106 at para. 56. (*Auton*, 2002, BCCA).

<sup>436</sup> *Supra* note 345. (*Eldridge*)

<sup>437</sup> *Tetrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

<sup>438</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709, as cited in *Auton*, BCCA at para.57.

<sup>439</sup> *Supra* note 106 at para. 58. (*Auton*, 2002, BCCA).

<sup>440</sup> The Court is referring to *Parens patriae*, the state’s duty of care for children (or adults unable to care for themselves) in the common law, classically used either to compel or to prevent the performance of some medical procedure, for the good of the child as perceived by the state, overriding the parent’s

The significant place of children in the law is supported further by Articles 23, 24 and 40(3) & (4) of the United Nations' *Convention on the Rights of the Child*,<sup>442</sup> ratified by Canada in 1992. For all children, a right to the highest standard of health care is emphasized in Article 24. Moreover, article 23 extends that right, with particular attention to the health care needs of mentally or physically disabled children, to rehabilitative care, in order to promote self-reliance and full participation in the community. In the same article, state signatories specifically recognize the right of a disabled child to special care, free of charge (subject to available resources of the state), designed to ensure the disabled child's access to education, training, health care services, rehabilitation services, recreation, and employment preparation. In countries with resources comparable to Canada's, a significant right to special care would be reasonable. Ultimately, no child is to be deprived of access to health care services. Article 40 of the same *Convention* documents the right of child offenders to a variety of dispositions other than institutionalization to meet their needs for care, including residential care, guidance, counseling, education and vocational training.

Generally, statutes of Canada, which possess a federal jurisdictional component as do health and criminal legislation, are interpreted so as to conform to international law.<sup>443</sup>

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objections; and the *Convention on the Rights of the Child*, U.N.T.S., passed by the United Nations in 1990 and ratified by Canada in 1992.

<sup>441</sup> There was no age restriction in either order for Crown funding of IBI therapy. However, in the BCCA, parents were granted leave to appeal for reimbursement of IBI services for which they had already paid, whereas previously they had been restricted to a symbolic award of \$20,000.00 each.

<sup>442</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), ratified by Canada in 1992.

<sup>443</sup> P. Cote, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000) at 367-389, cited in Jones, C. "Fixing to Sue: Is There a Legal Duty to Establish Safe Injection Facilities in British Columbia?" (2002) 35 UBCL Rev. 393-454.



Accordingly, Madame Justice Saunders (in reference to action pursuant to provincial statutory authority related to health care) upheld the use of international covenants in the section 1 stage of *Charter* analysis. Section 1 determines whether a Crown limitation of a right is reasonable and justifiable in a free and democratic society. A right upheld by international conventions would present a strong section 1 threshold for the Crown to meet.<sup>444</sup> The *Convention on the Rights of the Child* supports the claims of disabled children for funded health-care (whether ASD or FASD) thereby weighing against Crown justification of denial or infringement of that right under s. 1. Further, of particular importance for FASD offenders, the *Convention*, in article 40, supports the claim for provision of community-based treatment services for children who break the law.<sup>445</sup>

The Crown in *Auton* emphasized that its health care resources are limited and argued that the effect of funding treatment for ASDs would skew resources away from other children with special needs. The petitioners countered that a great deal of money spent by the Crown was misdirected, including money spent on researching critiques of the Lovaas autism treatment (LAT),<sup>446</sup> a particular form of IBI that the claimants were requesting.

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<sup>444</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, cited in *Supra* note 106 at para. 63. (*Auton*, 2002, BCCA).

<sup>445</sup> Applicable to adults, as well as children is article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* [1976], 993 U.N.T.S. 3 [1976- Can. T.S. 46, as it recognizes the right of everyone to the highest attainable standard of physical and mental health. For Aboriginal peoples, articles 23 and 24 of the *Draft Declaration of the Rights of Indigenous Peoples* raise the issue of self-determination in health care and social programmes, as well as inclusion of the Indigenous component of traditional healing.

<sup>446</sup> *Supra* note 383 at para. 25-52. Ivor Lovaas began his IBI project in 1970 at UCLA, after observing that ASD children do not learn from everyday environments. He hypothesized that their abnormal

With regard to another section 1 issue, evidence of effectiveness of treatment, the Court did accept the ASD parent petitioners' affidavits as admissible evidence regarding improvements in their children while receiving LAT. However, the Court was skeptical regarding the validity of the estimation processes used in the cost-benefit analyses presented by the same petitioners' economist.<sup>447</sup> Ultimately, the Court did concede that, in the long run, the costs of paying for effective treatment would be more than offset by the savings of not paying for lifelong care and institutionalization of ASDs.<sup>448</sup>

In *Auton*, ASD claimants received differential denial of treatment with respect to a non-mentally disabled comparator group of children, and a mentally disabled comparator

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behavior patterns and skills deficits could be ameliorated through intensive behavioral modification treatment, using both positive and negative reinforcement, and that such treatment would allow many ASD children to join their normal peers by grade one. In 1987, Dr. Lovaas published the results of his study, termed the Young Autism Project (YAP). The children in the YAP were three years or younger at the beginning of treatment and received 40 hours a week of intensive one-on-one treatment by a therapist. Lovaas reported that 17 out of 19 children who received his form of IBI termed Lovaas autism treatment (LAT) improved significantly in their social and communication skills. Nine out of the 19 were able to complete grade one in regular classrooms without special supports, and were indistinguishable from their peers in IQ, adaptive skills, and emotional functioning. A control group of similar ASD children who received no form of IBI, showed very little improvement; none were able to enter regular education classes. A follow-up study in 1993 showed that the treatment gains were maintained. Seventeen children in the experimental group showed an average IQ gain of more than 20 points. These results have never been replicated. YAP is the only controlled study undertaken with respect to IBI programs for ASD children; current ethical concerns preclude the use of a control group that would deny treatment at a critical time in their development to a group of young, vulnerable, disabled children. The use of physical aversives in the Lovass program to negatively reinforce dysfunctional behavior would also be highly controversial from an ethical point of view. Critics also point out that the Lovaas study, using a small sample of children, failed to randomly assign them to the control and experimental groups, and that the children placed in the experimental group may have had higher IQs from the outset. Without the use of random assignment, one cannot conclude that the groups were equal at the outset, and, therefore, it does not follow that any differences in the groups are due to the treatment variable. Lack of random assignment and replication are major flaws in the study, as well as the small sample size. (*Auton*, 2000, BCSC)

<sup>447</sup> *Supra* note 106 at para. 145. (*Auton*, 2002, BCCA)

<sup>448</sup> *Supra* note 383 at para. 145-147. (*Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2000] BCSC 1142.)

group of adults. As no reasonable accommodation of their needs for IBI treatment had been attempted, the point of undue hardship was not engaged. Therefore, failure to provide necessary medical treatment and adequate accommodation of the disabled ASD claimants constituted a denial of s. 15(1) of the *Charter* that was not a reasonable limitation under s. 1.

#### **3.2.2.1.4 The Case for FASDs Under S. 1**

The situation for FASDs is analogous to *Auton*, if not more compelling. The degree of curial intrusion into the budgetary allocations of the executive branch required to provide treatment for individuals with FASDs, would not likely be so extraordinary as to be subject to limitation under section 1, in light of similar gate keeping mechanisms as used in *Auton*. In addition, the Crown, at a minimum, has a duty to warn of the teratogenic affects of alcohol in order to reduce the incidence of FASDs requiring treatment. The dangers of *in utero* alcohol exposure have been known in the scientific literature since 1973.<sup>449</sup> The gravamen of the Crown's duty is escalated considering its

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<sup>449</sup> *Supra* note 262. (Jones, D.L., Smith, D.W., Ulleland, C.N. , Streissguth, A.P. "Pattern of malformation in offspring of chronic alcoholic mothers," *Lancet*, 2:1267-1271, 1973.; Jones, K. L., Smith, D.W "Recognition of the fetal alcohol syndrome in early infancy," *Lancet*, 2:999-1001, 1973; Jones, K.L., Smith, D.W., Streissguth, A.P. Myrianthopoulos, N.C. "Outcome in Offspring of Chronic Alcoholic Women," *Lancet*, 1:1076-1078, 1974.)

constitutional duty to enforce the alcohol ban, especially where prevalence of the condition is high, and where proper warnings, along with enforcement, could potentially dramatically reduce the occurrence of the syndrome. The Crown's duty also must be assessed in the context of the special, protected position of children in the law, including the ancient *parens patriae* jurisdiction, especially in view of the number of FASD children in care,<sup>450</sup> and international treaties, such as the *Convention on the Rights of the Child*, to which Canada is been a signatory.

Last, but not least, the Crown has a duty to accommodate the disabilities of those already affected by the teratogenic effects of alcohol through the funding of community-based treatment programs, modeled on best practices.<sup>451</sup> This duty is magnified as long as the Crown is involved in the sale, regulation, and licensing of alcohol. Currently, significant funds from the sale and taxation of alcoholic products are not directed to the prevention and treatment of FASD conditions.<sup>452</sup> Only recently have systematic prevention programs, short of universal warning labels, been introduced in Canada.<sup>453</sup>

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<sup>450</sup> *Supra* note 428. (Medicare in the Courts)

<sup>451</sup> *Supra* note 134. (Health Canada's *Best Practices*)

<sup>452</sup> *Supra* note 139. (SLGA)

<sup>453</sup> Food and Drug Administration, *Surgeon General's Advisory on Alcohol and Pregnancy*. (FDA: Washington, 1981) Drug Bull. 11.9-10. In 1981, in the landmark *Surgeon General's Advisory on Alcohol and Pregnancy*, women in the United States were advised to avoid all alcohol during pregnancy.

Similar conclusions regarding effectiveness of treatment and cost-benefit analyses formulated for ASDs would be applicable to FASDs. Parental affidavits concerning effectiveness of treatment methods should be equally convincing for FASDs as for ASDs. When dealing with human subjects, particularly children, rigorous scientific methods, including random assignment to experimental or control groups, where effective treatment may not be available, may be ethically inappropriate as all subjects are in need of effective, early intervention. Expert opinions as to best practices,<sup>454</sup> including Streissguth's longitudinal study identifying protective factors,<sup>455</sup> could supplement parental affidavits as evidence of effectiveness of treatment. In the case of FASDs, the Crown may contend that existing health, early intervention and special educational services do meet the standards of adequate accommodation to the point of undue hardship. However, services generally available do not meet the standard recommended by experts, no more than they meet the standards required for most ASDs, and, therefore, presumably would not meet the standard of accommodation of the disability to the point of undue hardship.

In conclusion, neither for ASDs nor FASDs, would the denial of funding for specialized treatment recommended by medical experts likely be considered a reasonable limitation of the right to equality under the *Charter*, based on the enumerated ground of disability. The case for FASDs is more compelling, given the state-causal factor, the constitutional breach of the treaty alcohol ban, and the breach of the duty to warn effectively. Only

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<sup>454</sup> *Supra* note 134. (*Best Practices*, Health Canada)

<sup>455</sup> *Supra* note 12. (Streissguth, Barr et al, 1996[unpublished] cited in *Fetal Alcohol Syndrome: A Guide for Families and Communities*)

effective treatment can reduce the marginalization and exclusion of ASDs and FASDs from mainstream society. Social inclusion, the essence of substantive equality under s. 15 of the *Charter*, is at stake for ASD and FASD affected individuals, absent the specialized treatment they require.

### 3.2.3.1 Section 24(1) Remedies

Section 24(1) of the *Charter* provides remedies for anyone whose rights have been unjustifiably infringed or denied:

**24(1)** *Anyone* whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. [Italics added]

There are myriads of discretionary options available as remedies under s. 24(1)—any the court considers “appropriate and just in the circumstances”. However, the need for remedy must be established on an individual appellant basis under s. 24, as the term “anyone” in the provision implies. Accordingly, in *Auton*, each claimant’s award of compensation was unique according to his/her circumstances. The remedies under s. 24(1) of the *Charter* ordered by the B.C.C.A. in *Auton* include:

- a declaration that the Crown discriminates against petitioners contrary to s. 15(1) in failing to accommodate their disadvantaged position through the provision of effective treatment for children with autism; and
- a direction that the Crown fund early intensive behavior therapy for children with autism;<sup>456</sup> as well as
- leave for parents to appeal for reimbursement of such funding (note: only symbolic damages had been awarded at the BCSC).<sup>457</sup>

Early Intensive Behavior Intervention therapy (IBI) was held to be a scientifically proven treatment for symptoms of autism. The fact that autism was incurable was not considered a reason to withhold such treatment, as other conditions, such as cancer and cerebral palsy, are not denied treatment because they may be incurable.<sup>458</sup>

Streissguth's four year longitudinal study of a cohort of 451 individuals ages 6-51 indicated early diagnosis and access to disability services among the critical protective factors, the presence of which attenuate the development of harmful secondary disabilities for FASDs.<sup>459</sup> Courts may consider Streissguth's study<sup>460</sup> as threshold evidence to justify the funding of accommodation, in line with the best

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<sup>456</sup> Note that the particular form of IBI, Lovass autism treatment (LAT), was not included in the Court's direction to the Crown.

<sup>457</sup> *Supra* note 106 at para. 94-100. (Auton, 2002, BCCA)

<sup>458</sup> *Ibid.* at para. 28. (Auton, 2002, BCCA).

<sup>459</sup> *Supra* note 12. (Streissguth, 1996)

<sup>460</sup> *Ibid.* (Streissguth, 1996)

practices recommended by medical experts in the field.<sup>461</sup> Only when a plan is implemented can further evidence of what constitutes parameters of effective treatment be established.

### 3.2.3.2 Section 33 Override

Section 15(1) of the *Charter* is subject to a potential section 33 legislative override.

Section 33 provides:

**33(1)** Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

However, the declaratory remedy used in *Auton*<sup>462</sup> and *Eldridge*,<sup>463</sup> and contemplated for use with FASD claimants, is unlikely to be subject to such s. 33 *Charter* override.

Public sympathy for people with obvious disabilities such as autism, deafness, and organic brain impairment militates politically against legislative limitation of their rights. However, readily apparent physical disabilities such as deafness are more likely to evoke public sympathy than less readily apparent mental disabilities, like pFAS,

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<sup>461</sup> *Supra* note 134. (Best Practices)

<sup>462</sup> *Supra* note 106, at para. 100. (*Auton*, 2002, BCCA).

<sup>463</sup> *Supra* note 345, at para. 95-96. (*Eldridge*)



F.A.E., or A.R.N.D. This is especially true if public awareness has not been raised about such less obvious conditions.

### 3.2.3.3 Section 32(1), *Charter* Jurisdiction and Deference to the Legislature

Further, pursuant to s. 32(1), the *Charter* applies to a range of federal and provincial legislative and governmental actions, giving the Court the jurisdiction it requires, in contrast to the situation in *L.E.K.*,<sup>464</sup> where a *Charter* application had not been made.

Section 32(1) reads:

- 32(1)** This charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including matters relating to the Yukon Territory and the Northwest Territories; and
  - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 32(1) initiates the debate whether or not an impugned discriminatory action involves a governmental actor, and, if it does, raises the further concern of judicial deference to the legislature in framing remedies. The delayed declaration used in *Eldridge* helped allay concern over interference with the legislature, as it left the specifics of how to rectify the infringement of s. 15(1) of the *Charter* in the

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<sup>464</sup> *Supra* note 279. (L.E.K.).

government's hands (the government being the creature of the legislature), and it allowed the government six months to bring its actions into line with the *Charter*. In this way, the Court was able to respect legislative autonomy, while at the same time, upholding *Charter* rights. *Eldridge* dealt with the concern whether or not a governmental actor was involved by way of a determination that the *Charter* may be infringed, not only by legislation *per se*, but also by the actions of a delegated decision-maker in applying such legislation. No piece of legislation prohibited the funding of SLI to the deaf. However, the medicare review committee declined to fund the service. In *Slaight Communications Inc. v. Davidson*,<sup>465</sup> the delegated decision-maker was an adjudicator under the *Canada Labour Code*,<sup>466</sup> who, in making his order, was not allowed to violate the employer's freedom of expression. *Eldridge* and *Slaight* exemplify the principle that, while in such cases the legislation remains valid, a remedy is ordered for the unconstitutional action taken thereunder.<sup>467</sup> As the *Charter* applies not only to legislation, but also to action taken under statutory authority,<sup>468</sup> the denial of access to medical services in *Eldridge* is action falling under *Charter* scrutiny for it involves a decision taken under such authority.<sup>469</sup> Similarly, the denial of necessary treatment for those with ASD or FASD is action taken under statutory authority, and falls under *Charter* scrutiny.

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<sup>465</sup> *Supra* note 432 at p. 1078. (Slaight)

<sup>466</sup> R.S.C. 1970, c. L-1.

<sup>467</sup> *Supra* note 345 at para. 20-22. (Eldridge)

<sup>468</sup> *Ibid.* at para. 24. (Eldridge)

<sup>469</sup> *Ibid.* at para. 46-51. (Eldridge)

In the respondent parents' cross-appeal, Madam Justice Saunders affirmed the continuing jurisdiction of the B.C.S.C.<sup>470</sup> This continued jurisdiction was for the purpose of entertaining an application for an order of mandamus against a public officer (for instance, the Minister of Health). Such order would be required were the court's declaration of breach of the children's equality rights under s. 15 of the *Charter* not honoured, nor its subsequent direction to the government to fund early IBI not effected. The order of mandamus would compel the Crown to execute or perform its legal duty, i.e., to fund early IBI for the child plaintiffs. The B.C.C.A. upheld the B.C.S.C.'s continued jurisdiction and limited supervisory role. Were the government not to implement a timely and effective program, the child applicants could readily renew their application for mandatory relief.<sup>471</sup> Without this continued jurisdiction, child applicants would have had to commence expensive litigation anew should the government not comply with the court's declaration. Similar retention of jurisdiction, in the s. 23 *Charter* context, after issuance of general and delayed declarations, was overturned by the Nova Scotia Appeal Court in *Doucet-Boudreau v. Nova Scotia*,<sup>472</sup> on the grounds that the Court was *functus officio*, and had lost jurisdiction to exercise such

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<sup>470</sup> *Supra* note 106 at para. 129. (*Auton*, 2002, BCCA)

<sup>471</sup> *Supra* note 106 at para. 100. (*Auton*, 2002, BCCA). Note: In *Clough (Litigation guardian of) v. Ontario*, [2003] O.J. No. 1074, a request for an injunction compelling the Ontario government to provide funding over and above what they had been providing for early intensive behavior therapy for autistic children, was denied, as it did not meet the compelling nature of the legal tests for such an injunction. *Clough* can be distinguished from *Auton*, as IBI funding had been provided in *Clough*.

<sup>472</sup> *Doucet-Boudreau v. Nova Scotia* [200] N.S. J. No. 191, (T.D.); rev'd [2001] N.S. J. No. 24 (C.A.); leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 459. Just before printing of this thesis, *Doucet-Boudreau v. Nova Scotia* (Minister of Education), [2003] S.C.C. 62, was released and restored the trial judge's order, holding that s. 24(1) of the *Charter* requires courts to issue effective remedies that guarantee full and meaningful protection of *Charter* rights, and in particular, that the enforcement of s. 23 rights may require novel remedies. The Court of Appeal erred in striking down the portion of the trial judge's order in which he retained jurisdiction to hear progress reports on the status of the province's efforts in providing school facilities by the required dates. At least in the context of s. 23 of the *Charter*, s. 24(1) remedies include the authority of the trial judge to retain supervisory jurisdiction.

a supervisory function. Ultimate resolution of the issue of continued jurisdiction remains moot until decided by the Supreme Court, leave to appeal having been granted in *Doucet-Boudreau v. Nova Scotia*.

### 3.2.3.4 Appeal of *Auton* to the Supreme Court and Implications for FASDs

*Auton* is also under appeal.<sup>473</sup> At issue during the appeal may be the adequacy of the evidentiary basis for effectiveness of treatment.<sup>474</sup> The Supreme Court of Canada may not be as dismissive of the importance of extensive cost-benefit analyses, whether in s. 1 jurisprudence, or even, perhaps, in s. 15(1). Either to establish a substantive right to fund specialized treatment, or in the alternative, to forestall the Crown from justifying limitation of that right to treatment, there must be evidence as to the effectiveness of the treatment, and its cost must be justified by the improvement which the treatment renders.

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<sup>473</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] S.C.C.A. No. 510. In addition, a number of related cases are under appeal in Ontario: *Clough (Litigation guardian of) v. Ontario*, [2003] O.J. No. 1074 (OntSupCtJus.), and *Lowrey (Litigation guardian of) v. Ontario*, [2003] O.J. No. 2009 (OntSupCtJus). In these cases the guardians of ASD children are requesting interim relief in the nature of continued IBI funding for their children. *Lowrey*, at para. 25, orders a mandatory injunction requiring the Ministry to continue to fund IBI therapy, which is to remain in effect until the earlier of the decisions of Kiteley J. in the Wynberg and Deskin cases that are about to start and that involve a large number of petitioners.

<sup>474</sup> *Supra* note 413. The evidence the BCCA relied on was the parent petitioners' affidavits of the effectiveness of the LAT on their children. The parents were neither experts nor disinterested parties to the determination of effectiveness of the treatment. (Greschner, G. and Lewis S., "Medicare in the Courts: *Auton* and Evidence-Based Decision-Making," publication pending in the Canadian Bar Review.)

The B.C. courts in *Auton* may have erred in construing the s. 15 right too much through the lens of access to medical services, where complex balancing is applied to determine comprehensiveness of coverage, potentially limiting the access of some groups under s.1 justification. The fuller duty to accommodate disabilities outlined in *Eldridge* may have been a hedge against such limitation. Nevertheless, accommodation would involve access to medical services to a considerable extent. The petitioners' application in *Auton* was directed at the Ministry of Health, at least initially,<sup>475</sup> and regardless of whether or not some of the services would be under the aegis of education or social services, the largest pool of funding available is through health.<sup>476</sup> Notwithstanding the hegemony of health services in the panoply of accommodation needs of disabled claimants, and the broadening of the definition of health *per se*,<sup>475</sup> something may be lost without fuller consideration of education and social services, such as the recognition of the multi-disciplinary nature of the treatment required.

A further critique the Court may consider in relation to the section 1 justification test applies to the Crown. Courts may require governments to be explicitly transparent about their complex balancing procedures and evidence-based decision making in determining which groups receive access to medical care coverage.<sup>477</sup> Only if such a standard were met would the Court consider justifying a s. 1 violation of a s.15 *Charter*

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<sup>475</sup> *Supra* note 383. (*Auton*, 2000)

<sup>476</sup> *Supra* note 428. (*Medicare in the Courts*)

<sup>477</sup> *Ibid.* (*Medicare in the Courts*)

right under the enumerated grounds of disability. Undoubtedly, such considerations, even if met, would be less applicable to a *Charter* claim for funding of treatment for FASDS, due to the Crown's complicity in contributing to the condition, and the special rights and protections surveyed that are associated with many of that class of claimants. Such special rights and protections include the Treaty Alcohol Ban, the ancient *parents patriae* jurisdiction, and relevant provisions in international treaties and conventions that promote the right to health care, including special health care for disabled children, as well as community-based treatment for child offenders.

#### 4. CONCLUSION

The focus of the research includes the legal and policy issues that present impediments to obtaining holistic, community-based treatment for offenders with FASDs. How to acquire such treatment through policy reform and legal redress is also considered. The discourse situates the history, ideology, case law, and statutory and constitutional provisions in the context of community-based treatment for such FASD offenders, many of whom are Aboriginal. Before contact, Aboriginal people had developed a restorative justice approach in community-based settings.<sup>478</sup> Colonizers disrupted the restorative approach, imposing their retributive system of justice, together with destructive assimilative influences such as the whiskey trade (an aspect of the fur trade) and residential schools.<sup>479</sup> Resultant intergenerational effects include FASDs among Aboriginal peoples. A restorative approach, consonant with an Aboriginal perspective of healing within the community, is more culturally appropriate than are carceral options for FASD offenders.<sup>480</sup> Considering the nature of this spectrum of disorders, characterized by involuntary organic brain impairment originating from alcohol

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<sup>478</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples. Special Report, Bridging the Cultural Divide: A Report on Aboriginal People in the Criminal Justice System, Part I, Aboriginal Concepts of Law and Justice—The Historical Realities* (Ottawa: Supply and Services Canada, 1996) at 1-25; and R. G. Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon, SK: Purich Publishers, 1998) at 32-34.

<sup>479</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples. Special Report, Bridging the Cultural Divide, Part 2, Current Realities: The Failure of the Justice System; The Root Causes of Over-Representation and Aboriginal Crime* (Ottawa: Supply and Services Canada, 1996), 39-53, at 47-52.

<sup>480</sup> *Supra* note 478.

exposure *in utero*, restorative justice seems a tenable position, and one now endorsed by the judiciary.

Significant analytical threads and nexus have been woven through areas of history, ideology, criminal law, health law, international law, and *Charter* and Treaty remedies, to create a diverse tapestry and framework through which to begin to restore community healing for offenders with FASDs. Such a synthesis is likely to be achieved through a combined approach of policy reform and legal redress. The methodology has been broad-based and inductive, more consistent with Indigenous research methodologies, than are deductive and syllogistic approaches.<sup>481</sup> A related concern with Indigenous methodologies and values involves the totality of the context, consistency with values of respect, and a focus on long range, big picture solutions,<sup>482</sup> rather than mere tinkering with the existing system in a fragmented manner.

In the mainstream (or dominant) criminal justice system, FASD offenders may be characterized as having a mental disorder. Some view such characterization as further stigmatization and victimization, preferring to rely instead on systemic factors as interpreted in *Gladue*.<sup>483</sup> As mentally disordered, however, FASD offenders potentially become subject to such threshold and specialized provisions of the *Criminal Code* as being declared unfit to stand trial or being excused from punishment on the basis of not

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<sup>481</sup> L. T. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books Ltd., 2001) p. 116-142.

<sup>482</sup> The Seven Generations' Rule. Aboriginal people traditionally consider the effects of any major decision on the next seven generations of their people.

<sup>483</sup> *Supra* note 258. (Gladue)



having criminal responsibility due to their mental condition. In addition, mental disorder or disability may function as a mitigating factor, along with systemic factors as in *Gladue*, in consideration of reduced sentences, especially probation and community-based sentences. An example is conditional sentences, with treatment options. One problem with all of these provisions, threshold or otherwise, is the dearth of therapeutic facilities in hospitals, clinics, or other community-settings. Because of this shortage the risk that untreated FASD offenders can pose to society acts as an aggravating factor, rendering them subject to carceral dispositions. Replacing shame and denial of mental disorders and disabilities with open acceptance, coupled with accommodation, tends to lessen the stigmatizing aspects of distinctions or differences, and brings affected individuals under the ambit of a potentially powerful *Charter* remedy. Regrettably, unjustified fears of stigmatization have been a barrier to development and implementation of effective treatment programs.

The crux of the inquiry has been on the legal and policy issues that are impediments to community-based treatment. Ideological and historical underpinnings have been analyzed, revealing that retribution and incarceration are not “natural” to society, but have evolved in response to state centralization of power, much as globalization seemingly is transforming our contemporary life along more coercive patterns. Customary law of some non-centralized societies seems akin to the system of law found in Aboriginal societies, in that both view wrongdoing as a personal or civil matter, to be resolved among and between individuals and families within the community.

Tragically, retributive, carceral consequences that dominate in our society impact disproportionately on disadvantaged groups, including enumerated groups based on race, class and disability. In our centralized, majoritarian nation, *Charter* rights, designed to protect such disadvantaged “discrete and insular” minorities, include equality rights. These rights ideally serve as a “sword” to advantage FASD offenders, who suffer social, political, legal, and historical or pre-existing disadvantage. Absent such *Charter* initiated accommodation appropriate to their disabilities, carceral dispositions may be their fate. *Charter* equality rights buttressed by various international law covenants may also serve as a “shield” against state justification of limitation of rights, particularly the right to be free from discrimination on the basis of a mental disability such as an FASD, and the right to have that disability treated and accommodated.

In addition, treaty beneficiaries of the alcohol ban can frame policy or contextualized *Charter* arguments for the provision of holistic, community-based services on that basis. Resultant treatment programs developed would undoubtedly advantage affected individuals, regardless of whether they were treaty beneficiaries of that particular provision, or whether they were Indian, Inuit, Metis or Non-Aboriginal. Treaty remedies, moreover, have the benefit of not relying solely on stigmatizing aspects of designation of disability or mental disorder, although risks do present in exposing treaty rights to potential judicial limitation if pursued on their own merits.

Essentially, the *Charter* is the remedy of choice for acquiring holistic, community-based treatment for FASDs, as not only does it replace shame, guilt, and stigmatization with open recognition of the disabilities faced by affected individuals, but it also attempts to accommodate the actual characteristics that comprise the disability, enabling affected individuals to participate more fully in society, rather than finding themselves excluded, institutionalized, incarcerated or otherwise marginalized. In addition, *Charter* analyses are contextual, interdisciplinary and holistic, incorporating into the analyses of infringement of *Charter* rights and their remedies as many relevant factors as possible, including: the treaties with the Indians, international law conventions, systemic factors of racism and marginalization, and the history of colonization, including the whiskey trade. A narrow, reductionist or positivist approach is eschewed, consonant with *Charter* equality jurisprudence, with the complexity of the problems surrounding FASDs, and with respect for diverse cultural ontologies involved. *Charter* arguments voiced to policy makers may be sufficient to lead to the implementation of services required for all individuals with FASDs. On the otherhand, actual litigation of *Charter* issues may be necessary to acquire the full complement of specialized, interdisciplinary, community-based treatment recommended.

Without some provision of holistic, community-based services, through *Charter* remedies, if necessary, any strategies adopted, including conditional sentences, a less-restrictive version of proposed hospital dispositions, or a resort to mental health courts, will be circumscribed. It is imperative that disabled members of our society, such as individuals with FASDs, receive the treatment they require. Otherwise, by default,

exposed to harsh penal settings, facing further deterioration of their mental states, and continued systemic discrimination, their lives may be an endless cycle of crime. For seven generations the colonizer's alcohol and its effects, combined with other destructive influences of colonization, have devastated many Aboriginal people. It is time to lay a foundation to ensure that all members of the next seven generations (including non-Aboriginals) will be healed, empowered, and transformed. The *Charter* is a vehicle which has the potential to assist with this goal, imbued as it is with contextualized processes and richly principled approaches, not the least of which is substantive equality premised on upholding the individual dignity of those who have suffered disadvantage.

## **APPENDIX**

The "Hospital Orders" Provisions of the Criminal Code, S.C. 1995, c. 22, s. 6 (not yet in force)

747. In this section and sections 747.1 to 747.8,

"assessment report" means a written report made pursuant to an assessment order made under section 672.11 by a psychiatrist who is entitled under the laws of a province to practise psychiatry or, where a psychiatrist is not practicably available, by a medical practitioner;

"hospital order" means an order by a court under section 747.1 that an offender be detained in a treatment facility;

...

"treatment facility" means any hospital or place for treatment of the mental disorder of an offender, or a place within a class of such places, designated by the Governor in Council, the lieutenant governor in council of the province in which the offender is sentenced or a person to whom authority has been delegated in writing for that purpose by the Governor in Council or that lieutenant governor in council.

747.1 (1) A court may order that an offender be detained in a treatment facility as the initial part of a sentence of imprisonment where it finds, at the time of sentencing, that the offender is suffering from a mental disorder in an acute phase and the court is satisfied, on the basis of an assessment report and any other evidence, that immediate treatment of the mental disorder is urgently required to prevent further significant deterioration of the mental or physical health of the offender, or to prevent the offender from causing serious bodily harm to any person.

(2) A hospital order shall be for a single period of treatment not exceeding sixty days, subject to any terms and conditions that the court considers appropriate.

747.2 (1) In a hospital order, the court shall specify that the offender be detained in a particular treatment facility recommended by the central administration of any penitentiary, prison or other institution to which the offender has been sentenced to imprisonment, unless the court is satisfied, on the evidence of a medical practitioner, that serious harm to the mental or physical health [page821] of the offender would result from travelling to that treatment facility

or from the delay occasioned in travelling there.

(2) Where the court does not follow a recommendation referred to in subsection (1), it shall order that the offender be detained in a treatment facility that is reasonably accessible to the place where the accused is detained when the hospital order is made or to the place where the court is located.

747.3 No hospital order may be made unless the offender and the person in charge of the treatment facility where the offender is to be detained consent to the order and its terms and conditions, but nothing in this section shall be construed as making unnecessary the obtaining of any authorization or consent to treatment from any other person that is or may be required otherwise than under this Act.

747.4 No hospital order may be made in respect of an offender

- (a) who is convicted of or is serving a sentence imposed in respect of a conviction for an offence for which a minimum punishment of imprisonment for life is prescribed by law;
- (b) who has been found to be a dangerous offender pursuant to section 753;
- (c) where the term of imprisonment to be served by the offender does not exceed sixty days;
- (d) where the term of imprisonment is imposed on the offender in default of payment of a fine or of a victim fine surcharge imposed under subsection 737(1); or
- (e) where the sentence of imprisonment imposed on the offender is ordered under paragraph 732(1)(a) to be served intermittently.

747.5 (1) An offender shall be sent or returned to a prison to serve the portion of the offender's sentence that remains unexpired where

- (a) the hospital order expires before the expiration of the sentence; or
- (b) the consent to the detention of the offender in the treatment facility pursuant to the hospital order is withdrawn either by the offender or by the person in charge of the treatment facility.

(2) Before the expiration of a hospital order in respect of an offender, the offender may be transferred from the treatment facility specified in the hospital order to another treatment facility where treatment of the offender's mental disorder is available, if the court authorizes the transfer in writing and the person in charge of the treatment facility consents.

747.6 Each day that an offender is detained under a hospital order shall be treated as a day of service of the term of imprisonment of the offender, and the offender shall be deemed, for all purposes, to be lawfully confined in a prison during that detention.

747.7 Notwithstanding section 12 of the Corrections and Conditional Release Act, an offender in respect of whom a hospital order is made and who is sentenced or committed to a penitentiary may, during the period for which that order is in force, be received in a penitentiary before the expiration of the time limited by law for an appeal and shall be detained in the treatment facility specified in the order during that period.

747.8 Where a court makes a hospital order in respect of an offender, the court shall cause a copy of the order and of the warrant of committal issued pursuant to subsection 747.1 to be sent to the central administration of the penitentiary, prison or other institution where the term of imprisonment imposed on the offender is to be served and to the treatment facility where the offender is to be detained for treatment.



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