"The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways"

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THE SENTENCING OF ABORIGINAL ACCUSED WITH FASD: A SEARCH FOR DIFFERENT PATHWAYS

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INTRODUCTION

The goal of this article is an exploration of the very significant problem of Aboriginal persons with Fetal Alcohol Spectrum Disorder (FASD) who wind up in the criminal justice system. The disorder has been defined as follows: “FASD is an umbrella term describing the range of effects that can occur in an individual whose mother drank alcohol during pregnancy. These effects may include physical, mental, behavioural and learning disabilities with lifelong implications.”1 Studies have found attention deficits, impulsivity, and hyperactivity in as much as 60–75% of FASD subjects.2 FASD can certainly have negative repercussions generally for its sufferers. It is not difficult to anticipate that FASD symptoms can translate into increased risk of criminal behaviour, a point that will be substantiated in the course of this paper. And indeed the first part of the paper will substantiate links between colonialism, FASD, and Aboriginal over-representation.

The question of what to do with FASD accused generally has been a difficult question for sentencing judges. Previous legal scholarship by Larry Chartrand and Kent Roach has noted that Canadian judges have been very inconsistent in deciding whether to use incarceration or

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non-custodial sentences like probation or conditional sentences for offenders with FASD. The article engages in an analysis of all reported cases where an Aboriginal person diagnosed with FASD has been sentenced before Canadian courts, many of which came after Kent Roach’s article. The cases reveal that Canadian judges are becoming more and more aware of the difficulties involved with applying standard sentencing rationales to persons with FASD, Aboriginal persons with FASD included. Deterrence is problematic in that many FASD persons are simply incapable of engaging in the risk and consequence analysis that deterrence theory presumes people will engage in. Retribution is problematic in that it assumes an ability to appreciate the moral content of certain behaviours that FASD persons again may not have. Incapacitation to protect the public may perhaps be the only sentencing rationale that can be invoked to justify incarcerating an FASD person that is relatively free of conceptual hang-ups. Even so, that does not necessarily relieve us of our need to explore more constructive avenues in the sentencing of FASD persons.

The paper will then argue that the sentencing of FASD Aboriginal persons needs to de-emphasize deterrence and retribution and move towards needs-based sentencing. The paper will concede that incapacitation may be the only consideration that may in individual cases demand incarceration for the sake of protecting the public when non-custodial options may not be sufficient to manage an accused’s future behaviour. Even so, the need for such an imperative can be minimized. There is evidence, albeit limited, that non-custodial sentences that provide improved guidance and structure in an FASD accused’s living situation, and include elements of Aboriginal culture and spirituality, can achieve remarkable successes in preventing future criminal recidivism.


It is to the credit of Canadian judges that they are becoming more supportive of needs-based sentencing instead of relying on deterrence or retribution to justify incarcerating FASD persons. There is also increasing recognition by judges that an Aboriginal accused having FASD is relevant to whether the accused should be given a non-custodial sentence pursuant to the Supreme Court of Canada’s (Supreme Court) judgment in *R v Gladue*.  

Unfortunately, Canadian governments have not provided the resources and services to match the increased judicial willingness to use alternatives to incarceration. There are significant gaps in available services. And even those services that do exist contend with significant issues of insufficient funding and staffing. The paper will thus argue that Canadian governments need to provide the resources and services so that the judges, who are now well aware and willing, have the options they need to facilitate needs-based sentencing. This argument may demand a significant commitment of resources in the short term, but there is a real imperative to pursue this avenue instead of routinely incarcerating FASD persons as a matter of justice reinvestment.

The paper will then argue that such a direction can be taken further, by investing in preventative initiatives. There are two distinct stages where preventative initiatives can intervene. One stage is before Aboriginal children are born in Aboriginal communities, with the initiatives designed to reduce maternal alcohol consumption. There is significant evidence that such initiatives can generate success. The other stage is to intervene after Aboriginal children are born with FASD, but before they get entangled with the criminal justice system. There is, unfortunately, a lack of evidence to validate the efficacy of interventions at this stage although that can probably be attributed to the profound gap in available services. The paper begins by setting out the linkages between colonialism, FASD, and Aboriginal over incarceration.

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THE PROBLEM

Aboriginal over-incarceration has been an ongoing problem for decades. A 2009 statistical analysis reveals that Aboriginal persons have consistently comprised 17–19% of all adult admissions to Canadian federal penitentiaries for the past decade, even though Aboriginal peoples represent only 3% of the Canadian population. The statistics are even more appalling when it comes to admission to provincial jails. In 2007–08, Aboriginal persons comprised 21% of all admissions to provincial jails in Newfoundland and British Columbia, 35% in Alberta, 69% in Manitoba, 76% in the Yukon, 81% in Saskatchewan, and 86% in the Northwest Territories.

A fact of Canadian history is that its Aboriginal peoples were subjected to harmful processes of colonization, which included military conquest, the acquisition of Aboriginal land bases through treaties, and policies of assimilation that attempted to force Aboriginal peoples to abandon their own cultures in favour of Euro-Canadian lifestyles by criminalizing cultural activities like the potlatch. An especially harmful part of the history of colonization was forcing Aboriginal children to attend residential schools. Many were physically and sexually abused,
and thus would themselves pass intergenerational trauma on to their descendants. Many were forced to abandon their languages and culture. Many left not having acquired the skills or education to gain meaningful employment, thus contributing, along with economic colonialism and ongoing workplace discrimination, to the impoverishment of Aboriginal communities. It is frequently argued that colonialism, and all the social devastation it has wrought on Aboriginal communities, is the key explanation for Aboriginal over-incarceration. Justice LeBel of the Supreme Court states: “The overwhelming message emanating from the various reports and commissions on Aboriginal peoples’ involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism.”

There is a basis to suggest that FASD is at once a reflection of the social damage inflicted by colonialism, and also itself a significant contributor to Aboriginal over-incarceration. Substance abuse is a serious problem in many Aboriginal communities. Statistical surveys have indicated that 74–77% of Aboriginal people feel that substance abuse is a problem in their communities. 33% feel that substance abuse is a problem in their homes, or a problem for a family member. 25% admit to personally having a drinking problem. Aboriginal peoples are also hospitalized for substance abuse problems at rates that far exceed


15 R v Ipeelee, 2012 SCC 13 at para 77, [2012] 1 SCR 433 [Ipeelee; citation omitted].

non-Aboriginal persons.\(^7\) 27% of Aboriginal adults admitted to use of cannabis, while the rates were 48% for Aboriginal youth aged 15 to 17, and 15% for Aboriginal youth aged 12 to 14.\(^8\)

There is the likelihood that alcohol abuse in Aboriginal communities also translates into FASD becoming a real problem in Aboriginal communities, which itself leads to increased likelihood of crime. A 2004 study that involved a sample of 418 patients diagnosed with Fetal Alcohol Spectrum Disorder found that 60% of the sample had come into contact with criminal justice systems as suspects or as charged accuseds.\(^9\) A recent Canadian study found that individuals with FASD were much more likely to be involved in the criminal justice system in comparison to those who do not have FASD. The percentages were almost 90% for FASD subjects compared to 40+% for non-FASD subjects when it came to having any youth court history, almost 60% compared to less than 5% when it came to 15 or more youth convictions, and 33% compared to approximately 10% for 15 or more adult convictions.\(^{20}\) There are presently no current and comprehensive empirical studies that set out the prevalence of FASD among Aboriginal peoples as compared to non-Aboriginal peoples across Canada. There are some studies that suggest an increased prevalence of FASD in Aboriginal communities, but they are dated, regional in their focus, and with small sample sizes.\(^{21}\) It should be noted though that for Caroline Tait, those studies are enough to substantiate a real link between FASD in Aboriginal communities and the social fallout left behind


\(^{8}\) Ibid at 167.

\(^{9}\) Streissguth et al, *supra* note 2 at 228.


The prevalence of FASD in Aboriginal communities is not something that has been definitely proven on an empirical level, but it has nonetheless been a distinctly noticeable phenomenon in the legal system such that judges have had to grapple with the difficulties involved. The ensuing discussions will reveal that judges have struggled a great deal with applying the standard Canadian sentencing framework to accused people with FASD, Aboriginal accused people with FASD in particular. An overview of that framework will now be provided.

**CANADIAN SENTENCING LAW**

The questions raised by this paper concern the difficulties involved with the application of Canadian sentencing provisions to FASD persons charged with criminal offences. Sections 718 and 718.1 of the *Criminal Code*, read:

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 objectives:

(a) to denounce unlawful conduct;
(b) to deter the offender and others 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 the victim or the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgement of the harms done to victims and the community.

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A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.\(^{23}\)

One can see in subsection 718(b) the utilitarian objective of deterrence. Deterrence as an objective can be subdivided into two categories. Specific deterrence focuses on the individual offender who has committed a crime. It is meant to communicate to the offender that the punishment is a direct consequence of crime, and therefore seeks to dissuade the offender against committing further crimes. General deterrence uses the punishment of an individual offender to send a message to society at large. The offender's punishment is used to dissuade other members of society against committing the same crime. One can also see in subsection 718(a) and section 718.1 reflections of "Just Deserts" theories, which propose that because an offender has caused harm by committing a crime, retributive pain must be inflicted upon the offender in proportion to the moral gravity of the crime. In subsection 718(c) there is a third justification specific to incarceration, the incapacitation of the offender. The public is protected against further harm from the offender by forcibly confining the offender. It is motivated by the same concern as deterrence. Deterrence, however, is premised on the idea that the offender and other members of society can be dissuaded against future misconduct. The incapacitation rationale in subsection 718(c) is conceptually different in that it is based on the assumption that the offender will not respond to the message of deterrence, at least not for the time being, and therefore physical separation becomes necessary.\(^{24}\)

\(^{23}\) RSC 1985, c C-46.

There are, however, other sentencing principles that have a special relevance to Aboriginal peoples, more particularly to Aboriginal persons with FASD. Subsection 718.2(e) of the Criminal Code reads in part:

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

\( (e) \) 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.\(^{25}\)

In *Gladue*, the Supreme Court stated that this provision was enacted in response to alarming evidence that Aboriginal peoples were incarcerated disproportionately to non-Aboriginal people in Canada.\(^{26}\) Subsection 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to reduce incarceration of Aboriginal offenders, and seek reasonable alternatives for Aboriginal offenders.\(^{27}\) Justice Cory and Justice Iacobucci add:

> It is often the case that neither Aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.\(^{28}\)

A judge must take into account the background and systemic factors that bring Aboriginal people into contact with the justice system, such as poverty, substance abuse, and “community fragmentation”, when determining the sentence.\(^{29}\) A judge must also consider the role of these

\(^{25}\) *Supra* note 23.

\(^{26}\) *Gladue*, supra note 5 at paras 58–65.

\(^{27}\) *Ibid* at para 64.

\(^{28}\) *Ibid* at para 74.

\(^{29}\) *Ibid* at para 67.
factors in bringing a particular Aboriginal accused before the court. A judge is obligated to obtain that information with the assistance of counsel, or through probation officers through a report, or through other means. A judge must also obtain information on community resources and treatment options that may provide alternatives to incarceration.

In a follow up decision to Gladue, Ipeelee, the Supreme Court affirmed that for sentencing courts to limit the applicability of Gladue to a small range of less serious offences amounts to “a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in Gladue.” Ipeelee reinforces that there is often justification for sentencing Aboriginal offenders differently under subsection 718.2(e), and that justification is tied to colonialism itself, of which residential schools were an integral part. Justice LeBel continues:

To the extent that Gladue will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances—circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e).

Section 718 provides deterrence, retribution, and rehabilitation all at once as objectives of sentencing. The legislative framework offers very little guidance on whether one objective should receive greater priority over another, and when. There is a list of aggravating factors that can increase punishment in subsection 718.2(a). Section 718.1 and subsection 718.2(c) call for proportionality, the sentencing of like cases in a like manner. Subsections 718.2(d) and 718.2(e) make a general call for restraint in the use of incarceration generally, not just with respect to Aboriginal accused. Even so, these provisions do not purport to offer

30 Ibid at para 69.
31 Ibid at para 84.
32 Ibid at paras 83–84.
33 Ipeelee, supra note 15 at para 63.
34 Ibid at para 79.
much more in the way of guidance for when sentencing objectives come into conflict with each other, particularly when rehabilitation may be at odds with other sentencing objectives that may demand harsher sentences.

It is not difficult to anticipate those conflicts becoming especially tense when they are applied to criminal cases involving FASD persons. Deterrence, retribution, and incapacitation may demand more severe sentences against an FASD person. The principles in Gladue and Ipeelee, as well as rehabilitation as a general goal of sentencing in section 718, may demand a more ameliorative approach with a search for non-carceral options by comparison. The next set of discussions explore in-depth the challenges and tensions involved with the sentencing of persons with FASD, utilizing an overview of reported cases where an Aboriginal FASD was sentenced for a criminal offence. The discussion begins with the difficulties that stem from applying the deterrence rationale to Aboriginal FASD accused.

DETERRENCE

Classical criminological theory holds that the effectiveness of deterrence rests on three essential components: the certainty that a punishment will be assessed as a consequence of committing a crime, the swiftness with which the punishment will be assessed afterwards, and the severity of the punishment itself. Some scholars argue that there is a profound lack of empirical evidence to support any claim that increasing the severity of sentences will enhance general deterrence. What little research that has been done to assess the effects of severity of sentence on general deterrence has not demonstrated a correlative relationship between the two. Other research has also not demonstrated a strong link between

incarceration, representing a more severe punishment than non-carceral alternatives, and specific deterrence of offenders who served time.  

This is not to say that deterrence is entirely a hollow shell. Some studies suggest that it is the certainty and swiftness that something will be meted out to a criminal as a consequence of committing an act, rather than the particular severity of that something (e.g., length of the prison term), that has any real deterrent value.  

However, there is one particular context (among others) where deterrence is particularly ineffective regardless of certainty, swiftness, and severity. Criminal sanctions lack deterrent effect on those who act out impulsively or in a moment of enflamed emotions, or on those who


assess that they can commit crimes without getting caught.\textsuperscript{41} It is well-known in medical fields that a symptom of FASD is an increase in impulsive behaviour.\textsuperscript{42} And indeed studies have concluded that FASD persons have high rates of recidivism precisely because of the impulsivity involved.\textsuperscript{43}

Prison itself fails to deliver an effective deterrent message, both to the general inmate population and to FASD persons specifically. David Cayley argues that prison life involves harsh conditions that harden inmates. Placing a convict among other convicts creates conditions whereby a convict has to harden himself, and be willing to commit violent acts without hesitation, in order to survive and convince the other convicts to leave him alone. Prisons have countercultures where the conventional rules of society are turned upside down. Defiance, lack of respect for authority, and violent behaviour become the norms. Once a person has done enough time, the painful effects of being separated from society wear off. Convicts frequently become acculturated and habituated into prison life such that they are unable to adapt to life outside of prison

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and even prefer to remain behind bars. This has been verified to some degree by empirical studies that have demonstrated that imprisonment increases the probability of offender recidivism in comparison to offenders given a suspended sentence, even for those offenders who previously had a high stake in conforming to societal norms and avoiding arrest.

The worsening effect has also been observed among Aboriginal inmates, at least in an anecdotal sense, if not in an empirical sense. Rupert Ross describes one of his personal conversations this way:

In that regard, I remember an Aboriginal woman at a justice conference complaining about the use of jail. She felt that jail was a place where offenders only learned to be more defiant of others, more self-centred, short-sighted and untrusting. Further, because they had so many daily decisions taken away from them, she felt that their capacity for responsible decision making was actually diminished, not strengthened.

Judge Heino Lilles stated:

Jail has shown not to be effective for First Nation people. Every family in Kwanlin Dun [the Yukon] has members who have gone to jail. It carries no stigma and therefore is not a deterrent. Nor is it a "safe place" which encourages disclosure, openness, or healing. The power or authority structures within the jail operate against "openness." An elder noted: "Jail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hurts them more and then they come out

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really bitter. In jail, all they learn is ‘hurt and bitter’.”

The concerns may be particularly acute when it comes to FASD persons. Diane Fast and Julianne Conry write:

Incarceration has the potential for victimization (physically, sexually, and emotionally). Although there is structure and routine in jail, people with FASDs may have trouble “getting” the rules and their actions may be misinterpreted by staff who do not understand about FASDs. People with FASDs may then have lengthy periods in solitary confinement due to their behavior being seen as willfully noncompliant. Individuals with FASDs can be negatively influenced by their peers or become scapegoats. People with FASDs who require incarceration for the protection of the community will need special consideration to prevent victimization and misunderstanding.

An additional problem is that there is no system in place in either the provincial jail or federal correctional systems for intake screening for FASD when inmates arrive in prison. Jennifer Chapman argues that while there are rehabilitative programs and services available generally to federal inmate populations, there are not any programs and services that can adequately meet the specific needs of FASD inmates. The generally available services are comprised of cognitive-based programming that aims to change thinking patterns, and thus are unable to reach FASD persons who are brain damaged. FASD programming needs to focus on the development of functional living skills, use repetitive learning, shorter lessons, less information, and a slower pace, as well as smaller groups, for

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more effective learning.\textsuperscript{51} The net result is that FASD inmates serve their terms and are released without having access to programming or services that might address their particular needs.

It is to their credit that the judiciary is starting to recognize the futility of applying deterrence to FASD cases, as an overview of cases involving Aboriginal persons with FASD will show. A possible exception to the trend is \textit{R v Campbell}, where the accused was charged with multiple offences, including two counts of driving while under a driving prohibition.\textsuperscript{52} Judge Kelly was convinced that the accused had shown a level of remorse, indicated at least in part by spending a year without getting into trouble since having been initially charged.\textsuperscript{53} It was assumed that the accused had FASD, as the mother drank while pregnant with him.\textsuperscript{54} The accused had outstanding addiction issues, which little had been done about,\textsuperscript{55} and exhibited poor impulse control.\textsuperscript{56} Judge Kelly decided that a short but sharp jail term was necessary in an effort to wake up the accused.\textsuperscript{57} The sentence was fines totalling $1700, 1 day after credit for 30 days served in relation to breach of recognizance charges, followed by a suspended sentence of 24 months in relation to property offences.\textsuperscript{58}

Then there are cases that recognize the futility of specific deterrence as applied to FASD accused, but suggest that general deterrence may still need to be taken into account during sentencing. For example, in \textit{R v Soosay}, the accused had been a permanent ward of the state during his


\textsuperscript{52} \textit{R v Campbell}, 2011 MBPC 59 at para 3, 271 Man R (2d) 16.

\textsuperscript{53} \textit{Ibid} at para 45.

\textsuperscript{54} \textit{Ibid} at para 43.

\textsuperscript{55} \textit{Ibid} at para 22.

\textsuperscript{56} \textit{Ibid} at para 44.

\textsuperscript{57} \textit{Ibid} at para 51.

\textsuperscript{58} \textit{Ibid} at para 52.
entire childhood, and had been engaged in lifelong alcohol abuse. FASD had left him with poor risk assessment and impulse control. The charges were two counts of robbery and one count of break and enter. Judge Anderson noted that specific deterrence would be lost on the accused, but emphasized that the sentence must still account on some level for general deterrence. Judge Anderson was, however, still willing to use a conditional sentence for other reasons that will be described later on. It is quite interesting to note that Judge Anderson was able to make the specific links between FASD, impulsivity, and the decreasing efficacy of specific deterrence in such a context.

In *R v Qitsualik & Michael* the co-accused were charged with armed robbery of a cab. One of the co-accused, Brent Michael, was diagnosed with FASD. Justice Charbonneau recognized that it was unfair to Michael to have to deal with the challenge of FASD in his life. Justice Charbonneau also noted that Michael was remorseful and wanting to stop his substance abuse, and that he would have access to some resources while in jail. However, Justice Charbonneau nonetheless emphasized that general deterrence, denunciation, and parity were to remain the prime considerations in sentencing. For example: “And I said, also, the reality is that regardless of the root causes of his condition, which he is not responsible for, he will be held responsible for actions that he commits that cause harm to others in the community that he lives in.” And again:

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59 *R v Soosay*, 2012 ABPC 220, 546 AR 155 [*Soosay*].
60 Ibid at paras 1–3.
61 Ibid at para 6.
62 Ibid at para 25.
63 Ibid at para 39.
65 Ibid at 6.
66 Ibid at 7.
67 Ibid at 9.
68 Ibid at 25.
69 Ibid at 17.
So there is no doubt both these young men, despite some of the good fortune they have had to have people who cared for them and looked after them properly, have faced and continue to face some challenges in their lives. I have taken that, and their aboriginal descent, into consideration. But even approaching their sentencing taking into account all those circumstances, I have difficulty finding how, in this case, it can have a significant impact on my decision beyond what I have already mentioned.\(^70\)

Michael was sentenced to 53 months, followed by 2 years’ probation, not so much to punish, but to provide some structure in Michael’s life, according to Justice Charbonneau.\(^71\) Justice Charbonneau’s reasoning seems, admittedly, rather confusing and muddled. It is as though she deems that only a significant term of incarceration is warranted, but is unsure of the basis on which to justify it. Is it general deterrence? Is it a more downplayed or measured notion of specific deterrence? Or is it the hope for a prison setting that can offer greater rehabilitative prospects? Nonetheless, what is present in Justice Charbonneau’s comments is the idea that there is an issue of fairness involved with an unrelenting application of specific deterrence to a person left disadvantaged by FASD, and that if an FASD person is going to be incarcerated, it will need a different justification.

In \textit{R v Harper}, the accused was charged with the sexual touching of a minor.\(^72\) The accused’s record included over 50 previous charges, mostly breaches of court orders, but also including two indecent acts and one prior sexual assault.\(^73\) Judge Lilles noted that FASD had left the accused intellectually deficient, prone to impulsivity, and unable to use past experiences in a flexible way to guide conduct in situations he had not previously encountered.\(^74\) Judge Lilles noted that specific deterrence for FASD persons decreases in correlation to the severity of cognitive defects

\(^70\) \textit{Ibid} at 13.

\(^71\) \textit{Ibid} at 27–28.


\(^73\) \textit{Ibid} at para 11.

\(^74\) \textit{Ibid} at para 17.
stemming from FASD. Judge Lilles sentenced the accused to time served (six months), and two years’ probation for reasons that this paper will describe later on.

In *R v Quash*, the accused was charged with sexual assault, failure to stop for a peace officer, and breach of recognizance. His record included a previous assault and prior sexual assault. He had been apprehended into the child welfare system at an early age due to his parents’ drinking. FASD left the accused with listening and memory problems, and Quash was unable to live independently. The accused was also a high risk to offend on the STATIC-99 scale. Judge Cozens of the Yukon Territorial Court recognized that the greater the cognitive difficulties from FASD, the less the role for specific deterrence. Judge Cozens went even further, and recognized that there is a certain unfairness involved with applying the general deterrence rationale to a case involving an FASD accused, as follows:

I also agree that the application of the principles of denunciation and general deterrence, although being the sentencing principles which almost invariably lead the way in sentencing offenders who have committed the type of sexual assault such as occurred in the present case, must be carefully applied in sentencing an FASD offender. There is some truth to the notion that an unfairness occurs when an individual who is the “innocent victim of the FASD visited upon him by maternal alcohol consumption during pregnancy,” and who then commits crimes, even abhorrent ones which are, to some extent, attributable to the cognitive difficulties accompanying the FASD, is to be held up as a public example in order to deter others. Such an offender is not only held up for his or her

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75 *Ibid* at paras 43–44.
76 *Ibid* at para 59.
77 *R v Quash*, 2009 YKTC 54 at para 1, [2009] YJ No 72 (QL) [*Quash*].
78 *Ibid* at paras 7–11.
82 *Ibid* at para 70.
own failings, but also as an example of the many others, be it individuals, communities and/or governments, who have also failed.\textsuperscript{33}

It must be noted at this point that Quash was sentenced to a prison term, but for reasons unrelated to deterrence, which will be described later on.

Judges are now recognizing the latent difficulties with applying deterrence to FASD accused. Judgments like Soosay, Quash, and Harper show a sophisticated judicial understanding of the linkages between FASD, impulsivity, lack of control, and the latent problems that they present for specific deterrence. It is perhaps an example of where the judges have caught up with the understanding that criminologists and medical professionals have long had on the issue. The Quash judgment offers up a fresh challenge to relying on general deterrence by raising questions of whether jailing an FASD accused to demonstrate a lesson to the public at large is even fair to the FASD accused to begin with. All of the judgments also seem to tilt in favour of the opinion that if courts are going to incarcerate accused with FASD, a better justification is needed. As we will see, judges are now beginning to recognize that the Just Deserts rationale is laden with problems as well.

\textbf{RETRIBUTION}

The primary emphasis for retributive sentencing is on the seriousness of the crime, in particular the harm caused by the offender. There is a well-known theoretical tension between deterrent and retributive justifications of punishment. Deterrence has a utilitarian emphasis. Punishment should be enough to deter the offender, or other members of society, from repeating the crime. Punishment should not exceed what is necessary to achieve the social net gain of decreasing crime. Retribution as an end in itself has the potential to inflict more punishment than is necessary, or less than what is required. Just Deserts theories emphasize the moral agency and rationality of the offender. Since the offender chose to engage in harmful behaviour, retribution must be inflicted upon the offender in proportion to the moral gravity of the crime. Therefore,

\textsuperscript{33} \textit{Ibid} at para 71 [citation omitted].
utilitarian theories wrongly use the offender as a means to a social end and end up denying the autonomy and rationality of the offender as a moral agent.⁸⁴

I do not myself intend to engage with this debate fully. However, the debate itself offers a certain insight. That insight is that pure retributive punishment as an end unto itself, which focuses solely on the degree of harm or seriousness stemming from the crime itself, is certainly at a disconnect from other important considerations that surely need to form part of the sentencing equation. Deterrence theory aside, retributive punishment in its purest form also will not consider background circumstances that may explain (but not altogether excuse) the accused's behaviour, or the accused's rehabilitative prospects.⁸⁵ Kristel Beyens and Veerle Scheirs argue that sentencing courts need to move away from a classical emphasis on retribution and punishment and make greater allowance for social reports that would set out factors like the accused's social background, history, and rehabilitative prospects. Doing so would mean a move away from the classical punitive culture that exists among judges and towards a more managerial culture that emphasizes rehabilitation and community safety.⁸⁶

Richard Lippke provides another interesting challenge to standard retributive sentencing. His idea is that retributive punishment should be measured not just by the harms caused by the accused's crime, but also the harms caused to the accused by the criminal sanction. A reasonable application of this theory would, in his view, result in an aggregate

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reduction of sentences given out for many crimes. An application of Lippke’s theory may have special relevance to Aboriginal persons with FASD. The studies by Burd and Chapman show that at the very least, penal institutions do not have the services that can adequately meet the needs of inmates with FASD. Fast and Conroy’s study argues that inmates with FASD may be especially vulnerable to getting exploited and victimized within prison.

I would take matters even further. There are definitely linkages to be drawn between the effects of colonialism on Aboriginal peoples, FASD amongst Aboriginal peoples, and Aboriginal over-incarceration. The Canadian state has ongoing responsibility for the continuing social fallout of colonialism, which manifests in Aboriginal over-incarceration, and Aboriginal accused with FASD getting caught up in the criminal justice system. J. Andres Hannah-Suarez argues that given the obvious social disparities between Aboriginal and non-Aboriginal peoples, punishment of Aboriginal peoples basically turns into punishing them for their lack of social luck. Retributive rationales for punishment thus lack rational or ethical justification. I would go a little further than Lippke in the sense that retributive sentencing needs to be attenuated not just by the prospective harm stemming from the criminal sanction that an Aboriginal accused with FASD will face, but also by the fact that the Aboriginal accused with FASD has likely already been harmed by Canadian colonialism before ever getting charged, and has diminished moral blameworthiness as a result.

The application of the retributive rationale in Canadian sentencing cases is also driven to a significant degree by the absence or presence of aggravating and mitigating factors. Mitigating factors are facts that, if proven or otherwise accepted by a sentencing court, will render an offence less serious or blameworthy, and thus merit a less severe sentence. Examples include an apology to the victim, cooperating with investigative


authorities, and the accused making interim progress with behaviour prior to sentencing. Aggravating factors are facts that, if proven or otherwise accepted by a sentencing court, will render an offence more serious and thus justify a more severe sentence. Examples include committing theft in breach of an employer’s trust, committing the offence while under a prior court order prohibiting criminal conduct, having a past record of related offences, harming an especially vulnerable victim, and having caused a greater degree of bodily harm. The Supreme Court recognizes that the systemic factors they referred to in *Gladue* are mitigating factors that may explain why an Aboriginal offender committed an offence, and may merit either a community-based sentence or a reduction in the term of incarceration.

The retribution rationale certainly has the potential to warrant more severe sentences against FASD accused by emphasizing the harm caused to victims. It is nonetheless again to the credit of the judiciary that recent decisions show an increased awareness of the difficulties of applying the retributive rationale to such cases, although the results can vary on how far that awareness can translate into a reduced sentence.

*R v Charlie* is a complex case that illustrates an inherent tension involved with applying the retributive rationale to FASD persons. The accused was charged with armed robbery, failure to attend, and breach of recognizance. His parents had been abused in residential school. Judge Heino Lilles recognized that there was a direct link between the social factors in the case, and the social factors described in *Gladue*, as follows:

This history of Franklin Charlie’s family is important because it identifies a direct link between the colonization of the Yukon and the government’s residential school policies to the removal of children from their families.

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into abusive environments for extended periods of time, the absence of parenting skills as a result of the residential school functioning as an inadequate parent, and their subsequent reliance on alcohol when returned to the communities. Franklin Charlie’s FASD is the direct result of these policies of the Federal Government, as implemented by the local Federal Indian Agent. Ironically, it is the Federal Government who, today, is prosecuting Mr. Franklin Charlie for the offences he has committed as a victim of maternal alcohol consumption.94

His Honour was also of the view that the accused’s blameworthiness was diminished because, due to no fault of his own, FASD had left him the intellectual equivalent of a 10- to 12-year old.95 However, this recognition of diminished blameworthiness could only go so far in its effect on the actual sentence. An important consideration was the harm caused to the victim. The victim was a 50-year-old man who was on the receiving end of a home invasion and a beating that, while it had not resulted in serious physical injuries, had left him emotionally and psychologically damaged, such that he had trouble sleeping. He also lost his car after the accused stole in and ran it off the highway, resulting in enough damage that the victim could not afford the repairs and had to sell it.96 Proportionality was thus the key consideration in sentencing.97 Judge Lilles handed out a sentence of two years and nine months.98

In R v Ward, one of the co-accused was charged with home invasion and robbery.99 Ward had been accepted by the Bosco Homes “Open Arms—A Man’s Journey” program in the Fort Saskatchewan Correctional Center Psychology Department for treatment of FASD, although he had not been formally diagnosed with FASD.100 Judge Rosborough noted the

94 Ibid at para 9.
95 Ibid at para 28.
96 Ibid at para 3.
97 Ibid at para 38.
98 Ibid at para 41.
100 Ibid at para 15.
presence of certain aggravating factors such as the physical and emotional harm caused to the home occupants, and that the crime was committed in the presence of children. His Honour however also noted the presence of mitigating factors such as the social factors described in Gladue, that the accused had the support of his community, and that the accused took steps on his own initiative to begin rehabilitation. Judge Rosborough decided on the balance that a sentence of 23 months after credit for pre-trial custody was warranted.

What we see in these cases is a kind of competition between retribution and other relevant sentencing factors. The judges in these cases recognized the concerns expressed by myself and Hannah-Suarez, and recognized that they mean diminished moral blameworthiness for Aboriginal accused suffering from FASD. However, they were not willing to take that recognition to the point of giving the accused a non-carceral sentence. Perhaps these cases reflect an application of Lippke’s call for a measured use of retribution. Even if the judges still felt constrained by retributive principles to use terms of incarceration, it was still attenuated by a consideration of the harm to the accused on account of colonialism and diminished personal blameworthiness. And indeed, Judge Lilles in Charlie specifically noted that: “Mr. Charlie’s personal circumstances require the Court to reconsider the appropriateness of the sentencing precedents filed by the Crown.”

In R v Blanchard, the accused was charged with assault causing bodily harm. His father died of a heart attack when he was 8 years old. He had been in a tense family situation, with a lot of arguing with his mother and grandparents. He was aggressive towards other kids in school, and had trouble maintaining workplace relationships. Judge Cozens stated that

101 Ibid at paras 32, 37.
102 Ibid at para 32.
103 Ibid at para 43.
104 Charlie, supra note 91 at para 5.
106 Ibid at paras 12–14.
because of his FASD, the accused had lower moral culpability relative to other offenders. There had been concern that the accused had previously been through the Community Wellness Court in the Yukon. However, his Honour also noted that the accused at the time of sentencing had the opportunity to attend an alcohol abuse program designed specifically for FASD individuals, and thus was willing to sentence the accused to nine months’ probation.

In Soosay, the accused was charged with a series of armed robberies and a break and enter. The Crown sought 33 months’ incarceration, as it was proportionate to sentences given for armed robberies in the past. However, Judge Anderson noted that the applicability of Gladue and Ipeelee could mean less relative emphasis being given to proportionality and retribution in this manner:

I cannot agree with this approach or the sentence suggested by the Crown. The approach is understandable and the sentence is consistent with sentences that have been imposed in the past but the suggested approach is the one specifically condemned in Ipeelee as part of the Supreme Court's attempt to reverse the overpopulation of aboriginal offenders in our prisons and this approach would result in an artificial sentence that would be grossly disproportionate to the gravity of these crimes and the offender’s moral culpability. Leaving the Gladue factors aside, these facts do not fit well into the categories suggested by the Crown and the suggested global sentence ignores the accused’s personal circumstances, particularly his cognitive deficiencies and the challenges presented by a pre-natal brain injury, all of which are clearly part and parcel of the offender’s involvement in these offences.

107 Ibid at para 19.
108 Ibid at para 11.
109 Ibid at para 12.
110 Ibid at para 32.
111 Soosay, supra note 59 at para 28–29.
112 Ibid.
The imperative to diminish the applicability of retribution and proportionality on account of Gladue and Ipeelee was especially acute in the accused’s case, as FASD also resulted in a diminishment of moral blameworthiness. Note the very similar reason provided by Judge Lilles in Harper:

> Where FASD is diagnosed, failing to take it into account during sentencing works an injustice to both the offender and society at large. The offender is failed because he is being held to a standard that he cannot possibly attain, given his impairments. As noted by Judge Barry Stuart, FASD takes away someone’s “ability ... to act within the norms expected by society”, and it is manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a “normal” offender cannot serve the same ends when imposed on an offender with FASD; it will not contribute to respect for the law, and neither will it contribute to the maintenance of a just, peaceful and safe society.

The calculus of sentencing the average offender simply does not apply to an offender with FASD. Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD.113

The primary emphasis in Soosay was to be on rehabilitation.114 The accused received a 4-month conditional sentence followed by 12 months’ probation.115

> It could be suggested that the Blanchard and Soosay decisions reflect not just an appreciation of the diminished moral blameworthiness of Aboriginal accused with FASD, but also an acceptance of Beyen and Scheir’s ideas. Instead of staying wedded to traditional concepts of retribution to hand out carceral sentences, they were willing to move

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113 Harper, supra note 72 at paras 38–39 [citation omitted].
114 Soosay, supra note 59 at para 42.
115 Ibid at paras 48–50.
towards a more managerial-based model of community safety. It is interesting to note that each decision moves in the same direction, but by slightly different avenues. Judge Cozen noted specific programming that would be available for the accused as a justification for de-emphasizing retribution. Judge Anderson by comparison did not point to any specific programs that would be available to the accused during probation, but emphasized instead that prison would only be counterproductive for the accused. Another sentencing goal that has a lot of relevance is that of protecting the public.

**PUBLIC SAFETY**

There are at least two cases where the court strongly emphasizes the need to protect society from an FASD person, notwithstanding the accused’s misfortunes on account of FASD and Aboriginal ancestry. In *R v Jessie George*, the accused got into a fight that led to manslaughter.\(^{116}\) The accused had a very extensive youth record leading up to the altercation.\(^{117}\) He also had very tragic background circumstances:

Information contained in the *Gladue* report sets out the offender’s background. Mr. George’s mother was raised in residential school and foster homes and had a very difficult time. She became addicted to alcohol at a young age. Her addiction while pregnant with Mr. George affected his brain development. He has been diagnosed with alcohol related neurodevelopmental disorder which is within the class of fetal alcohol spectrum disorders. Mr. George’s father is deceased. His mother was incapable of nurturing him and often rejected him, leaving his care to others. She entered into a second marriage which soon degenerated into alcoholism and violence. The children were the victims of both. The offender’s mother and his step-father separated when Mr. George was 5 years old and he bounced between both homes, always subject to the neglect and rejection born of alcoholism and drug dependency. From 8 or 9, Mr. George’s care was supplemented by foster care, relatives and sometimes his step-father.


\(^{117}\) *Ibid* at paras 12–14.
broke down when he was in his teens. He was cast out on the streets when his step-father moved and didn't tell Mr. George where he lived. The offender's childhood was chaotic.

The offender's attempts to return to school were defeated by his association with a gang that emphasized excessive drinking and drug use. He fathered a child when he was in his teens. His daughter, with whom he has no contact, is now 5 years old. Mr. George would like to attempt a fathering relationship with that child some day.

At 18, the offender moved back with his mother. He began selling and consuming street drugs as well as drinking heavily to escape his sadness. He attempted to begin again by spending 6 months in Woodstock, Ontario, but was drawn back into a destructive lifestyle when he returned to Thunder Bay. Life revolved around “partying, getting drunk and going to jail.”

Justice Pierce of the Ontario Superior Court of Justice recognized that the accused had no control over his childhood circumstances or having FASD. However, the accused's FASD also resulted in a lack of control over impulsive and aggressive behaviour, which in turn raised concerns for public safety. It is interesting to note that while arguments based on unfortunate life circumstances and lack of behavioural controls may provide an effective counterargument to justifications based on deterrence and retribution, they run into a quite different obstacle when the incapacitation rationale is invoked. Those very same life circumstances, life situations, behavioural problems, and such that may paint a more sympathetic picture of the accused can at the same time highlight risks of future danger and invite the sentencing court to invoke the incapacitation rationale. The accused was sentenced to seven years, with three years' pre-trial credit.

The accused in *R v Obed, John Julius* was charged with sexual assault. He had been violently abused by his father and sexually abused

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118 *Ibid* at paras 7–9.
119 *Ibid* at paras 50–57.
120 *Ibid* at para 58.
121 *R v Obed, John Julius*, 2006 NLTD 155 at para 2, 260 Nfld & PEIR 286 [*Obed*].
by a cousin. The pre-sentence report concluded that the accused was a high risk to reoffend so as to not be suitable for probation or a conditional sentence.\textsuperscript{122} He also had a lengthy record that included seven previous sexual assaults, five previous assaults, and numerous breaches of court orders and property offences.\textsuperscript{123} Justice Fowler of the Supreme Court of Newfoundland & Labrador concluded that the accused lacked any checks against impulsive behaviour due to FASD, and this meant that any court orders or conditions would be unable to exercise control over the accused’s behaviour.\textsuperscript{124} He thus emphasized the need to protect the public, as follows:

I would add to that as well, at this point, that when the courts are considering the sentencing of aboriginal offenders and the court is asked to consider the community, the court must also consider the whole community and the vulnerability of all persons in these isolated communities as well. Aboriginal persons, especially aboriginal women have the same right to safety in their homes and communities as do women in any other part of this province or indeed in any other part of this country. The same protections and the same considerations apply as they would to any person in this country. So, in striving to balance and to find the appropriate sentence for an aboriginal offender, one must not lose sight of the fact that all persons within aboriginal communities especially in small isolated communities are as vulnerable if not more vulnerable than any where else in this country and require equal and meaningful protection from the courts.\textsuperscript{125}

The primary determinants for sentence, notwithstanding Aboriginal ancestry and FASD, were the need to denounce violence against women and the need to separate especially dangerous offenders from society.\textsuperscript{126} Justice Fowler imposed a sentence of 10 years, reduced to 8 years and 8

\begin{itemize}
\item \textsuperscript{122} \textit{Ibid} at para 5.
\item \textsuperscript{123} \textit{Ibid} at para 6.
\item \textsuperscript{124} \textit{Ibid} at para 58.
\item \textsuperscript{125} \textit{Ibid} at para 16.
\item \textsuperscript{126} \textit{Ibid} at para 63.
\end{itemize}
months after credit for time served.\textsuperscript{127} What is particularly telling is this quotation from Justice Fowler after pronouncing the sentence:

> Mr. Obed before you go. I don’t know what more to say to you. I feel almost helpless in one way by the inability of the court in being able to do something that would offer you some form of rehabilitation. This is the first case I’ve ever had where I felt that rehabilitation was not a realistic factor. I hope that somehow the Federal or Provincial Authorities will take a hard look at this FASD phenomenon. I hope, as well, that you become the person that they rally around and work with and see if somehow, some of this damage. . . . I just hope in your case, because this is one of those cases that to me falls somewhere between total responsibility and diminished responsibility and I don’t know really. . . . I’m not a psychiatrist, nor am I a psychologist, or a medical doctor and I only have heard the expert evidence. But I refuse to be without hope and in your case I hope that something comes along that can focus on you and help you with this. Maybe you’ll become the expert on FASD in society. You’re not that old that further research can’t have profound effect on you and I would hope that you do benefit from such future research. In any event, in the meantime, I have to protect society from your violent behaviour. I have to protect people from you, even from behaviour that you don’t know you’re going to commit yet.\textsuperscript{128}

One can detect definite irony in this quotation. Justice Fowler all but knows that incarceration will do nothing for the accused, and that the accused’s problems are not his fault. And yet Justice Fowler felt there was no other choice but to call upon incapacitation to justify a lengthy prison term. Justice Fowler was also well aware that the incapacitation would only be temporary, and so he expressed at once a defeatist resignation that the accused was likely to offend again after being released, but also a fanciful hope that it will not turn out that way.

The accused in \textit{R v Keewatin} was charged with a convenience store robbery.\textsuperscript{129} He had a lengthy record for violent and property offences.\textsuperscript{130}

\textsuperscript{127} \textit{Ibid} at paras 71–74.

\textsuperscript{128} \textit{Ibid} at para 78.

\textsuperscript{129} \textit{R v Keewatin}, 2009 SKQB 58 at para 1, 323 Sask R 150 [\textit{Keewatin}].
He had been abused by his mother and in residential school.\textsuperscript{131} He also had a Native Syndicate affiliation,\textsuperscript{132} as well as severe substance abuse issues.\textsuperscript{133} FASD had left him with significant comprehension, learning, and memory deficits.\textsuperscript{134} He was assessed as a very high risk to reoffend according to the Saskatchewan Primary Risk Assessment (SPRA), which emphasizes criminal history, residence stability, education and employment, financial situation, familial and marital relationships, peers, substance use, pro-criminal attitude, anti-social behaviour, and self-management awareness.\textsuperscript{135} Justice Gunn of the Saskatchewan Court of Queen’s Bench stated: “The more serious the crime, the more emphasis is to be placed on protection of the public and less on the rehabilitation of the offender.”\textsuperscript{136} Justice Gunn thus sentenced the accused to two years in provincial jail, and three years’ probation afterwards.\textsuperscript{137}

Judges are increasingly recognizing that there are conceptual and practical problems with emphasizing deterrence and retribution in the sentencing of FASD persons, and Aboriginal persons with FASD in particular. What is perhaps the remaining and truly legitimate basis to sentence an FASD person to incarceration is when public safety necessitates incapacitation where non-custodial alternatives like probation may be inadequate to control the accused’s behaviour. It becomes easy to see a tension between protecting the public and exploring non-custodial options that may be more constructive as it concerns FASD persons. The ensuing discussions explore how to address this tension.

\textsuperscript{130} Ibid at para 4.
\textsuperscript{131} Ibid at paras 8–9.
\textsuperscript{132} Ibid at para 15.
\textsuperscript{133} Ibid at para 18.
\textsuperscript{134} Ibid at paras 22–24.
\textsuperscript{135} Ibid at paras 29–31.
\textsuperscript{136} Ibid at para 51.
\textsuperscript{137} Ibid at para 54.
TOWARDS NEEDS-BASED SENTENCING

Recall that many different sentencing principles, some of them in clear contradiction with each other, are embedded in section 718. Recall also that the section itself provides little guidance for when those objectives come into conflict with each other in the same case. The framework therefore leaves plenty of room for the judicial development of common law principles and the judicial exercise of discretion. It is fair to say that thus far judicial sentencing principles have given greater relative priority to deterrence and retribution in comparison to rehabilitation. That prioritization perhaps finds concrete expression in the “starting point” approach. If a certain crime is committed with certain facts present, then the sentencing judge must use the guideline sentence as a starting point.138 For example, in Alberta the starting point for a sexual assault that involves a breach of trust with respect to a child victim is four years.139 The presence of additional aggravating factors may justify a sentence more severe than the initial starting point. Likewise, the presence of mitigating factors, of which the accused having positive rehabilitative prospects would be an example, can justify a lesser sentence than the starting point. The latter possibility can only be taken so far, though. A sentence that departs too far from a starting point is a factor that will be taken into consideration during a sentencing appeal when deciding whether a sentence is demonstrably unfit.140 The framework therefore has a distinct tilt in favour of objectives like deterrence and sentencing.

I am not suggesting a complete overhaul of this system across the board. My point is that if there is room in the existing framework to give a general tilt in favour of deterrence and retribution, then there is also room to tilt in favour of rehabilitation in certain specific contexts. Accused suffering from FASD, Aboriginal persons with FASD in particular, represent just such a context.141 Heather Douglas argues that there needs

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138 McDonnell, supra note 89 at 986–92.
139 R v DMB; R v SEW (1993), 141 AR 307, 20 WCB (2d) 578 (CA).
140 McDonnell, supra note 89 at para 43.
141 See Institute of Health Economics, supra note 4 at 20.
to be a shift away from deterrence and retribution in the sentencing of FASD accused, and more towards needs-based sentencing and supervision. It is therefore again to the credit of the judiciary that they are not only recognizing this need, but now also recognizing the linkages between the Gladue factors, the impacts of colonialism on Aboriginal peoples, and the role of FASD in crime committed by Aboriginal persons.

In *R v Dayfoot*, the accused was charged with robbery, uttering a threat, failure to comply with recognizance, and failure to attend court. Justice Shamai of the Ontario Court of Justice concluded that the accused's condition attenuated section 718.1’s demand for proportionality, as follows:

The violence in this case is at a low level, being expressed in words and threats rather than causing bodily harm. It is in a setting where the accused Mr. Dayfoot was negatively influenced by his co-accused. Again this is symptomatic of a person suffering ARND. To punish behaviour which results from a clinically recognized disability runs contrary to the principles of criminal law, certainly where treatment is available. Unaided, the continued disability leaves Mr. Dayfoot more dangerous than he might be with treatment. Thus fundamental principle of sentencing expressed in Section 718.1, relating to the degree of responsibility of the offender, is properly interpreted by fashioning a sentence taking into account the role played by ARND, and the prospect of eradicating this source of criminal misconduct.

Justice Shamai also concluded that the linkage between the Gladue factors

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143 See e.g. *Quash*, supra note 77 at paras 53, 60.

144 2007 ONCJ 332 at para 1, 74 WCB (2d) 298.

and the accused’s FASD demanded a different approach to sentencing:

The application of section 718.2(e) supports the result of a conditional sentence as well, inasmuch as “the consideration of all available sanctions other than imprisonment . . . with particular attention to the circumstances of aboriginal offenders” directs the Court to the shocking prevalence of suspected FASD/ARND among the aboriginal population. Restorative justice in sentencing a member of the First Nations communities must be seen in the context of not just the individual and the victim. . . . Where the community is the First Nations communities, many of which have been ravaged and damaged by the dismemberment effected by residential school policies, and the disintegration of family and community identity through adoption, restorative justice must apply to the community as well as the offender and victim.\(^{146}\)

One of the expert witnesses, Dr. Pripstein, recommended an intensive supervision program that included wearing a medical bracelet, a vocational strategy, as well as immersion in Aboriginal culture and traditions.\(^{147}\) Justice Shamai was therefore willing to order an 18-month conditional sentence.\(^{148}\)

Then there are decisions that recognize that incapacitation for the sake of public safety should be the only legitimate basis to not pursue a needs-based sentence for an FASD accused. Stated differently, as long as a non-custodial sentence can be structured such as to eliminate or minimize risk to the public then there should be no other impediment to emphasizing rehabilitation. Judge Lilles stated in Harper:

I am of the opinion that separation (where necessary for the protection of society) and rehabilitation should be the primary focus of judges involved in sentencing FASD-affected offenders. Separation does not equate with jail, however. Separation can and should be achieved in a secure community setting in most instances. We do not jail children under the age of 12 in Canada and when they are under the age of 18 years, they are detained separately from adults. FASD-affected individuals who function

\(^{146}\) Ibid at para 24.
\(^{147}\) Ibid at para 21.
\(^{148}\) Ibid at para 26.
at the level of children should only be placed in jail as a last resort and then in a facility separate from adults in order to avoid the victimization experienced by Mr. Harper when he was in custody. Similarly, rehabilitation for Mr. Harper must accommodate his cognitive disabilities and cannot be achieved through typical offender programming. It must involve individualized supports and a focus on improving his life skills through repetitive tasks done under supervision. Mr. Harper is capable of learning and developing, but he needs to be guided and supported in a manner that takes into account his limitations.149

The accused was sentenced to 1 day served and 24 months’ probation.150 His Honour even went as far as suggesting that a reliance on deterrence and denunciation to justify jailing an FASD accused could potentially invite the application of section 12 of the Charter, which prohibits the cruel and unusual punishment of an accused.151

It is preferable to pursue non-custodial options as the more constructive route, so long as public safety is not endangered. And indeed the reason Judge Anderson in Soosay refused to put the accused into federal penitentiary on the basis of general deterrence or incapacitation was because of fears that the accused would develop gang ties while in a penitentiary and further reinforce anti-social behaviour.152

So how do we go about addressing that tension between public safety and needs-based sentencing when it comes to FASD persons, Aboriginal persons with FASD in particular? An important prerequisite is to gather the right information first. Consider this quotation from Justice Watson of the Alberta Court of Appeal in R v Ramsay:

Crafting a fit sentence for an offender with the cognitive deficits associated with FASD presents at least two identifiable challenges: accurately assessing the moral blameworthiness of the offender in light of the adverse cognitive effects of FASD; and balancing protection of the


150 Harper, supra note 72 at paras 60–63.

151 Ibid at para 47. See also Quash, supra note 77 at para 82.

152 Soosay, supra note 59 at para 41.
public against the feasibility of reintegrating the offender into the community through a structured program under adequate supervision. Medical reports assessing the prospect of the offender’s rehabilitation and reintegration into the community are essential to the task and must be carefully analyzed.\textsuperscript{153}

Bonny Lynn Gerger wrote a Masters in Justice Studies thesis based on qualitative interviews with 11 justice professionals with FASD expertise, 2 First Nations lawyers, 2 lawyers with experience representing FASD clients, 2 Provincial Court judges, 2 correctional psychologists, and 2 correctional educators.\textsuperscript{154} The interviews indicated that one of the most pressing needs to prevent recidivism was for probation staff to have greater awareness of FASD so as to be able to identify each offender’s needs.\textsuperscript{155}

Diane Fast and Julianne Conry stress the need for a comprehensive medical-legal report that includes an FASD diagnosis that can serve as a starting point and a proper foundation for an appropriate sentence.\textsuperscript{156} The process of getting adequate information before the courts not just on the presence of FASD itself, but also the specific effects of FASD on an individual accused, can be very involved. As Diane Fast and Julianne Conry explain:

A comprehensive medical-legal report can assist the judge, lawyers, and others involved with individuals with FASDs. Assessments can be prepared before or after sentencing, and should describe the disabilities of

\begin{itemize}
\item \textsuperscript{153} 2012 ABCA 257 at para 16, 536 AR 174.
\item \textsuperscript{155} Ibid at 133–34.
\end{itemize}
the offender and implications for sentencing. Only professionals who are recognized as being experienced in assessing people suspected of having FASDs should prepare the medical-legal reports, psychological assessments, and social histories. The report should clearly document the evidence supporting the diagnosis of FAS or another FASD. Often the most difficult part is obtaining a confirmed history of prenatal alcohol exposure. Since people with FASDs have difficulties in comprehension and recall, it is critical that they are not the only informants. Information contained in previous reports cannot be taken at face value without verification. Psychiatric diagnoses and the social history need to be documented. The psychological report should include findings from assessments of intelligence, language, memory, reasoning, executive function, and adaptive skills. Individuals with FASDs with a normal IQ (above the range of mental handicap) may have significant deficits in these areas. The courts often understand only the importance of low IQ as a mitigating factor, and expert evidence can help explain the extent of the disabilities and how the testimony of a particular victim, witness, or accused can be affected.157

Recall also that sentencing under Gladue requires a report that includes not only general references to the social factors behind Aboriginal over-incarceration, but also individualized information that explains how those factors specifically played a role in bringing a particular Aboriginal accused before the courts.158

What do we do once we do have the right information? Another key challenge is the seemingly ubiquitous risk that an FASD person will not respond to the terms of a probation order or a conditional sentence and get into trouble. The same symptoms stemming from FASD that were underlying the initial offence also present a risk of breach or another subsequent offence.159 A psychology thesis by Kaitlyn McLachlan affirms that there is a definite risk involved with placing FASD persons under probationary supervision. Her study involved a comparison between 100 persons aged 12 to 23 who had been involved in the criminal justice

157 Fast & Conry, “Fetal Alcohol”, supra note 49 at 255.

158 Gladue, supra note 5 at para 69. See also Ipeelee, supra note 15 at 60.

system, 50 of whom were diagnosed with FASD and 50 of whom were not. \textsuperscript{160} 46 of the FASD persons (92\%) had a breach of bail charge compared to 36 non-FASD persons (72\%). 46 of the FASD persons (92\%) had a breach of probation charge compared to 36 non-FASD persons (72\%). \textsuperscript{161} There is obviously a need for carefully tailored probation, otherwise an FASD person is being set up for breaches. \textsuperscript{162} The operative word needs to become “structure”. Consider subsections (2) and (3) of section 732.1 of the \textit{Criminal Code}:

\begin{verbatim}
732.1 (2) The court shall prescribe, as conditions of a probation order, that the offender do all of the following:
(a) keep the peace and be of good behaviour;
(b) appear before the court when required to do so by the court; and
(c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

732.1 (3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:
(a) report to a probation officer
   (i) within two working days, or such longer period as the court directs, after the making of the probation order, and
   (ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;
(b) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;
\end{verbatim}

Kaitlyn E McLachlan, \textit{An Examination of the Risks, Abilities, and Needs of Adolescents and Young Adults with Fetal Alcohol Spectrum Disorder (FASD) in the Criminal Justice System} (PhD Dissertation, Simon Fraser University, 2012) [unpublished] at 29.

\textsuperscript{160} \textit{Ibid} at 85.

\textsuperscript{162} See Douglas, \textit{supra} note 142 at 228.
(c) abstain from

(i) the consumption of alcohol or other intoxicating substances, or

(ii) the consumption of drugs except in accordance with a medical prescription;

(d) abstain from owning, possessing or carrying a weapon;

(e) provide for the support or care of dependants;

(f) perform up to 240 hours of community service over a period not exceeding eighteen months;

(g) if the offender agrees, and subject to the program director’s acceptance of the offender, participate actively in a treatment program approved by the province[.]

Consider also section 733.1, which makes breach of probation a criminal offence. The framework very much relies on a carrot and stick concept, hoping that the accused can more or less become self-regulating of his or her own accord with some oversight provided by a probation officer and the incentive to avoid a breach charge. There is nothing inherently wrong with the framework in and of itself. It is just that the expectations stemming from the framework will encounter problems similar to relying on deterrence when it comes to FASD persons.

There is a growing train of thought that probation for an FASD person needs a fundamentally different orientation. Judge Michael Jeffery from Alaska is of the opinion that it is best to explore sentencing options based on adequate living arrangements that will provide structure for the accused, as well as adequate supports and services to meet the accused’s needs.164 Fast and Conry adroitly point out: “The most effective sentences for people with FASDs may be those that aim to change their living or social situation, rather than their behavior. Accomplishing this may be difficult, as the judge’s power does not extend to individuals other than the accused.”165

163 Supra note 23.


165 Fast & Conry, “Fetal Alcohol”, supra note 49 at 255 [citation omitted].
Judges are becoming increasingly aware of the need for a different emphasis during supervisory sentences. For example, in *R v MAP*, Judge Whelan assumed FASD despite the lack of formal diagnosis. Her Honour was concerned about the absence of a sex offenders’ program that could address the accused’s pedophiliac tendencies. Her Honour was nonetheless satisfied that the accused’s needs could be addressed by adequate structure in a care home setting, and thus sentenced the accused to three years’ probation for a breach of recognizance to stay away from schools (during which no children were actually harmed).

In *R v Mumford*, the accused was subjected to a dangerous offender hearing as he had a long history of sexual offences. FASD was not discovered until after he had served several penitentiary terms. The availability of resources in the accused’s community to manage FASD and make long-term supervision and treatment tenable was what persuaded Justice Kiteley in *Mumford* to grant a Long Term Offender order instead of a Dangerous Offender order notwithstanding differences between the expert opinions.

On the other hand, the lack of available and suitable structure can dissuade a judge against a non-custodial sentence. In *Keewatin*, a critical reason why Justice Gunn sentenced the accused to two years in provincial jail was because the proposed probationary plan depended on the accused living with his girlfriend, and his girlfriend providing the needed structure and stability. Justice Gunn was not convinced that the girlfriend adequately understood the extent of the accused’s problems or could provide adequate supports. What the accused needed was a caseworker from an appropriate agency with FASD-specific supports and services, but such was not available. It is interesting to note that Judge Lilles was still...

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166 2006 SKPC 96 at para 16, 287 Sask R 71.
167 *Ibid* at paras 16, 42.
168 *R v Mumford* (2007), 75 WCB (2d) 784 at paras 23–38, 2007 CLB 2201 [*Mumford*].
171 *Keewatin*, supra note 129 at paras 43, 45. See also *Charlie*, supra note 91 at para 40.
willing to hand out a probationary sentence in *Harper* even though he was concerned that supervised residential housing was necessary to control the accused's behaviour, and that such a level of supervision is beyond the capacity of probationary services.\(^{172}\) It must be said that in that instance though, Judge Lilles would otherwise have been willing to sentence the accused to a significant length of incarceration but for the cumulative effect of the accused's diminished blameworthiness and the accused having already served six months' pre-trial custody, which resulted in double credit against sentence.\(^{173}\)

Even if there is that judicial sensitivity, there of course remain tangible problems with implementation. There has to be the human resources available to make it work, provided by people who are committed to providing the needed structure and supports for FASD persons. Courts cannot invoke any legal principles to compel the availability of such human resources, as Anthony Wartnik and Susan Carlson relate:

> Even if the criminal justice system in a particular area has the advantages of therapeutic courts and some sentencing schemes that provide the flexibility to deal with defendants diagnosed with FASD, the criminal justice system is not a social service agency.\(^{174}\)

I would take it a little further and say that what is especially important is that Aboriginal communities attain the capacity and resources to provide structure and services in such a way as to be tailored to the needs of Aboriginal persons with FASD who end up in the criminal justice system.

There are indications, albeit limited, that such a possibility can produce positive results. Carrie Ann Schemenauer did a qualitative study on the Central Urban Métis Federation Wellness Centre. The study was based on interviews with six FASD persons aged 17 to 30, and six Centre staff members. One of the FASD persons had previously been

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\(^{173}\) *Ibid* at paras 59–60.

incarcerated, while three others disclosed having had justice issues in the past. Four had experienced prior substance abuse issues, while one disclosed having been a gang member in the past. Centre staff were assigned to FASD persons to assist them with life skills like buying groceries, paying bills, accessing social services, finding housing, finding and maintaining employment, maintaining a budget, and the development of healthy and positive interpersonal relationships. Schemenauer concluded, based on the interviews, that providing sufficient structure and supports to FASD persons resulted in a decreased likelihood of getting into trouble with the criminal justice system in addition to other improvements (e.g., stable housing and employment).

The Community Council Program is an extensive diversion program for urban Aboriginal communities in Toronto whereby no offence is inherently ineligible for diversion. The Program handles a lot of clients with FASD. The Council is based on the Seven Grandfather Teaching of the Anishnaabe: Caring, Sharing, Kindness, Respect, Honesty, Respect, and Bravery. A council of Elders decides on a plan of reintegration that is tailored to the individual and specific needs of each participant, including for those with FASD. The plans often last for months or even years, and involve activities like therapy, counselling, community service, and participation in spiritual ceremonies and cultural activities. FASD clients are often given multiple chances over issues like missed meetings in recognition of the difficulties that FASD persons may have. The program has had 70% of its FASD clients complete and comply with their plans.

This fact is impressive when weighed against McLachlan’s study verifying that FASD accused breach probation more often than


176 Aboriginal Legal Services of Toronto, *Community Council Program*, online: <http://aboriginallegal.ca>.

non-FASD accused.

A fundamental problem is that Canadian governments have thus far not invested the justice resources to match the need. This is a problem that has been noted more than once in judicial decisions. Recall in Quash that there was recognition that there is a definite futility in relying on deterrence in sentencing an FASD person to incarceration. In spite of that recognition, the sentence was 26 months' incarceration reduced by 14 months for pre-trial custody credit.\footnote{Quash, supra note 77 at para 85.} The critical reason was that there were insufficient resources available in the community to address the accused's needs as part of a probationary sentence.\footnote{Ibid at para 82.}

In Kendi, the accused was charged with spousal assault.\footnote{Ibid at para 82.} The accused also had an extensive record for violent offences.\footnote{Ibid} Judge Ruddy stressed that a rehabilitation-based sentence must emphasize adequate supports and structure to manage FASD symptoms, but those supports and structure were unavailable to her for purposes of a non-custodial sentence.\footnote{Ibid at paras 11, 14.} Her Honour thus felt that public safety concerns left her with little else but a sentence of 180 days, reduced to 100 days to reflect pre-trial credit, while expressing the (speculative?) hope that the Prolific Offender Management group in the Yukon could find an appropriate community placement for him following his term of incarceration.\footnote{Ibid at para 20.}

In Obed, an expert witness named Dr. Rosales expressed the opinion that the accused needed a highly structured environment with a “second brain”—a full-time caretaker to assist the accused with decision making on a 24-hour basis. The accused would otherwise be a certain risk to re-offend, while deterrence will have no impact.\footnote{Obed, supra note 121 at paras 20, 28–29.} Dr. Rosales also indicated to the court that it would be 5 to 10 years before there were any

\footnote{Quash, supra note 77 at para 85.}
\footnote{Ibid at para 82.}
\footnote{Ibid at para 1.}
\footnote{Ibid at para 6.}
\footnote{Ibid at paras 11, 14.}
\footnote{Ibid at para 20.}
\footnote{Obed, supra note 121 at paras 20, 28–29.}
community-based programs in Newfoundland that could address the needs of FASD persons.\textsuperscript{185} It is not just judges that are providing the observation either. The interview participants in Gerger's study also stressed the need for a greater investment of resources into programs and services that can address the needs of FASD persons.\textsuperscript{186} Saskatchewan's Commission on First Nations and Métis Peoples and Justice Reform has also called for greater resources for community-based programming that can address the needs of Aboriginal persons with FASD, and an FASD court that can pass more constructive needs-based sentences.\textsuperscript{187}

Judges are now, more than ever, willing to engage in a more constructive and contextual approach when it comes to the sentencing of FASD persons, Aboriginal persons with FASD in particular. The problem is that they provide only part of the equation. Even when a judge would like to pursue a supervisory sentence, the judge can find his or her hands tied as Canadian governments have not provided sufficient resources to match the need such as to provide viable sentencing options. Judges have also at the same time been reluctant to issue judgments that compel the state to make greater allocations of justice services to match the need, perhaps for fear of exceeding proper institutional boundaries by purporting to behave as pseudo-legislatures. For example, the British Columbia Provincial Court concluded in \textit{R v MacKenzie} that section 7 of the \textit{Charter} does not impose an obligation on the state to fund a FASD assessment and diagnosis.\textsuperscript{188} Likewise, Judge Mary Ellen Turpel-Lafond of the Saskatchewan Provincial Court made this order, which was overturned by the Saskatchewan Court of Appeal:

\begin{itemize}
\item \textsuperscript{185} \textit{Ibid} at para 22.
\item \textsuperscript{186} Gerger, \textit{supra} note 154 at 133–34.
\end{itemize}
It is the direction of the court that there be a youth worker with special training and understanding in the organic brain impairment who is assigned to his file, and that a comprehensive case 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.¹⁸⁹

While the judiciary may not be able to compel the legislative and executive branches of Canadian governments to provide the resources that would enable meaningful probationary options to draw on, I would argue that there are moral, practical, and social imperatives that Canadian governments need to act on. The practical incentives exist in the financial realities. It is estimated that as of 2010 it averages $24,825 each year to supervise an offender in the community in comparison to $101,666 to keep an offender incarcerated for one year.¹⁹⁰ This figure also says nothing of the long-term savings that may accrue if needs-based sentences actually do work and prevent Aboriginal persons with FASD from reoffending and continuing to get caught up in the justice system.

The moral and social imperatives stem from the fact that FASD in Aboriginal communities, as with so many other social fallouts in Aboriginal communities, can be attributed to the damage inflicted by Canadian state colonialism against Aboriginal peoples. It is thus the Canadian state that has a fundamental responsibility to address the fallout from colonialism, of which FASD is part and parcel. I submit that this fundamental responsibility includes a responsibility to provide more constructive possibilities for Aboriginal persons with FASD who commit crimes than to simply warehouse them in prisons over and over again. We have this comment from Judge Trueman in *R v Creighton*:¹⁹¹

¹⁸⁹ *R v K(LE)*, 2001 SKCA 48 at para 14, 153 CCC (3d) 250, rev’g *R v K(LE)*, [2001] SJ No 434 (QL), 2001 CarswellSask 483 (WL Can) (Prov Ct (Youth Ct)).


The Crown has a fiduciary duty towards children because children are not able to function at the same level as adults. I do not think that people with mental disabilities are like children. Children are children and adults are adults. Their needs are different. But the idea that people with mental disabilities will never be fully capable, through no fault of their own, of participating on a level playing field is something that, I think, may spark a fiduciary duty on the part of the Crown. Where the Crown through its welfare agencies and through its penal sanctions has such power over these individuals, they must have a concomitant fiduciary duty. The recognition of such a duty is, I think, the way of the future. 192

Judge Cozens also provides this insight in *Quash*:

In accepting responsibility for their role in causing such a negative impact on First Nations individuals, their families and their communities, the Government of Canada implicitly should be seen as also accepting responsibility for ongoing participation in ameliorating the consequences of this impact on First Nations individuals, their families and their communities. All too often it is in the criminal justice system where these negative impacts are to be found, not just in the victims of criminal activity but in the offenders who commit the crimes.

It is not enough to apologize for harm done without making reparation for the harm. This reparation must reach beyond the payment of monies to former students of the residential schools. It must extend to how we treat First Nations peoples involved in the criminal justice system, regardless of their role within it. Legislation designed to “get tough” on crime must not lose sight of the fact that the very individuals that suffered harm, either directly or indirectly, perhaps as children of students of residential schools, may be the same individuals who are committing the crimes and who are, under such legislation, the individuals that the justice system will now “get tough” on. 193

As an afterthought, there may still be some cases where an Aboriginal FASD person is such a danger that incarceration remains necessary. I have previously published on the need to invest more resources in culturally


193 *Quash*, *supra* note 77 at paras 55–56.
appropriate programming for Aboriginal inmates in the federal penitentiary system, which has been empirically proven to be more effective in reducing recidivism amongst Aboriginal inmates in comparison to standardized correctional programming.\textsuperscript{194} There is certainly something to be said for investing in correctional services to address the needs of FASD inmates, Aboriginal inmates with FASD included.

There is, however, just as with probationary options a profound gap in services that can fulfill the need. In fact, the gap may be especially pronounced as there are not any correctional services that are geared specifically towards FASD persons at all. A research report from the Aboriginal Corrections Policy Unit of the Correctional Service of Canada noted that most correctional programming is designed for higher functioning individuals. The report notes more specifically that Aboriginal FASD offenders have problems with attention deficits, inability to appreciate consequences, or maintain concentration, and thus perform poorly in mainstream programs that are available. There is also a lack of supports and services once offenders are released to either day parole or full parole.\textsuperscript{195} The Policy Unit further adds:

Aboriginal offenders present themselves to the mainstream justice and correctional systems with a multitude of complex issues and needs. As well, it is believed that a large percentage of Aboriginal people with FASD enter correctional facilities and are ill-equipped to deal with this chronic condition. Training for correctional services staff is minimal and inconsistent, offenders rarely have an accurate diagnosis which results in lack of appropriate response from correctional institutions, and programs that specifically address FASD are virtually non-existent. Of the programs that do exist, there are serious challenges for FASD-affected individuals to participate in them.\textsuperscript{196}

It was also noted in 	extit{Keewatin} that federal and provincial FASD-specific


\textsuperscript{195} Aboriginal Corrections Policy Unit, supra note 187 at 11.

\textsuperscript{196} Ibid at 10.
services in correctional institutions in Saskatchewan were still in development at time of judgment.\textsuperscript{197}

The Genesis House is also the only halfway house facility in Canada that provides day parole services specifically for offenders with FASD. The House has a high staff to client ratio. It also provides life skills, case management, therapeutic casework, and reintegration. There is only one Canadian community reintegration facility that specifically specializes in providing services to adult Aboriginal persons with FASD, the Genesis House in New Westminster, British Columbia.\textsuperscript{198} Amanda Miller adds:

The mere fact that there is only one of these facilities goes to show the lack of education, information, and government services available for people with FASD. It also goes to show the lack of motivation on the part of the federal and provincial governments in implementing new programs and services in order to meet the needs of these individuals.\textsuperscript{199}

If FASD-specific services for Aboriginal offenders better prepare them for release and reintegration, it may very well further reduce recidivism and in turn present itself as an additional field for justice reinvestment. The article will now explore how we can take the whole concept of justice reinvestment as it concerns Aboriginal communities even further, well before any Aboriginal person with FASD ever shows up in court.

\section*{PREVENTATIVE PROGRAMMING}

There is an open question of how much difference the sentencing process can make for a problem as deep-seated as Aboriginal community dysfunction that gives rise to significant numbers of Aboriginal offenders with FASD. Some scholars have expressed the concern that the social problems tied with Aboriginal over-incarceration may be too large for

\textsuperscript{197} \textit{Keewatin}, supra note 129 at paras 48–49.

\textsuperscript{198} Amanda Miller, \textit{Fetal Alcohol Spectrum Disorder and the Incarceration of Métis and Other Aboriginals} (Vancouver: Vancouver Métis Community Association, 2005) at 14–15.

\textsuperscript{199} \textit{Ibid} at 5.
subsection 718.2(e) to address, at least by itself. Carol LaPrairie suggests that it is unrealistic to place too much emphasis on the justice system's ability to provide "real and long-lasting solutions to the over-representation problem." Sanjeev Anand adds: "Sentencing innovation cannot remove the causes of aboriginal offending because it cannot address problems like inadequate housing, substance abuse, lack of education, and scarcity of employment opportunities for aboriginal people."

There is certainly much to be said in favour of supporting preventative programming so as to not rely solely on sentencing innovations. There are two distinct temporal points where preventative programming can be pursued. One is before Aboriginal children are ever born, with the intention of minimizing the number of children that are born with FASD. Certainly there have been plenty of mainstream initiatives geared towards minimizing FASD births. In fact, there had been at least 350 FASD prevention initiatives in Canada in two decades leading up to 2007. And certainly those mainstream efforts have enjoyed successes.

I and others, however, would argue that something different is needed that is tailored to the specific needs of Aboriginal communities.


201 Carol LaPrairie, "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions" (1990) 32:3 Can J Crim 429 at 436.


203 See Robin Thurmeier, Creating Effective Primary Prevention FASD Resources: Evaluation Processes in Health Promotion (Saskatoon: Saskatchewan Prevention Institute, 2007) at 29.

204 See Carmen Rasmussen et al, "The Effectiveness of a Community-Based Intervention Program for Women At-Risk for Giving Birth to a Child with Fetal Alcohol Syndrome (FASD)" (2012) 48 Community Mental Health J 12.
Mainstream prevention efforts are unlikely to be successful in Aboriginal communities where alcohol abuse is endemic. They are not delivered in a culturally appropriate way. They focus blame on the mother for making a negative individual choice where in Aboriginal settings, FASD is a much larger issue involving mother, family, and social conditions in the broader community. Mainstream efforts are also focused on extreme atypical examples, such as utilizing a photograph of a severely shrivelled FASD-affected brain as a scare tactic. The Aboriginal Corrections Policy Unit report also argues that Elders are excluded from culturally appropriate training to deal with FASD individuals.

Addressing substance abuse in Aboriginal communities that leads to FASD births must of necessity address the social factors tied to colonialism. A study based on interviews with 80 women who had children with FASD found that 80% of the interviewees had extensive histories of severe emotional, physical, and sexual abuse. Given the alarming extent of violent and sexual abuse of many Aboriginal women in their communities, which is in itself part of the fallout from colonialism, it is not at all a stretch to suggest that the inflicted trauma leads to substance abuse by Aboriginal women which in turn leads to FASD births. Amy Salmon adds:

Linking public health concerns to decolonising agendas has had success in

205 See Aboriginal Corrections Policy Unit, supra note 187 at 9.
207 Aboriginal Corrections Policy Unit, supra note 187 at 13.
bringing issues facing under-served women, children and families to the attention of State funders and policy-makers. While this approach may have instrumental value in assisting communities to get programmes funded or to raise awareness of maternal and child health concerns, hegemonic understandings of what causes FASD and why it needs to be prevented remain intact: the targets for FASD prevention messages are pregnant women who drink (not the State policies that perpetuate colonial conditions and health disparities), and “FASD births” (i.e. Aboriginal children whose mothers drank during their gestation) need to be prevented because they represent extraordinary costs to communities and State institutions.\textsuperscript{210}

Additionally, I would also argue that Aboriginal culture and spirituality needs to be integrated into such programming as it would then be much more likely to get through and have persuasive value for its intended recipients.

There are indeed indications that Aboriginal-specific programming can generate remarkable successes. A study was based on 732 adult American Indians, using the Pearson’s coefficient value ($r$) as a correlative measure. A value of 1.0 means perfect correlation while a value of 0 means no correlation. Aside from age ($r = 0.26$), the most significant correlates for alcohol cessation were participation in traditional activities ($r = 0.22$), cultural identity ($r = 0.18$), and involvement in spiritual ceremonies ($r = 0.26$), whether or not they participated in treatment and therapy.\textsuperscript{211}

The Alkali Lake reserve in California enjoyed considerable success by integrating traditional activities and ceremonies with their treatment programs. The rate of community members who drank alcohol went from over 97\% at the start of the 1970s to only 5\% by 1981.\textsuperscript{212}

The Ord Valley Aboriginal Health Service’s fetal alcohol program in


Australia has enjoyed remarkable success. The program performed three assessments during a pregnant Aboriginal woman’s pregnancy. The questions were designed to assess the woman’s level of alcohol consumption before and during pregnancy, awareness of FASD, and any barriers or obstacles to reducing alcohol consumption. The assessment process is always carried out in a non-judgmental manner. It is also carried out by Aboriginal staff workers, so that communication and engagement can be carried out in a culturally appropriate way. The staff will also engage and make referrals to other services in the community when needed after obstacles to reducing consumption have been identified. 84.7% of 78 women who were assessed had consumed alcohol prior to engagement with the program. 56.4% reported to have completely abstained from further consumption of alcohol following initial FASD education. 14.1% reported reducing alcohol consumption, while 1.2% continued to drink post-FASD education.\(^{213}\)

The “FASD in Lab Mice” Project was used in Aboriginal communities in Alaska. It is a school-based project whereby students are required to maintain regular observation of laboratory mice in a control group and a comparison group, whereby each give birth to pups with a very small pregnancy period of nine days. The control group mothers were given a very small dose of ethanol diluted in water, whereas the comparison group were not. The students noted that pups born from the control group displayed smaller size and marked anatomical abnormalities (e.g., fused digits) in contrast to the healthier pups born from the comparison group. The method is meant to show the students that even a single drinking bout can risk damage to a developing fetus, in contrast to mainstream initiatives that emphasize extreme examples. The method made such an impression on many of the students such that they in turn provided presentations to other members of the community to spread FASD awareness further through their communities. Some of the students also affirmed that they would abstain from alcohol during pregnancy, or for

male students do what they could to prevent their partners from consuming alcohol during pregnancy.\footnote{214}

Another point of intervention is to provide services for those Aboriginal persons who have FASD before they ever get involved with the criminal justice system. There is a significant body of literature that stresses the need for such services to minimize FASD progressing towards a criminal life style. A study by Anne Koponen, Mirjam Kalland, and Ilona Autili-Rämö based on qualitative interviews with 38 children in care showed that undiagnosed children were more likely to develop behavioural problems than children who were diagnosed early.\footnote{215} In another qualitative study by Dorothy Badry, children were less likely to develop behavioural problems if they had supports and services that addressed their needs in the education system, and they had a stable home placement.\footnote{216} Rae Mitten adds:

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.\footnote{217}

\footnote{214}See Jacquier, Kleinfeld & Gilliam, supra note 206 at 51–53.
\footnote{216}Dorothy Badry, The FASD (Fetal Alcohol Spectrum Disorder) Community of Practice (CoP) in Alberta Human Services: Leading from Within Initiative (Edmonton: Alberta Centre for Child, Family & Community Research, 2013).
\footnote{217}H Rae Mitten, Barriers to Implementing Holistic, Community-Based Treatment for Offenders with Fetal Alcohol Conditions (LLM Thesis, University of Saskatchewan, 2003) [unpublished] at 67.
One could certainly suggest that this type of programming could also use an Aboriginal cultural emphasis as well. A graduate thesis by Shahdin Farsai was based on qualitative assessments of 27 informants and parents and 3 Aboriginal elders. The Elders indicated during their interviews that the revival of traditional teachings and values needed to be an essential component of any plans to undo the damage of colonialism and intergenerational trauma. There is, unfortunately, a lack of empirical evidence to verify the efficacy of such programming. Perhaps the reason for this lack of validation is that there is a profound gap in the availability of such services, and those services that do exist are inadequately supported.

A crucial component for the effective delivery of such services is the provision of extensive diagnostic services to detect FASD. FASD often goes undetected, or is misdiagnosed as something else, like a mental disorder. There is a need for more extensive services for diagnosing FASD, so that it can be caught earlier. However, there is a shortfall in available diagnostic services. Sterling Clarren and Jan Lutke report that as of 2008 there are 27 clinics capable of FASD diagnosis, and only three of them saw adults regularly.

Those services that do exist experience significant difficulties in having the capacity to meet the needs. The Ma Mawi Wi Chi Itata Centre in Winnipeg, the Eastern Door Centre in Elsipogtog First Nation in Manitoba, the Prince Albert Grand Council, the Prevention Institute in Saskatoon, and Aboriginal Head Start are all examples of institutions that provide services to Aboriginal families with FASD children. All of them also experience a lack of funding, resources, and high caseload to...

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219 See Aboriginal Corrections Policy Unit, *supra* note 187 at 8.


221 See Aboriginal Corrections Policy Unit, *supra* note 187 at 16–17.
staff ratios.\textsuperscript{222}

A report by the Ajunnginiq Centre indicates that there are several services in the Canadian north, such as FASD health awareness initiatives and support services for families with FASD members.\textsuperscript{223} Problems included insufficient screening or diagnosis, inability to deliver sufficient services to small and isolated communities, and in particular a lack of funding to meet the needs.\textsuperscript{224} Note this example:

In Labrador, funding was identified as the greatest barrier to addressing FASD. Lack of funding was identified as a barrier to diagnostic services. There is a genetic pediatrician willing to go to Labrador for three months to provide diagnosis, train physicians, develop community capacity and so on. Unfortunately, at the time this scan was conducted, there was no money available to pay his salary, despite the fact that Health Labrador will provide him with accommodations, office space, and medical supports. Without diagnosis, services and supports are not made available in communities.\textsuperscript{225}

The interviewees in Farsai’s thesis study identified significant barriers to addressing the needs of Aboriginal persons with FASD in British Columbia, including: 1) inconsistent diagnosis processes, 2) the inadequacy of the education system to meet the needs of FASD children, 3) the inadequacy of support services for Aboriginal persons with FASD, and 4) the extensive damage wrought by colonialism and intergenerational trauma.\textsuperscript{226} Again, it must be stressed that the funding has to match the need. Amy Salmon warns that is inappropriate and impractical to devolve responsibility for health and preventative initiatives onto Aboriginal communities without sufficient resources to address

\textsuperscript{222} See \textit{ibid} at 17.

\textsuperscript{223} Mark Buell, Catherine Carry & Marja Korhonen, \textit{Fetal Alcohol Spectrum Disorder: An Environmental Scan of Services and Gaps in Inuit Communities} (Ottawa: Ajunnginiq Centre, National Aboriginal Health Organization, 2006) at 2–6.

\textsuperscript{224} \textit{Ibid} at 6–9. See also Aboriginal Corrections Policy Unit, \textit{supra} note 187 at 9.

\textsuperscript{225} \textit{Ibid} at 8.

\textsuperscript{226} Farsai, \textit{supra} note 218 at 26–43.
the needs.  

One could suggest that the demand for justice reinvestment is even stronger for preventative initiatives than it is for sentencing initiatives.  

The monetary costs of FASD are staggeringly high. A Canadian study estimates the annual individual costs of FASD at $21,642, and the aggregate yearly costs for FASD persons in the age range of newly born to age 53 at $5.3 billion. These estimates do not even take into account the costs to the criminal justice system itself associated with policing, prosecution, probation, and/or incarceration.

CONCLUSION

Much of the discussion in this article has relevance to the larger issues of criminal justice policy generally, and Aboriginal over-incarceration. There is nonetheless a pressing need to address the specific needs of FASD persons who wind up in the criminal justice system, with particular attention to Aboriginal persons with FASD. Judges may in the past have struggled with how to sentence FASD accused. It is to their credit that they are now showing increased recognition of the need to utilize needs-based sentencing for FASD persons instead of a conventional reliance on deterrence and retribution. Part in parcel with this is a concurrent recognition that FASD in Aboriginal communities is part of the Gladue factors that need to be taken into consideration, and speaks to the imperative for non-custodial sentences under Gladue. Judges are now willing, but what is missing is adequate provision of services and resources by Canadian governments that will give the judges the tools they need.

Canadian governments should feel a definite imperative to engage in

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227 Salmon, supra note 210 at 173–74.


justice reinvestment as the problem of Aboriginal over-incarceration continues unabated. The need for justice reinvestment, however, is especially acute for the issues surrounding FASD in Aboriginal communities. The available albeit limited empirical evidence suggests that investing in programs and services that can address the needs of FASD accused, Aboriginal accused with FASD in particular, may prove to be a more constructive avenue that could save resources in the long-term. However, we can take things further by also investing resources into social programming and services that can minimize a priori the need to criminally prosecute persons with FASD. Investing in both better sentencing options and preventative programming is needed as part of a comprehensive solution.

It may, for example, be tempting to suggest that an investment in preventative programming, but then leave the status quo in the justice system itself intact. This comment from Amanda Miller conveys a recognition that some FASD persons may still “slip through the cracks” in spite of effective preventative programming:

Many people with FASD have trouble connecting action vs. reaction: they are often unable to foresee consequences and act impulsively, which more often than not leads to criminal behaviour. Because people do not ‘outgrow’ FASD, they are faced with extreme challenges their entire lives. Many of their learning disabilities and behavioural problems will eventually lead to a criminal lifestyle if they are not addressed as a child. Even still, with the best of parenting, some of those afflicted with FASD still end up in the justice system because they lack the structural setting that would best be suited to their specific needs.

Justice Fowler provides an especially illuminating commentary in *Obed* that also provides a worthy note on which to end this article:

Governments now know that people with FASD will fill our prisons in increasing numbers because people with FASD have a very, very high likelihood of committing criminal offences in that they act on impulse, without consideration for the consequences. It is not difficult to predict that our jails will be overflowing with people with FASD if society

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230 Amanda Miller, *supra* note 198 at 10–11.
somehow does not develop an understanding of how to deal with this serious problem while children are young enough to be helped. This is sadly the case in aboriginal communities to a higher degree than in any other segment of our society. More efforts must be made to deal with this incredibly difficult problem in aboriginal communities . . . . It is my understanding that it costs approximately $100,000.00 a year to incarcerate one person in our prison system. One can only imagine if that same amount of money was redirected to develop programs that would assist children who come from parents who have been alcohol dependent when they were pregnant with these children. Dr. Rosales was perfectly clear when he stated that this is not just an aboriginal problem, this problem is found at all levels of our society, in every community, in every walk of life, throughout our society and until something is done to curb this, then our crime rate will increase.

This case is like the canary in the coal mines. It’s a warning that we will be incarcerating more and more people in our society for criminal matters, serious criminal matters unless immediate steps are taken to study this issue more carefully and to develop programs that have a meaningful way of dealing with them. 231

Justice Fowler’s comments must serve as a warning to all of us, but most especially to our governments. If we do not embrace justice reinvestment, particularly in the context of Aboriginal over-incarceration and FASD, the consequences, both the financial and social, promise to be dire indeed.

231 Obed, supra note 121 at paras 67–68.