

## ABORIGINAL PRACTICE POINTS

# Young Aboriginal offenders

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## Key points

- Working with Aboriginal young offenders can be challenging for defence counsel who may, due to their lack of familiarity with Aboriginal communities, misinterpret, misidentify, or miss completely the significance of cultural commonalities.
- The *Youth Criminal Justice Act* ("YCJA"), which came into force April 1, 2003, provides that at sentencing, alternatives to custody must be considered for all youth, and in particular for Aboriginal youth. The *YCJA* also creates a presumption that measures other than court should be used for first non-violent offences. It encourages family, victim, and community involvement and aims to rehabilitate and reintegrate young offenders. Aboriginal communities have long advocated the restorative justice approach.
- Aboriginal youth are overrepresented in custody by six times their proportional representation in the general population. Defence counsel for Aboriginal youth should try to break this systemic cycle of incarceration by getting to know their clients as well as possible, assessing available resources, and preparing for sentencing.
- Differences exist between Aboriginal offenders and other young offenders. These differences affect every stage of the court process, from before the first appearance to sentencing. Counsel should consider the young offender's level of understanding and education, the amount of family or community support available, whether the youth uses alcohol or drugs, whether Fetal Alcohol Syndrome or Fetal Alcohol Effect has been diagnosed, the youth's level of motivation or initiative, whether the youth's family suffers the effects of the residential school system, and the physical environment of the youth.
- Many Aboriginal young offenders are referred to defence counsel by the Legal Services Society through its legal aid program. Counsel should look for details in the referral and in Crown disclosure to determine whether the client is Aboriginal. Crown disclosure should be provided to Aboriginal youth as soon as possible to allow ample time for the youth to review the documents or have someone review the documents with him or her. Counsel should also determine the youth's level of sophistication and urbanization, and caution the youth not to provide statements to police; Many Aboriginal young offenders want to "get it over with" and make plea decisions accordingly.
- Defence counsel should find out details of their Aboriginal youth clients' families, homes, education, hobbies, cultural participation, health, and friends. Counsel should be aware of cultural differences in communication and should not draw negative inferences due to an Aboriginal youth's reluctance to make eye contact or to answer questions with a lot of details. These should be understood as traditional traits regarding communication and respect, and not as signs of a lack of credibility. Counsel should determine what family and community supports are available for the youth.
- Alternative justice is usually considered at the sentencing stage. Diversion often includes community work service hours, which can be very significant on reserve, where the work is visible and the community is defined. It is critical for defence counsel to look for restorative justice alternatives within the city, too.
- Where community resources are available and Crown and the courts agree, counsel can come up with creative, non-custodial sentences. Alternatives such as sentencing circles take place regularly within some Aboriginal communities.
- FAS/FAE affects an unknown portion of the Aboriginal community and can impair functional ability, judgment, and comprehension. At its most severe, FAS/FAE may

affect a young person's capacity to understand and provide instructions in legal proceedings. Counsel must be aware of any FAS/FAE diagnosis and share it with the court, ensuring it is taken into account during sentencing. Lawyers should be cautious and not assume the existence of FAS/FAE if it has not been diagnosed.

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## I. Introduction

Some of what is set out in this article is true for young offenders in general, who present defence counsel with a multitude of unique considerations. Aboriginal young offenders can pose a challenge to defence counsel who are not familiar with Aboriginal communities and who, as a result, may misinterpret, misidentify, or simply miss completely the significance of certain cultural commonalities. This has the potential to affect seriously the quality of legal representation afforded to the Aboriginal young offender.

## II. Young Offenders Act and Bill C-7: the Youth Criminal Justice Act

The *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("YCJA"), which replaced the *Young Offenders Act*, R.S.C. 1985, c. Y-1 ("YOA"), came into force on April 1, 2003. The YCJA, in its declaration of principles, directs that, within the limits of fair and proportionate accountability, measures taken against young persons who commit offences should be responsive to the needs of Aboriginal youth.

One of the primary differences between the *YCJA* and the *YOA* is that the new legislation devises a process for using extrajudicial measures. The *YCJA* creates a presumption that measures other than court should be used for first, non-violent offences. It encourages the involvement of families, victims, and communities, and is intended to set out a legislative framework to facilitate the rehabilitation of young persons and their reintegration into their communities by ensuring meaningful consequences for criminal behaviour. This restorative justice approach has been long advocated by Aboriginal communities, in particular those on reserves.

The *YCJA* also permits the convening of conferences to give advice on extrajudicial measures, sentencing, conditions for pre-trial release, and reintegration plans. Reintegration plans are mandatory and must be prepared for youths in custody. The term "conference" is not defined in the *YCJA*, but may include sentencing or healing circles, youth justice committees, case conferencing, or victim/offender mediation.

Such legislative confirmation of restorative principles means that a more holistic approach to Aboriginal justice issues will no longer depend on the initiative of and co-operation between defence counsel, the Crown, the court, and the young offender's community. With the passage of the *YCJA*, these principles became an entrenched component of the youth justice system. This is especially meaningful for youth who reside in a defined community, such as a reserve or rural non-Native community, with a true stake in the rehabilitation and reintegration of the youth.

For Aboriginal young offenders, the principles of the *YCJA* can assist defence counsel to craft a meaningful process for their clients. For communities that have already initiated restorative justice initiatives, the *YCJA* provides the legislative teeth to incorporate community-based processes into the traditional legal justice system. This should complement the unique approach each Aboriginal community will bring forth, based on its own standards and principles of governance and justice.

### **III. The Aboriginal youth as client in a criminal context**

Being charged with a criminal offence is a stressful event for most youth, regardless of who they are. One must, however, be mindful of the statistics that indicate approximately 30 per cent of the youth in custody are Aboriginal, which is a sixfold overrepresentation, compared to the general population. According to the Honourable Judge Sheila Whelan of the Saskatchewan Provincial Court, that number is as high as 97 percent in Saskatoon (presentation at 2004 National Youth Justice Forum for Defence Counsel). These statistics do not answer the greater question, which is: Do a greater percentage of Aboriginal youth commit crimes, or are they simply more likely to be convicted or end up in jail than their non-Aboriginal counterparts?

It should be incumbent upon all defence counsel who deal with Aboriginal youth to make a concerted effort to break this systemic cycle of incarceration, which is well-documented and begins with the youngest members of the Aboriginal community. In order to provide the best service to one's young client, it is critical to get to know the client as well as possible, to place the offending behaviour into a context, to assess available resources, and to prepare for sentencing, if necessary. Although we are lawyers, not social workers or psychologists, with youth it is critical for us to establish some sort of relationship to gain trust, to explain the proceedings against them, and to take proper instructions. This is even more significant for an Aboriginal youth, particularly from on reserve, who is thrust into the system surrounded by authority figures who are mainly non-Aboriginal: Crown, clerks, sheriffs, a judge, and usually defence counsel.

## IV. Practical aspects of representing Aboriginal young offenders

The problematic treatment of Aboriginal people in the courts must not be compounded by cultural and language difficulties. Therefore, if defence counsel is not willing to go an extra mile for an Aboriginal offender, then perhaps such representation should be given a second thought.

Many differences exist between Aboriginal young offenders ("AYOs") and mainstream young offenders ("YOs"), which alter the standard practice at all stages of the court process, including before the first appearance, at trial set-up, and at sentencing. Various factors to consider include: level of understanding, level of education, amount of family or community support, alcohol and drug use, Fetal Alcohol Syndrome/Effect (FAS/FAE), self-motivation or initiative, and the generational effect of the residential school system.

### A. Procedures before first appearance

Due to economic difficulties faced by the majority of Aboriginal people, most AYOs will be referred to the Legal Services Society for legal aid. Often, counsel will not know until physically meeting a new client whether the client is Aboriginal. There are some details in the legal aid referral form and in Crown disclosure documents that counsel can look for to help make this determination. Look at the address for hints that the YO lives on a reserve. First Nations organizations are increasingly assigning traditional names to streets and roads. Read Crown disclosure documents carefully for indications that the accused is Aboriginal. These notations could be in the police narrative report or in their police notebook copies. If you have a contact number, call the young person.

The following list of questions is intended not to be exhaustive, but to provide a springboard for discussion and to flag common areas of particular relevance to Aboriginal youth. The questions should be asked so as to elicit a responsive rather than "yes" or "no" answer, and include:

- What is your address?
- Who do you live with?
- What is your background? Are you Aboriginal?
- Are you in school? Is there a First Nations school liaison I can speak to?
- Who can I leave a message with?
- Is there anywhere else that I can leave a message for you?

Sometimes, the YO will give the alternate number or address for the band office or a Native Friendship Centre.

Once you have disclosure from Crown, provide this information to the AYO as soon as possible. This allows ample lead time for the AYO to review the documents before the first appearance. This also allows the AYO to get help from others in reading and comprehending the documents, if necessary. This is important because the AYO may have difficulties reading and understanding the disclosure. Such a situation arose in one case where the AYO was in RCMP custody and there were approximately 100 pages of Crown disclosure dealing with numerous charges. The stepfather of the AYO agreed that the AYO would have difficulties "getting through the stuff". The family and the AYO all wanted matters dealt with that day. In order to do so, counsel needed the assistance of a suitable person and also the RCMP. It

was eventually arranged for the stepfather to go to the RCMP cells and read the particulars to the AYO. One must be careful in assigning this task to the AYO's parent or other adult the youth feels comfortable with such as an aunt or uncle. Oftentimes, these adults may be survivors of the Indian residential school system and may themselves have difficulties reading or comprehending disclosure material, but may be reluctant to admit so. If the AYO cannot identify someone to assist at this stage and if defence counsel does not have the time, the Native courtworker is a valuable asset and would likely be able to assist.

Defence counsel must find out the AYO's level of comprehension and that of the AYO's family—not only of the disclosure material, but of the legal process and consequences at each stage of the process. For example, First Nations people have criticized what they see in the courts as "a circus". This refers to the number of required court appearances and the shuffling of documents, including arraignment reports and trial readiness reports, between the clerk, the judge, Crown, and defence counsel. Therefore, the more circus-like the proceedings appear, the more likely it is that the AYO will not respect or respond to such a system, unless he or she is given some explanation of the process.

Defence counsel must also understand the level of sophistication of the AYO. For example, determine whether the AYO is newly arrived from a small, rural Indian reserve or community, or whether the AYO has been residing in an urban setting with connections to Aboriginal organizations. The less urbanized or sophisticated the AYO, the more difficult the simplest matters can be, and they may present obstacles for the AYO. Addresses can be hard to find, bus time schedules will be a challenge, court schedules will be difficult to adhere to, and even courtrooms will be difficult to locate. The concept of "Indian time", even though the term is not always used in a politically correct manner, does play a part in an AYO's life. The smaller and more rural the background of the AYO, the deeper this concept may be entrenched. Time concepts differ greatly. Depending on the amount of family or community support or the sophistication of the AYO, the AYO may need help just getting to court on time. Native courtworkers are a valuable resource at this very early stage also.

The client should be cautioned not to provide any statements, or additional statements, to police. Many young Aboriginal offenders approach the legal system from the perspective that they need to get it over with and tell all. This attitude of "just getting it over with" may be a direct reflection of the AYO's lack of understanding of the consequences of his or her decision to enter a guilty plea and deal with sentencing. Defence counsel must explain the court procedures and the consequences at each stage of the legal process. This should be done at the initial interview. It is also suggested that at this early stage counsel should learn as much as possible about his or her client's background and circumstances. This can help to establish rapport and provide valuable information to assist in the defence of the client. Areas to be canvassed include:

- Who do you live with? Many Aboriginal children live with extended family, which often doesn't include a mom or dad. If the AYO does not live with his or her parents, ask where the parents are, and the number of siblings.
- Who else lives at home with you?
- Who raised you?
- What grade are you in? If the AYO is not in school, find out why, and for how long he or she has been out of school. Is the youth at the appropriate grade level for his or her age? If not, this should be explored with a school counsellor or home-school coordinator: Is there an identified learning disability? Is the youth academically gifted? Has FAS or FAE been diagnosed? If so, this can have a significant impact on proceedings. Also, graduation is a significant achievement and should be brought to the court's attention. Self-esteem is often a very big issue.

- What kinds of things do you like doing when you're not in school? Discussion of hobbies such as basketball and other non-threatening topics can help establish a relationship, ease tension, help the youth to relax, and discuss him- or herself and areas where he or she excels or derives particular enjoyment.
- How do you participate in your culture? (For example: sing, dance, drum, do artwork, or do other cultural activities.) Do you have an Indian (traditional) name? These questions can also be relevant if there is a release condition dealing with curfew. A court may be amenable to varying a curfew to allow a youth to take part in positive, supervised activities such as sports or cultural events.
- Describe your health.
- Do you drink or take drugs? How often? If appropriate, determine if this was a factor in the commission of the offence.
- Is this the first time you've been charged with a criminal offence? If it isn't, how was the previous charge dealt with? (Was there a trial? Did you plead guilty? Did you take part in alternative measures, also known as diversion or extrajudicial measures or sanctions?) Ask the youth these questions using all of the different legal terms, as he or she may well not realize they are all different terms meaning the same thing.
- Who are your friends? Note if they are co-accused; if so, this may be setting up the AYO for a potential breach, if conditions prohibit contact with close friends or cousins who may be the youth's only circle of friends. It may also be almost impossible to have no contact if the no-contact order relates to family members or others in a very small community. This should be brought to the court's attention so any order can be appropriately worded.

## B. Trial set-up

Often, AYO's will exhibit traditional communication traits, which do not assist or advance any kind of defence to the offence charged. For example, the AYO may be reluctant to look directly at counsel and may not answer questions in any expansive manner. This may result in counsel getting only part of the story or explanation. It may also lead counsel to believe that the AYO does not present well and may not be a credible witness if required to give evidence. More of a concern is that counsel themselves may not believe the AYO. Defence counsel's understanding of the traditional traits regarding communication and respect among Aboriginal people is necessary to avoid these pitfalls.

If at all possible, counsel should go to the site of the alleged crime. If communication is lacking between counsel and the AYO, then a visit to the scene will help in recognizing possible defences. For example, something commonplace to the AYO may not appear important enough to mention to counsel. Also, counsel may discover that the AYO may not consider that certain people can and should be called as witnesses. For example, if Aunt Millie lives across the street from the scene, the AYO may not consider her a "witness", not wanting to involve her because she is family. Only the attendance of counsel at the scene can identify potential issues of this kind.

Other issues that counsel can identify at this stage include whether there are any kinds of family or community supports for the AYO that would help in making further attempts to divert the AYO. There are many new justice programs on reserves and in other Aboriginal communities that the AYO may not be aware of, and counsel, through attending the scene and speaking with people, may become aware of such programs.

If the AYO agrees and counsel can see a possible benefit, attempts should be made to contact the band office and identify contact people who can provide further information regarding the AYO, the AYO's family, and whether there is a community-based restorative justice program that could assist in dealing with the matter. This could be helpful during the trial preparation stage, or at sentencing, if required. This lays the groundwork, not only for this AYO, but for future AYO's.

### C. Alternative/restorative justice

Alternative justice is usually considered in the context of sentencing. In the Aboriginal community, it should be used, whenever possible and appropriate, as a means to divert young offenders out of the justice system at an early stage. After convincing the Crown, an effective diversion plan may be developed through consultation with the family, especially extended family, community resource workers, or a council of Elders and/or chiefs, who may sit as a justice committee or be called together as required. It is critical to be mindful of the community protocol for approaching justice issues outside the legal system. Defence counsel cannot waltz in and impose his or her own view of what is needed for the client or the community to effect rehabilitation and reconciliation. Getting out of the legal system and seeking solutions from within the community is one of the purposes of alternative justice, to empower Aboriginal communities.

One of the principles of the *YCJA* is to reduce the overreliance on incarceration for non-violent offenders; the Youth Court judge is only permitted to commit a young person to jail under very specific criteria. Under s. 39(1)(b), a "young person (who) has failed to comply with non-custodial sentences" may be committed to custody. The reality is that a high percentage of youth find themselves before the court charged with breach of probation offences and thus subject to possible jail, notwithstanding that they may be non-violent offenders. Alternative justice measures are especially relevant under the *YCJA* as reasonable options for keeping AYO's who are subject to s. 39(1)(b) out of jail. Counsel should review the sentencing principles set out in s. 38(2), especially s. 38(2)(d), which addresses AYO's. Alternative justice, if available, may offer to the court a reasonable sanction to address and hold accountable an AYO who has shown non-compliance with court orders.

One frequent component of alternative justice or diversion can be community work service hours. These can have a special significance on reserve, where there is a real, defined community, where news travels fast, and where the undertaking of community hours can be very visible. The community sees the young offender at work, taking responsibility for his or her actions and making amends through service in a meaningful manner. Community hours on-reserve (either through diversion or as a part of sentencing) can address specific and general deterrence, rehabilitation, restitution, and reconciliation principles. Community work service hours that are meaningful, provide real value to the community, and impart a lesson to the young person require community resource people who can make it happen once court has imposed the sentence.

Although restorative justice is most commonly associated within the context of a defined Aboriginal community, such as on reserve, it is critical for defence counsel to apply this approach within the city, as well. Counsel acting in an urban setting should acquaint themselves with restorative justice programs that may be available, and consider that the principles of *R. v. Gladue*, [1999] 1 S.C.R. 688, are applicable wherever an Aboriginal offender may reside. With over 50 per cent of Aboriginal persons now residing off reserve, it is incumbent upon defence counsel to find out what community resources are available to the urban Aboriginal youth. Many youth are active participants in Friendship Centre programs or continue to maintain close ties with other urban members of their First Nation. There are rich, urban Aboriginal communities with close kinship ties, but they must be sought out and are not immediately evident to the dominant population.

## D. Sentencing considerations for Aboriginal young offenders

Creative, non-custodial sentences can be crafted where Crown and the court are receptive, and where there are community resources available to support and supervise the sentence. Communication between defence counsel and resource persons is essential. It is pointless to prepare a restorative sentencing approach if there are no means to implement, supervise, and see the plan through to its conclusion.

Alternatives to traditional court sentencing include sentencing circles. These can be set up in a variety of ways, depending on the practice of the community and the nature of the offence. They may or may not include the judge. A leader or facilitator may bring recommendations from the circle to the court for sentencing at a later date, or if the judge is present in the circle, he or she may incorporate the recommendations of the circle into a standard probation order. A circle requires co-operation and willingness to participate on the parts of both the accused, who clearly must be willing to take responsibility within a public forum, and the victim. It is an excellent opportunity for parents or other family members to be active participants with their child in dealing in a responsible, responsive manner to the offence committed and to seek an appropriate remedy. Having the entire family involved can invoke concepts of acknowledging shame and restoring honour and balance in a holistic, rather than a fragmented, manner.

Alternative justice is not something that's suddenly taking shape because there is a recognition of its need within the legal community. It happens regularly within some Aboriginal communities, and occasionally those working within the legal system are privileged enough to bear witness to it.

### 1. Heiltsuk First Nation justice

Until the late 1950s, it was common for a wayward youth to be called before a group of Elders of his or her extended family and hereditary chiefs. The group would hear of the youth's transgression and devise a means of dealing with it, with a view to restoring balance within the community. This form of restorative justice, which was based on traditional standards of Heiltsuk self-government and values, was gradually supplanted by pressure from Indian Affairs, which usurped hereditary leadership in favour of elected band councils and the Canadian legal system.

In earlier times amongst the Heiltsuk, banishment was a means of dealing with individuals who had upset the balance of communal life.

The most well-known case of banishment is that of Frank Brown, who, as an incorrigible youth in the 1970s, faced hard time at Burnaby's Youth Detention Centre after conviction for a brutal assault. Frank's uncle Robert Hall asked the Honourable Judge Cunliffe Barnett to allow him to deal with Frank the traditional Heiltsuk way by removing him from the community. Judge Barnett agreed and, taking a professional risk, permitted Mr. Hall to place Frank on an isolated island for eight months. Frank was monitored by his family to ensure his well-being during his banishment. Frank underwent a dramatic transformation. In 1989, he hosted a feast to acknowledge his wrongdoing and rebirth as a contributing member of the Heiltsuk community and to acknowledge those persons who came to his aid at a critical time. Frank's story has been documented in an award-winning documentary. In discussing Frank's case in later years, Judge Barnett has cautioned that, although banishment worked for Frank, there are many cases in which it would not be appropriate. For Frank, he had the family and spiritual support that helped to make the experience a success in terms of rehabilitation and restoration.

Banishment has in recent times been sanctioned by the courts on a few occasions to deal with Heiltsuk offenders. Approximately 30 kilometres south of the village of Bella Bella (Waglisla), the Heiltsuk have a traditional site known as Koeye, which consists of a camp, lodge, and traditional big house. It is used throughout the year for various purposes, including as a place for offenders to be removed from the community under an isolated yet supported environment. The Provincial Court in one case agreed to a period of isolation at Koeye for a young man under the terms of a probation order. Such an order would not have been possible without the Heiltsuk community, which laid the groundwork. Between sittings of the circuit court, the Heiltsuk Justice Committee sought direction from Elders and chiefs, as well as the family of the individual involved, and devised a plan for the isolation period, which was presented to and accepted by the court.

The potlatches of the Heiltsuk people of Bella Bella frequently include a washing ceremony as part of the program. The washing ceremony is a public way of acknowledging an incident that has occurred within a family, and symbolically washing the individuals involved of it in order to move forward unimpeded by the unpleasant memory and to restore balance to the family. Washing ceremonies may be conducted for those who suffer accidents, attempt suicide, or are convicted of crimes, and sometimes for even those who are acquitted of crimes.

In a potlatch held in the fall of 2001, a washing ceremony was undertaken that included a young accused person who had been charged with and acquitted of assault causing bodily harm, his victim, and both of their families. Although the accused was acquitted by the legal system, it was his wish and that of his family that he publicly acknowledge the crime he did in fact commit and the injuries he inflicted upon the victim. This was to allow all those involved to move forward and not harbour ill-will towards each other, a critical element of co-existing in a very small and isolated community. During the ceremony, each young man walked through an archway of cedar boughs, his arm linked with the mother of the other, with their respective family members following them, each similarly linked with a member of the other family. As they stepped through the cedar, each was leaving behind the pain and anger of the past, to start a new beginning of healing.

## **2. Qwi:qwelstom—Sto:lo Nation Restorative Justice**

The Sto:lo Nation in Chilliwack operates a Restorative Justice Program, Qwi:qwelstom. This program meets regularly with Crown, Youth Court workers, probation officers, the Native justice worker, and others involved directly in the court process. In this writer's experience, when Qwi:qwelstom becomes involved, all players in the court system appear all too relieved that they have an alternative to resort to in dealing with AYO's. Diversion becomes significant to the AYO, the AYO's family, and the community.

Some of the conditions imposed by the participants in Qwi:qwelstom include volunteer work at the band office, serving meals to the Elders, working in the daycare, and other community work service that is meaningful to the community.

Such plans can include attending the winter session of the Longhouse season. This season is from approximately September/October to approximately March/April. Plans can also include actually residing in the Longhouse and performing all the duties required of that AYO.

The more credible the justice program becomes, especially in the eyes of the police and Crown, the more readily the police and Crown will consider diversion, even after the initial charge approval and early court appearances. Clearly, if counsel familiarize themselves with various Aboriginal justice initiatives, then AYO's will benefit.

### 3. Residential Treatment for AYO

Despite ongoing government cutbacks, both provincially and federally, there are some programs available for AYO. One example in Vancouver is the Young Bears Lodge, operated by the Urban Native Youth Association. Young Bears is for youth between the ages of 13 and 18 and offers a five-bed, 15-week, residential addiction treatment program. The program provides individual and group counselling, cultural teachings, recreational activities, arts and crafts, academic opportunities, and life skills training. Referrals to Young Bears are made through an addiction counsellor and are voluntary, as opposed to court-ordered. Even so, attendance at such a program, if the youth is willing, can be incorporated into the terms of a probation order. Although with only five beds, Young Bears is in high demand; it is not a resource necessarily limited to urban youth.

A culturally relevant residential treatment program available to youth in custody is the A'mut' program in Chilliwack. A'mut' accepts youth between the ages of 12 and 18. The youth probation worker typically makes the referral, and the decision as to who is accepted into the program is made by the warden of the facility where the youth is held in custody.

### 4. A special case: An adult Aboriginal young offender

*R. v. C.H.* (unreported; 2001 B.C. Prov. Ct.)

The facts: C.H., a member of a First Nation in a relatively remote rural area and a tightly knit community, was 54 years old. He was charged, in an information sworn on November 25, 1999, with three counts of sexual offences that occurred between August 1, 1961 and August 31, 1961. Clearly, C.H. was a young offender at the time of the offences. Despite his age at trial, 54, he was tried as a youth, without the benefit of a preliminary inquiry, and was convicted of two of the three counts.

Following many discussions between Crown, the victims, defence, C.H., and the Provincial Court judge, the matter was adjourned for completion in a "circle sentence". The community had not had such a sentencing in its past. There was much preparation to be done before the sentencing. C.H. had to make arrangements for all of the work that he had to do before sentencing. This might have included gathering gifts for all participants, spiritual cleansing ceremonies before the sentencing, arranging for appropriate spiritual people to attend the sentencing, performance of various ceremonies before, during, and after the ceremony, and arranging for the physical setting for the sentencing, as all parties recognize that the courtroom setting is not the appropriate venue for this sentencing.

Also, the chief and council of the band had to be advised and involved in arranging the sentencing. This was necessary so that the community was involved and the entire process valid from the very beginning. Also, Crown was kept abreast of all developments. In this case, the Crown counsel was not Aboriginal, and this was a learning experience for him.

On the afternoon that the circle took place, there was a planning meeting that included the Crown, defence counsel, the judge, the First Nation's justice liaison, and a facilitator. The parties agreed that the circle would consist solely of community members without counsel or the judge, because discussions could go beyond the testimony heard by the judge and beyond findings of fact that the court made at trial.

After the circle took place, sentencing was adjourned to a later date, and was based on the circle's recommendations, as provided to the court by the First Nation's justice liaison. C.H. was sentenced to a period of probation with conditions based in part on the outcome of the circle.

This sentencing set a precedent for all parties involved, including the Aboriginal community. The success or failure of this sentencing to address the concerns of all parties involved laid the groundwork for future circle sentencing. To date, C.H. has not been brought back before the court for any reason.

## 5. Sentencing and Fetal Alcohol Syndrome/Effect

Although FAS/FAE is a complex subject worthy of an entire paper, a discussion of sentencing of Aboriginal young offenders would be incomplete without due consideration to this issue. FAS/FAE affects an unknown and often hidden portion of the Aboriginal community. Its consequences, depending on the severity of the condition, include impaired functional ability, judgment, and comprehension. FAS/FAE in its most severe form may affect a young person's capacity to understand legal proceedings and provide instructions. It may result in false confessions or statements and contradictory evidence. A lawyer representing a client who has been diagnosed with FAS/FAE must ensure that this information is presented to the court and that it is taken into consideration throughout the proceedings, and especially during sentencing. It is also critical that lawyers be cautious and not assume FAS/FAE in someone who has not been so diagnosed; its symptoms can also be common to other disorders.

Judge M.E. Turpel-Lafond of the Saskatchewan Youth Court has provided compelling case law arising from the primarily Aboriginal FAS/FAE youth appearing before her. In *R. v. L.E.K.*, [2001] S.J. No. 434 (Sask. Youth Ct.), she ordered that a plain-language probation order be made available to the Aboriginal young offender, adopting the approach first suggested by Judge Barnett. In *R. v. W.D.*, [2001] S.J. No. 70 (Sask. Prov. Ct.), although a stay of proceedings was ordered, Turpel-Lafond J. felt compelled to note for the record her concerns regarding the mental ability of the youth to comprehend the proceedings, should they ever be reinstated. She noted what she viewed as a real lack of attention to the circumstances of a severely disabled youth. In *R. v. M.L.*, [2000] S.J. No. 17 (Sask. Youth Ct.), the court noted that community protection is not served by the temporary warehousing of FAS/FAE children, and that the principles of *Gladue* apply to young offenders as well. The court also noted the challenges in appropriately sentencing persons with mental conditions such as FAS/FAE, because deterrence and punishment lose their usual meaning.

## V. Closing comments

The courts appear almost always receptive when any reasonable alternative to jail is offered for AYO. For example, in several cases, Provincial Court judges have been agreeable to adjourning sentencing AYO for lengthy periods of time (up to six months or more) so that AYO can attend and complete various residential counselling treatments. Also, if AYO through their counsel can provide to the satisfaction of the court a plan of action for the AYO, then the courts will adjourn sentencing until the plan is substantially or fully completed.

The courts have indicated a readiness to accept recommendations to rely on traditional Aboriginal ways of dealing with AYO. Their so doing enables the Aboriginal community to take responsibility for its own youth, by removing the AYO from the justice system and providing creative, culturally appropriate, and meaningful consequences for the youth's misdeeds.

## **VI. Additional resources**

"Voyage of Rediscovery"; 1990 video of the Frank Brown story; alternative justice and banishment of a young Aboriginal offender.

Judge M.E. Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (1999) 43 *Criminal Law Quarterly* 34