# FASD: KNOW YOUR LEGAL RIGHTS IN ORDER TO ENFORCE THEM

Presented by Yude M. Henteleff, C.M., Q.C., LL.D. (Hon)
to the
To the 2nd International Conference on Fetal Alcohol Spectrum Disorder
*Research, Policy and Practice Around the World*
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The comments contained in this paper are personal to Yude M. Henteleff, C.M., Q.C., LL.D. (Hon), Winnipeg, Manitoba and were made for the sole purpose of presentation to **2nd International Conference on Fetal Alcohol Disorder** and is not to be distributed to any other party or made use of without acknowledging the source.

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### Introduction

In Canada the scales of social justice and equality continue to be tilted against children and youth with special needs in the provision of needed services. This is particularly so of such individuals with Fetal Alcohol Spectrum Disorder (FASD) and even more so for aboriginal children and youth who suffer from that condition.

### FASD Needs Assessment

Since 1987, four Standing Committees on Health of the Federal Government; The Royal Commission on New Reproduction Technologies; the National Advisory Committee on FASD; and Private Member Bills in 1995, 1996, 1997 and 1997 have all recommended strategies on FASD.[1]

In 1996, sixteen national health and allied associations identified the use of alcohol during pregnancy as a national health concern, and committed to identifying many provincial strategies to reduce incidences of FASD[2].

In October of 1996 the then Federal Health Minister David Dingwall and the President of the Canadian Paediatric Society, Dr. Pierre Beaudry, released a joint statement on Fetal Alcohol Syndrome and Fetal Alcohol Effects. Their statement noted that FAS had been widely recognized in Canada as one of the leading causes of preventable birth defects and developmental delays in children.

In the background information paper accompanying their statement, they noted that FAS is the leading cause of development delay in children in Canada and North America; that FAS children may suffer a variety of physical and behavioural effects; and that many of these children are hyperactive, have severe learning disabilities and are often dyslexic. This background paper also noted that in June of 1992 the Senate Committee on Health and Welfare Social Affairs Seniors and the Status of Women released its report "Fetal Alcohol Syndrome: A Preventable Tragedy".

In 1999 the Government of Canada created the national FASD Initiative through expansion of Canada Pre-natal Nutrition Program (CPNP). Its purpose was to further develop Canada's knowledge and expertise in FASD by building on existing programs services and organizations of national and local health and allied professional organizations and of aboriginal communities.

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[1] Public Health Agency of Canada, "Backgrounder on Government of Canada and FASD", http://www.phac-aspc.gc.ca/fasd-etcaf/goc-bg_e.html (Accessed Feb. 28, 2007)

[2] *Ibid.*

In September 2000 the Government of Canada and provincial/territorial (P/T) governments reached an agreement on Early Childhood Development (ECD) that designated FASD as a priority[3].

In 2002 the Government of Canada further committed itself under a five-year federal FASD strategy on early childhood development for First Nations and other aboriginal children, to support the development of prevention and early intervention measures for the First Nation communities, including enhancing training for service-providers and developing practical screening tools and the like[4].

In November 2004 thematic workshops on alcohol policy sponsored by Health Canada were conducted by the Canadian Centre on Substance Abuse with key stakeholders identifying FASD as an area requiring further action.

In September 18, 2006 the Second Report of the Standing Committee on Health (SCH) of the Federal Government report titled "Even One is Too Many: A Call for a Comprehensive Action Plan On Fetal Alcohol Spectrum Disorder" was tabled in the House of Commons.

The Minister of Health, Mr. Tony Clement responded[5] to the Chair of the SCH regarding its report by stating that the Government will continue to work towards fulfilling the federal role within the visions and goals outlined in the earlier report "FASD: A Framework for Action" (Framework). This latter report was released in 2003 by the Government of Canada. The Framework Plan provided details for stakeholders to develop specific measurable actions for prevention and remediation. Despite the clear outline of what should be done as detailed in Framework, the recommendations put forward in the September 2006 report by the Standing Committee on Health, again called on the Government of Canada, Health Portfolio specifically, to develop a comprehensive FASD action plan with clear goals, objectives and timelines.

The tabling of the SCH report "Even One is Too Many" marks the 10$^{th}$ anniversary of the announcement by the former Federal Health Minister Dingwall and the President of the Canadian Paediatric Society, and we are still waiting for a shared comprehensive action plan on FASD by the Government of Canada, the Provinces and the Territories.

Our failure to deal with this national tragedy, as we should, has been noted internationally. A 1999 report by the Canadian Coalition for the Right of Children tilted "The UN Convention the Rights of the Child; How does Canada Measure Up?" researched six areas related to the Convention Articles. The report noted seven areas in which children's rights are being systemically violated in Canada and 26 situations where immediate action is required. The reports states: "In this study, aboriginal children, children with disabilities, abused and neglected children, and refugee children were found to be particularly at risk."

The report points out, with particular reference to Convention Article 23, children with disabilities, that there is insufficient funding for early identification of children and for early intervention with appropriate programs and services for such children.

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[3] *Ibid.*
[4] *Ibid.*

[5]Minister of Health response to Chair, Standing Committee on Health:
http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=0&SourceId=188751& (Accessed Mar. 5, 2007) or Public Health Agency of Canada, "Fetal Alcohol Spectrum Disorder", http://www.phac-aspc.gc.ca/fasd-etcaf/govresfasd-resgovetcaf_e.html (Accessed Mar. 5, 2007)

On May 1, 2002 the Canadian Coalition for the Rights of Children, in anticipation of the United Nations General Assembly Special Session on Children being held in New York during May 8 - 10, 2002, issued a statement, part of which notes: "Other rights outlined in the UN Convention on the Rights of the Child to which Canada is a signatory, have been consistently violated by the laws, policies and practices in Canada."

Their statement also noted that in Canada there has been "a steady deterioration of the supports required to enable children with special needs to enjoy the very rights afforded them under the Convention. In fact support and services for children with special needs, aboriginal and First Nations children, and other disadvantaged children and their families are being rolled back in many places."

In the years 1999 - 2000 a needs assessment of persons with disabilities was carried out in the Northwest Territories. The report, "Living with Disability…..Living with Dignity: Needs Assessment of persons with Disabilities in the NWT" was published in October 2000[6].

What is particularly startling about the report is that among children 0 - 14 years of age, who were assessed,

- 70% have a learning disability;
- 56% have an intellectual disability;
- 50% have a speech disability.

This is several times greater than would be found in similar population in the rest of Canada.

Among persons 15 - 64 years of age who participated in this assessment:

- 64% have a physical disability;
- 34% have a learning disability;
- 28% have an intellectual disability

This is also several times greater than found in similar population in the rest of Canada.

The report also notes that persons with a learning disability are the least likely to have their disability assessed, diagnosed, named.

Dealing with the reasons for such disabilities, the report notes that 57% of those who have what are described as "intellectual disabilities" are born with it as a result of FAS/FAE. The report also asserts that many of these children and youth with brain-related disabilities, that is cognitive intellectual difficulties, come into care or into the criminal justice system.

The report concludes by outlining the need for further programs and services. The report makes it clear that the needs far exceed what is available.

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[6] Health and Social Services Publications, Northwest Territories.
http://www.hlthss.gov.nt.ca/content/Publications/pubresult.asp?ID=212 (Accessed Feb. 28, 2007)

One of the significant acknowledgements in the report is the strong correlation between FAS children and youth and their coming into conflict with the law. We know too well the disproportionate number of Aboriginal children who are in juvenile custodial situations, many of whom will ultimately find their way into penitentiaries.

A similar survey was recently carried out by the Manitoba First Nations. It is titled "The Disability Needs Assessment Study: A Profile of Manitoba First Nations Disabilities" carried out in 2000 and reported in March 2001. The Need Assessment survey of Manitoba's 63 First Nations noted that although the situation for First Nations people with disabilities was serious throughout Manitoba, in the north it was particularly dreadful. The problem in the north is compounded by the lack of the basic necessities of daily living by First Nations persons with disabilities. For example, 35% of their households have no running water; 36% have no indoor plumbing; 37% lack full bathroom facilities. The needs survey makes seven recommendations that require urgent action.

Dr. Anne Stierssguth, of the University of Washington Medical School, Director of the Fetal Alcohol and Drug Unit, is a leading researcher in the area of FAS/FAE. Her research on the damage to the central nervous system suffered by alcohol exposed children indicates that these children may display a number of characteristics of central nervous system damage such as attention deficit hyperactivity disorder (ADHD), attention deficits, learning disabilities, mental retardation, gross motor and fine motor problems, poor impulse control, problems with social perception, and severe behaviour problems.

In the area of cognitive difficulties, these children often experience processing delays, misinterpreting signals that the senses receive in processing and storing such information, difficulties in accessing information and difficulties in expressing themselves. Most importantly, the alcohol affected child has trouble with many aspects of reasoning. In the result they have difficulties in problem-solving, memory, and trouble with organizing thoughts and actions. They also suffer from severe difficulties in overall language and attention span. There are general problems with distractibility, causing them to react impulsively to their environment. In the result, many of these children manifest severe difficulties in school resulting in a high early drop out rate.

Added to all of this is that because of their neurological dysfunction, alcohol affected children have trouble negotiating social situations. This makes it hard for them to consistently experience success with many aspects of peer relations. They simply do not understand social rules and how to resolve conflict. These difficulties, largely unremediated, result in many of these children coming into conflict with the law. Many are aboriginal, proportionately far in excess of non-aboriginals, and are significantly over-represented in the juvenile justice system and our penitentiary system.

Too many child service systems, including the education system, fail to effectively deal with the area of cognitive dysfunction and its consequences when dealing with children and youth with FASD. Their failure to do so means they are failing these children.

In that regard, I would like to refer to a Statement on Fetal Alcohol Syndrome by the Indian and Inuit Health Committee, Canada Paediatric Society, published in Paediatrics and

Child Health, March 2002, Volume 7, No. 3[7]. This excellent Statement addresses FAS prevention, diagnosis, early identification and management for health care professionals.

The Canadian Paediatric Society recommends in its Statement that the following amongst other measures be taken to prevent, diagnose and manage FASD.

- Primary prevention of FASD should involve school-based educational programs; early recognition; treatment of at-risk women; and community-sponsored, culturally-centred programs.
- If abnormalities consistent with FASD are identified, intervention should begin without delay, even before a definitive diagnosis is made.
- Intervention programs should involve the child's family and community.
- FASD diagnostic and treatment services require a multidisciplinary approach, involving physicians, psychologists, early childhood educators, teachers, social services professionals, family therapists, nurses and community support circles.
- Diagnostic and treatment services should be publicly funded and available to all Canadians, regardless of their ethnicity, status (e.g., status and non-status aboriginals), place of residence or income.
- Interventions should continue to be evaluated for effectiveness.
- To ensure that all children have access to the appropriate services and support, cooperation is required at various levels and across various sectors: federal government; provincial ministries of health, social services and education; and local community groups.

In 1998 a conference was held on FAS in Vancouver titled "Finding Common Ground Working Together for the Future", sponsored by the University of British Columbia and the Children and Women's Health Centre for British Columbia. Andrea Beaulieu and Rob Taylor presented a report at that conference that notes that there is a potential of 30% - 40% of all children borne on reserves being identified as FAS/FAE.

Dr. Rizwan Shaw, Director of the Family Ecology Centre in Des Moines, Iowa, pointed out that the health care costs for individuals with FAE/FAS can be staggering. He estimated that the lifetime cost of each child born with FAE that remains unremediated was 2.4 million dollars. A number of studies have made it clear that the front end costs are far less than the ultimate cost to society.

An excellent report by Correctional Services Canada (CSC) in July of 1998 titled "Fetal Alcohol Syndrome: Implications for Correctional Service"[8] by Fred J. Boland, Rebecca Burrill, Michelle Duwyn and Jennifer Karp confirms that there is a considerable link between FAS/FAE,

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[7] Paediatrics and Child Health, Journal of the Canadian Paediatric Society, March 2002, Volume 7, Number 3: 129-132 http://www.pulsus.com/Paeds/07_03/contents.htm (Accessed Mar 6, 2007)

[8] Fred J. Boland et al "Fetal Alcohol Syndrome: Implications for the Correctional Service" July 1998, http://www.csc-scc.gc.ca/text/rsrch/reports/r71/er71.pdf (Accessed Feb. 28, 2007)

attention deficit disorder, conduct disorder, delinquency and crime. They strongly urge that the criminal justice system and Corrections Services Canada develop a screening process for identifying suspected cases of FAS/FAE, and recommend in-depth training for program officers and psychologist, including other personnel such as parole and classification officers. Furthermore, that an appropriate institutional program be developed that specifically deals with these individuals' specific cognitive deficits and behavioural patterns. I strongly support the proposal. However, I also strongly urge that the same recommendation be put in place in the juvenile justice system. Representations have been made to governments for years that they do so, without any response.

I urge everyone at the conference to not only read this report but make it available to anyone who is associated with the criminal justice system and particularly with respect to offenders who suffer from FAS/FAE. The report re-affirms conclusions made by earlier research that persons with FAS/FAE suffer from pre-natal and post-natal growth delay, retardation and central nervous system impairments. The paper notes that FAS individuals have profound and permanent learning and intellectual impairments. Central nervous system damage from pre-natal alcohol exposure results in permanent impairments such as neurological abnormalities, behavioural dysfunctions, developmental delays, and intellectual impairment. The research paper notes that attentional problems, which have been identified as a major deficit in FAS children, are especially problematic because they have negative consequences on other cognitive functions like storing information and memory and information processing.

The report contains an excellent outline of the issues that must be dealt with in diagnosis of children with FAS/FAE. The report makes it clear that as a result of an accumulation of research, the incidence of FAS in aboriginal populations is documented to be as much as ten times higher than general population estimates.

The report makes a number of significant recommendations, which are equally applicable to the juvenile justice system. I referred to these and other extensive research on the correlation between FASD and coming into conflict with the law in a paper presented by me to the National Associations Active in Criminal Justice, Annual Joint Policy Forum, Ottawa, Ontario, May 6, 2002 titled "The Human Rights Of Individuals With FAS/FAE: Still Largely Unmet"[9].

In a report to Health Canada, Alberta region, prepared by Oliver, White and Edwards, titled "Fetal Alcohol Syndrome, a Hopeful Challenge for Children, Families and Communities", they note that the costs including the loss of human potential in failing to adequately deal with FAS/FAE is staggering, particularly considering that FAS is entirely preventable. They point out that many of the women who suffer the effects of Fetal Alcohol Syndrome are alcoholics. They are homeless or marginally housed, living on the edge of mainstream society. The majority of these women suffer the effects of childhood physical and sexual abuse partnered with violence, poverty and discrimination. They raise children also affected by maternal alcohol use. Many of these women are subject to multiple risk factors and health problems, including injectable drug use and alcohol abuse, which put them at risk for HIV infection, hepatitis, sexual transmitted diseases, tuberculosis, and a plethora of other health problems. Systemic issues such as poverty, racism and violence against these women must be addressed.

As yet, despite the fact that the front end investment is a fraction of the ultimate costs that a community is put to by not providing the necessary programs for prevention and

[9] To request a copy, email Henteleff@pitblado.com

remediation of FAS/FAE, and despite the gross breach of the fundamental human rights of people with FAS/FAE, governments, federal, provincial and territorial, are woefully delinquent in providing much needed services to many Aboriginal communities. Major communities such as Winnipeg, Regina, Calgary and Whitehorse have made some progress. However, most aboriginal people live in non-urban areas where drug and alcohol problems are raging and the incidence of FASD has reached epidemic proportions.

Despite the clearest directions that recent decisions of the Supreme Court of Canada have given to governments, including the education system as to their respective obligations under the Charter and Human Rights Codes to provide to persons with disabilities such as those with FASD the same access to the opportunities, benefits and advantages available to other members of society, that simply has not occurred.

In an article in the Toronto Star on Wednesday, October 7, 1998, the late Chief Justice Brian Dickson, a former Chief Justice of the Supreme Court of Canada, stated:

> It may be the short-term financial interests of a government to require people with disabilities to litigate the removal of every barrier. As a group, they are generally poor. Legal aid resources are in scarce supply. But such an approach would not only place an impossible strain on these resources, it would also put a strain on the moral authority of the courts. WHEN THE SUPREME COURT OF CANADA HAS SPOKEN IT SHOULD NOT HAVE TO REPEAT ITSELF…. Thus when the Courts have spoken, as they clearly have, it brings justice into disrepute to disregard what they are saying.

The Supreme Court of Canada has spoken clearly on the Charter rights of persons with disabilities, but the federal government and many provincial governments have failed to respond nearly to the extent they should.

To realize the rights under s.15 of the Charter to equal protection under the law means the right to equality of opportunity, and that the right to equal benefit under the law means the right to unequal distribution of resources in the case of unequal need. The fundamental premise, in which equality is rooted in the Charter, is that every person is unique and that such uniqueness must be responded to on an individual basis. Only by assuring the right of a person with disabilities to have her/his individual needs respected and responded to appropriately, will such person be guaranteed that he/she will receive services appropriately responsive to his/her unique or special needs - only in this way will persons with disabilities achieve true equality. Only in this way will their dignity be respected and protected.

Some have denigrated the Supreme Court for having invaded Parliament's right to make policy by virtue of its decisions on the Charter. However the Charter is a living document and its wording clearly invites the Court's involvement. When an individual's or a group of individuals' Charter rights have been denied, the Court has acted strictly within the authority given to it by the Charter in dealing with that issue.

Iacobucci J., in the Supreme Court of Canada decision in *Vriend*[10], stated:

> In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and

[10] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 559-560

> equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words. (my emphasis)

I will therefore at this time refer to several decisions of the Supreme Court of Canada, which confirm the rights of persons with disabilities including those with FASD, and in particular children with disabilities being the most vulnerable members of our society, to receive from government and its delegatees the services they need and are entitled to, and in a timely fashion. It is essential that such individuals and groups of individuals know their rights so they can act upon them, and acting upon them is an option that more and more are doing because of the lack of progress by governments and its delegatees to meet their needs.

Importance of an Appropriate Education

The importance of an appropriate education for children was dealt with in the 1996 judgment of the Supreme Court of Canada in *Ross*[11]. The unanimous judgment of the Court was delivered by LaForest J. who at paras. 81-82 stated as follows:

> In discussing the interest of the State in the education of its citizens in Jones, supra, at p. 296 ((1986) 2 S.C.R. 284), I stated that "[w]hether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society". And I adopted at p. 297 much of what was said in the American case of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), in the following passage, at p. 493:
>
>> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.
>
> The importance of the provision of education by the state, and the Government of New Brunswick's commitment to eradicating discrimination in the public school system must inform our constitutional review of the order, which, it will be remembered, was made to remedy practices in the provision of educational services found to be discriminatory.
>
> There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian education system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. While the importance of education of all ages is acknowledged, of principal importance is the education of the young. As stated in Brown, supra, education awakens children to the values a society hopes to foster and to nurture. ... The importance of ensuring an equal and discrimination free education environment, and the perception of fairness and tolerance is the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others. (my emphasis)

[11] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825

As was stated by Justice McLaughlin in the 1999 decision of the Supreme Court of Canada in *Bazley*[12], the care of vulnerable children is a critical area of human conduct.

The Best Interest of the Child

The late Justice Dickson, the Chief Justice of the Supreme Court of Canada, in *C.N.R. v. C.M.H.R.C*[13], stated:

> Human rights legislation is intended to give rise amongst other things to individual rights of vital importance rights capable of enforcement.... We should not search for ways and means to minimize these rights so as to avoid their proper impact ... human rights legislation for people with disabilities is to guarantee...that they will...enjoy a real and not simply hypothetical right to equal opportunity with (other) individuals to make for themselves the lives that they are able and wish to have through their fullest possible integration into and participation in society. (my emphasis)

In that same context, I refer you to *Eaton*[14], a 1997 decision of the Supreme Court of Canada. In this case, the school system wished to place Emily, a child with generalized mental disabilities, in a specialized setting. The parents wished Emily to remain in the general classroom. The Court found that Emily's best interests would be best served in a specialized setting. The late Mr. Justice Sopinka who wrote the judgment stated:

> ... in general distinctions based on presumed rather than actual characteristics, are the hallmark of discrimination and have particular significance when applied to physical and mental disabilities …. The accommodation of differences…is the true essence of equality. This emphasizes that the purpose of s. 15(1) of the *Charter* is (1) not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but (2) also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons. (my emphasis.)

Justice Sopinka went on to state in his reasons for judgment in *Eaton* that:

> (1) The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. (2) The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. (my emphasis)

Justice Sopinka's reference to the group is most important because it emphasizes the need to address these concerns systemically if the barriers are to be effectively overcome.

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[12] *Children's Foundation v. Patrick Allan Bazley*, [1999] 2 S.C.R. 534 and particularly at 568 ("*Bazley*")

[13] *Canadian National Railway Company v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114

[14] *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241

I agree completely with Justice Sopinka's further finding in *Eaton* that the decision that is to be made ultimately should be one which is child-centered, that is in the child's best interests. He stated:

> We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centered perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. (my emphasis.)

He went on to state:

> As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. (my emphasis)

Justice Sopinka went on to make the following very important finding:

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind parson cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.... It is recognition of the actual characteristics and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. (my emphasis)

Justice Sopinka then made his seminal decision that although integration should be the norm, the ultimate decision as to what educational environment the child should be in, is one that is in the overall best interest of the child. He stated:

> In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality.... Special education for students with learning disabilities indicates the

> positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides. (my emphasis.)

A 2003 decision by the Court of Appeal of Ontario, *Bonnah*[15] noted that schools must strive to create an environment in which all students, including those with exceptional needs, can thrive and achieve their full potential. It is important to stress that this is not a guarantee of outcome. That is not what parents want, as some would have you believe. They want guaranteed access to required services, no different from what all parents want for their children. By guaranteed access, I mean the provision of such resources as optimizes the use of such services by the student with disabilities.

*Bonnah* was a case in which there were two competing concerns: One, to provide programs to the exceptional child that was in that child's best interests, and second, the behaviour of that child, which resulted in safety concerns for others in the school system. In other words, there were two "best interests" at play, namely (1) that of the exceptional child and (2) the best interests of the other children. The Court, in determining that the action by the school system was inappropriate in removing the child from the school for the safety of others, noted that one must bear in mind the special significance of the placement decision as it relates to exceptional pupils, and the school system must strive to minimize any interference with that placement. The Court noted that the safety concerns could have been properly addressed by the school by removing the child from the classroom, rather than from the school, which they failed to explore, and an approach that has the more limited consequence must be preferred in the case of an exceptional child.

The ultimate rationale of this judgment, re-affirming the decision of the Supreme Court in *Eaton*, is that the focus must be on what is in the child's best interest and the more dependent the child, the greater the right to the required accommodation in order to achieve equality. The decision by the Supreme Court in *Eaton* remains undiminished in its effect.

The Right to Receive Appropriate Services in the Most Enabling Environment

Only by assuring the right of a person with learning disabilities, such as those with FASD, to have his or her individual needs respected and effectively responded to, will such person receive those services appropriately responsive to his or her needs; in other words, the right to appropriate accommodation provided in the most enabling environment.

An education in the most enabling environment for special needs children means an education that:

1. is based on correctly identified needs, that is as determined by an individual education profile ("IEP");

2. the IEP is implemented by competently trained persons in association with required specialists and in a timely fashion;

3. is carried out in an environment best suited to the child's needs, socially, physically, emotionally, mentally, behaviourally and educationally;

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[15] *Bonnah* v. *Ottawa Carlton District School Board,* [2003] O.J. No. 1156

4. provides all those resources which maximizes every individual's ability to make the fullest use of the programs offered by the school system;

5. has a built-in process of regular evaluation and adjustment;

6. has meaningful participation by parents and when appropriate the child, at all stages of assessment, planning, placement and instruction;

7. provides a range of placement options, each being particularly suited to meet the child's best interests as encompassed by the foregoing.

This was supported in the decision by Justice Sopinka in *Eaton, supra*, a decision of the Supreme Court in which the Court held that for the purpose of achieving the objective of respecting and meeting the right of a disabled child to educational equality, the means chosen must be one that is in the child's best interests. Education equality therefore is achieved when every child receives an education in the most enabling environment specifically related to their identified needs and in a timely fashion.

The obligation by the school system to provide the most appropriate accommodation for special needs children was recently re-emphasized in a decision by the Supreme Court of Canada in *Granovsky*[16] in 1999 where the Court stated:

> What s. 15 of the Charter can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental Impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which person with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied. (my emphasis)

It is therefore absolutely critical to specifically identify the child as having a learning difficulty or learning disability as early as possible, and to begin remediation in a timely fashion.

In a 1999 judgment by the Supreme Court of Canada known as *Grismer*[17], Justice McLaughlin reaffirmed the right of each person being assessed according to his or her own personal ability instead of being judged against presumed group characteristics. She stated:

> Employers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or her own personal abilities instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. (my emphasis)

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[16] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703.

[17] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("Grismer")

The Supreme Court of Canada in *Law*[18] emphasized the obligation of governments to carry out its responsibility to vulnerable persons so as to avoid unjustifiable differential treatment, as follows:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. (my emphasis)

The Supreme Court of Canada emphasized in *Law* that if differential treatment reflects the stereotypical application of presumed group or personal characteristics, it would be a violation of essential human dignity and a violation of section 15(1).

The Supreme Court also stated in *Law* that:

> It is impossible to evaluate a section 15(1) claim without identifying specific personal characteristics or circumstances of the individual or group bringing a claim and comparing the treatment of that person or group to the treatment accorded to a relevant comparator. (my emphasis)

The Supreme Court in *Law* also determined that one of the means by which a court can determine whether the legislative scheme is discriminatory, is whether it was underinclusive in purpose or effect. In other words, the legislative scheme is discriminatory by providing services to some groups while excluding those same services sought by the claimants. The inquiry by the courts means looking beyond the question of what the law provides to the question of whether what the law provides is discriminatory in a substantive sense.

One of the excuses used by some professionals and some school systems, indeed by school administrators and governments, not to identify as early as possible (and therefore not to provide services), is the alleged negative effect on children by virtue of being labelled. We label children with such terms as measles, mumps, cancer, cerebral palsy, etc. This simply identifies the condition at that moment in time and points to the treatment required. Yet, some argue that we should not identify a child's difficulty because there is some misconstrued idea that identification might have a pejorative affect. How can one possibly determine a specific course of action if there is not a precise assessment and precise identification, followed by precise remediation?

One can't help but consider that those (particularly school boards and governments) who espouse the totally unjustified position of labelling as being pejorative, is in order to justify de-categorizing children with learning disabilities. The real reason they do so is because there are

[18] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497

so many more children with learning disabilities compared to others and therefore more money to save by deleting categories of LD children who had previously received funding specific to these children's needs, followed by deleting funding. Such actions by governments wishing to save money have had the most negative impact on children with learning disabilities.

The following are some measures provincial departments of education and school boards have taken to reduce their costs on the backs of the learning disabled:

- No longer categorizing children with mild or moderate learning disabilities as a specific category deserving of special monetary support and now describing them as children having "unspecified learning difficulties" dumping them into the general classroom with little or no remediation and no longer providing specific funding;

- Establishing arbitrary waiting periods – two to three years – before providing meaningful service to see "if they will grow out of it". In the meantime, many of these children suffer irreparable harm;

- Cancelling all pull-out programs for such children, which did provide them with specialized assistance, including regular, timely support by specialists for the child and classroom teacher;

- Early identification and timely effective assessment and remediation have become severely delayed as a result of the extraordinary reduction in the number of personnel such as psychologists, resource teachers, language pathologists, reading clinicians and the like, because the numbers of special need children, having been artificially reduced by the foregoing actions, no longer warrant such personnel. The result is that such services when provided are so intermittent as to be useless.

The foregoing actions by too many Departments of Education deprive these children of their right to equality as guaranteed by the Charter and their right not to be discriminated against as guaranteed by Human Rights Codes.

Equal Entitlement to Services

In *Eldridge*[19], a 1997 decision by the Supreme Court of Canada, the Court stated that all human beings are entitled to those services that respect their dignity and that includes the right to benefit equally from services provided to the general public.

As noted particularly in the judgment of Lamer, C.J. in *Eldridge* in the Headnote, in which he stated:

> To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. (my emphasis)

Furthermore, at para. 78 of the judgment, La Forest stated as follows:

[19] *Eldridge v. British Columbia (Attorney General*), [1997] 3 S.C.R. 624

> The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. (my emphasis)

The Court re-emphasized in *Eldridge* that the equality section of the Charter, namely section 15(1), serves two distinct but related purposes. Firstly, it expresses a commitment deeply engrained in our social, political and legal culture to the equal worth and human dignity of all persons. All individuals in society must be secure in the knowledge that they are recognized at law as human being equally deserving of concern, respect and consideration. Furthermore, section 15 instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantages in our society.

When in *Eldridge* the government argued that it should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits, Supreme Court Justice La Forest in response stated:

> This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner. Government must take special measures to ensure that disadvantaged groups are able to benefit equally from government services. (my emphasis)

Leaving aside the immoral and unethical position of a government not providing to persons with disabilities the resources they need to maximize their potential by being able to fully access the same services provided by government to others, the fact is that investment in all individuals with disabilities does give positive returns far in excess of investment made.

A three-year study completed in 1997 and carried out under the auspices of the United Nations, clearly showed that a 12-year special education investment in special needs children produced a positive return from 99% of such children, regardless of how extensive their disability. Positive return meant that they were totally self-supporting in adulthood and, in addition, paid an average of $50,000 in personal income taxes during their working life.

I also refer you to "Children in Need: Investment Strategies for the Education of the Disadvantaged", an 87 page report released on September 8, 1987 by the Committee for Economic Development by the City of New York. This report warns that 30% of students in their schools who are special needs students face a "major risk of failure and lifelong dependency" unless there is an increase in funding provided to meet the educational and health needs of these children. The report presents convincing arguments that programs in education and health will pay for themselves, especially if the investment is made early in the life of a child. The report presented data that indicates that for every dollar spent on appropriate school education for children with special needs will save $4.75 in social, remedial and incarceration costs later.

In a long-term study in Ypsilanti, Michigan, three- and four-year-olds in the Perry Preschool Program were tracked since 1962, a large group of whom received an on-going enrichment program. These youngsters, who live in what was described as "one of the worst-congested slum areas" in the state, were matched with children of similar intelligence and family background living in the same neighbourhood who did not receive the program. When they all reached the age of 19, the outcomes were reviewed. The children in the early enrichment program were twice as likely to be employed or attending college, a third more likely to have

graduated from high school, 40 percent less likely to have been arrested, and 42 per cent less likely to have had a teenaged pregnancy.

The balance sheet showed that for every dollar the City of Ypsilanti spent on early childhood education, the city saved almost six dollars on the cost of remedial education, jails and social services.

In my view, when the argument is advanced that we can't afford it as it relates to the provision of services to special needs persons, it is an act of moral turpitude. We have no right to take the position that some persons have less human rights than others. We should not tolerate any government treating certain citizens, who through no fault of their own have special needs, as second class citizens.

The policies of too many governments are driven by what I describe as the "cost-benefit" approach. This is the approach that argues that as we have limited resources, we must for the sake of perpetuating a certain elite allocate the maximum of our resources available to those who will likely make the maximum economic contribution to society. What is therefore left is to be doled out to the "less than normal". By this policy, the "less than normal" do not qualify for an appropriate share of resources because they are considered poor risks on return of investment. Whatever limited share the disadvantaged person gets must be supported by that person demonstrating that there is appropriate economic output from such investment. The cost-benefit approach has become a rationale to legitimize what I consider a completely amoral policy. I cannot think of any philosophy that is more discriminatory.

Undue Hardship as a justifiable reason for not providing Reasonable Accommodation

In Canada, pursuant to Human Rights Codes, reasonable accommodation is obliged to be provided by the employers or service providers unless that obligation should constitute undue hardship to such employer or service provider. Therefore, undue hardship can be a justifiable defence to a complaint of discrimination. Under the Charter, if a respondent satisfied the substantial requirements of section 1, that is a full defence to a claim for equality under section 15(1). More on this subject later in this presentation.

In *Central Alberta Dairy Pool*[20], the Supreme Court of Canada (1990) held that where an employment rule has an adverse effect on a prohibited ground, the rule will be upheld if the employer can show that it accommodated the employee to the point of undue hardship.

The Supreme Court of Canada elaborated on the concept of undue hardship and reasonable accommodation in the case of *Central Okanagan School District*[21], Justice Sopinka who wrote the majority decision at p. 85 stated:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept.

[20] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489

[21] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

In other words, the result of Justice Sopinka's decision is that "reasonable" in the phrase "reasonable accommodation" means up to the point of undue hardship.

The need for the required supports and services amongst Canadians with disabilities and particularly those with learning disabilities is well documented. One survey was conducted in that regard by the Canadian Council on Social Development Disability Information Sheet No. 17[22] in 2005. It notes that among children, the most commonly required aids/devices are those related to learning disabilities, such as specialized computers, tutors, recording equipment, talking books, spell check and hearing aids.

A further report titled Disability Supports Required in Canada for Children with Disabilities aged 5 - 14: Needs and Gaps[23] was also published in 2005. This report emphasized the extent to which required accommodation is fully met, partially met, and fully unmet. The report also notes that in terms of sheer numbers, the greatest requirement for aids and devices comes from those with learning disabilities.

In *Schachter*[24], a 1992 decision by the Supreme Court, it is noted that any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or expenditure of money and, therefore, that alone is not a justifiable defence to a charge of discrimination except in very rare circumstances.

In a further recent decision by the Supreme Court of Canada in *Meirion*[25] in 1999, the Court stated that "one must be wary of putting too low a value of accommodating the disabled. It is all too easy to cite increased costs as a reason for refusing to accord the disabled equal treatment." The Court also stated that in assessing whether it is impossible to accommodate without imposing undue hardship the following inquiries should be made.

- Details of the financial cost of required accommodations.
- Information about the size and financial resources of the organization.
- How, if at all, the accommodation would cause substantial interference with the rights of others (employees, other service users, members of the public, etc.).
- Details of any additional risks or detriments (including effect on morale) alleged to flow from the required accommodation and whom they are borne by.
- Details as to whether the service could be re-designed, provided in a different way or from a different location, etc.
- Whether, and how, other similar service providers have achieved appropriate accommodation.

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[22] Disability Research Information Page, http://www.ccsd.ca/drip/research/ (Accessed Feb. 28, 2007)

[23] Benefits and Services for Persons with Disabilities, http://www.socialunion.ca/pwd/part2.html (Accessed Feb. 28, 2007)

[24] *Schachter v. Canada,* [1992] 2 S.C.R. 679

[25] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.C.U.* [1999] 3 S.C.R. 868 (the *Meirion* decision)

A 2004 decision by the Supreme Court of Canada in Newfoundland (Treasury Board)[26] dealt with the issue where cost alone was sufficient to establish undue hardship. The Province of Newfoundland refused to honour its obligation to make payment under an agreement made by it with a group of female employees in the province as a result of not their having received equal pay for work of equal value, followed by enacting legislation to confirm such payment. Before payment, the province was able to establish that it was in such financial straits that the whole fabric of its social security system and other systems were bound to fail unless the payment was deferred to some considerable time in the future. The action by the employees was dismissed in that the Court found that s.1 of the Charter applied.

The Court also stated that it would be very rare indeed where such a situation would occur. The Court made it clear that a government would have to be in a catastrophic financial state before it could demonstrate undue hardship and justify action under section 1 of the Charter denying the constitutional rights of this group of women to receive the payments that they were entitled to in order to achieve equality.

As to the matter of reasonableness regarding the obligation to provide accommodation, I refer to the 1990 decision of the Supreme Court of Canada in *Stoffman*[27], and in particular the judgment of Wilson J. at p. 483. As noted by Wilson J., Canadian citizens and governments alike have come to consider equal access to health care as a basic right of social citizenship. In my view, it is equally the case that equal access to education is also a basic right of social citizenship. All one needs to do is read the objects and purposes of most School Acts and the Human Rights Act of a particular province or territory to come to that conclusion.

Pearl Eliadis, who until recently was Research Director for the Ontario Human Rights Commission, in a recent article in the publication Charter and Human Rights Legislation noted that by its decisions in *Mercier*[28], *Grismer, Meiorin, Law* and *Granovsky*, the Supreme Court of Canada has emphasized the need to adapt society so as to include persons with disabilities in its design, structure and concept. This shift in the approach to disability law affirms the centrality of dignity in achieving equality and the importance of individual differences in determining the nature of accommodation. She stated that the further practical result of these decisions is that in most cases of discrimination on the grounds of disability, individualized accommodation is necessary.

The decision by the Supreme Court of Canada in *Grismer, supra*, also deals with the issue where costs to be incurred by the Government was used by it as justification for denying accommodation.

The Complainant having established a *prima facie* case for discrimination, the burden then shifted to the Government to demonstrate that if it were obliged to provide reasonable accommodation to the Complainant, it would experience undue hardship. The Court found that the evidence advanced by the Government in *Grismer* was deficient.

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[26] *Newfoundland (Treasury Board) v. N.A.P.E.,* [2004] 3 S.C.R. 381

[27] *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483

[28] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 ("Mercier")

McLachlin J., who gave the unanimous decision of the Supreme Court in *Grismer,* stated: “One must be wary of putting too low a value on accommodation of the disabled. It is all too easy to cite increased costs as a reason for refusing to accord the disabled equal treatment.” (my emphasis)

Once a *prima facie* case of discrimination is proven, the onus shifts to the service provider, say, the Government and its delegatee a School Board. As required by *Grismer*, each would have to prove that:

I. The standard or policy does not exclude members of a particular group on impressionistic assumptions.

II. The standard or policy does not treat one particular group more harshly than others without apparent justification.

III. There has been an effective search for alternative approaches, including potential accommodation.

Therefore, to fulfill the “reasonably necessary element” the policy or standard must be designed and adopted in such a way to accommodate individual differences up to the point of undue hardship on the part of the service provider.

By virtue of these decisions, the Supreme Court of Canada has clarified and broadened the extent of the duty to accommodate, ruling that:

(1) Accommodation measures must be taken unless it is impossible to do so without undue hardship.

(2) The threshold to establish undue hardship is high.

(3) Employers and service providers must be sensitive to the various ways in which individual capabilities can be accommodated.

(4) Courts, labour arbitrators and human rights tribunals are to take a strict approach to exemptions from the duty to accommodate. That is to say, exemptions are to be permitted only when they are reasonably necessary to the achievement of legitimate objectives.

Appropriate methods of accommodation developed by trained personnel is absent for far too many special needs students in school. It is about time that systems of education fully carry out their obligations to accommodate those children as is clearly enunciated by the Supreme Court of Canada.

In order to assure that appropriate and timely accommodation is provided, experts in the field of accommodation should be on staff. They would determine the accommodations that are specific to the instructional accommodation, environmental accommodation and assessment accommodation for each special needs child. The following is an example of that as prepared by the Centre for ADHD/ADD Advocacy Canada, which particularly relates to LD and ADHA students, some or all of which may be required by a particular student.

**INSTRUCTIONAL ACCOMMODATIONS**

- High structure, quiet classroom
- Avoid open concept classrooms
- Direct instruction
- Reduced/uncluttered format
- Spatially cued formats
- Repetition of information
- Rewording rephrasing of information
- Pair written instructions with oral-Use multi sensory approach
- Extra time for processing
- Non-verbal signals, gesture cues
- Word retrieval prompts
- Reinforcement incentives
- Frequent breaks
- Physical activities
- Organizational coaching
- Time management aids
- Tracking sheets
- Visual cueing/ scheduling
- Graphic organizers
- Use concrete hands-on materials
- Dramatize information
- Ability grouping
- Buddy/peer tutoring
- Duplicated notes
- Note-taking assistance
- Reduced homework/course load
- Computer options with voice to text software
- Use humour not sarcasm
- Augmentative and alternative systems (FM) communication

| ENVIRONMENTAL ACCOMMODATIONS |
| --- |
| • Alternative work space<br>• Strategic seating / preferential seating<br>• Proximity to instructor<br>• Reduction in audio /visual stimuli<br>• Study carrel<br>• Minimizing background noise<br>• Quiet setting<br>• Use of headphones<br>• Special lighting<br>• Supervise transition times with care and cueing 5-10 minutes before changes<br>• Assistive devices or adaptive equipment such as:<br>    o FM system<br>    o tape recorder<br>    o computer |
| **ASSESSMENT ACCOMMODATIONS** |
| • Extended time limits<br>• Alternative settings, a quiet room free of distractions<br>• Space tests and assignments to prevent feelings of being overwhelmed<br>• Reduction in the number of tasks used to assess a concept or skill<br>• Extra time for processing the questions as well as the answers<br>• Prompts to refocus<br>• Reduced /uncluttered format<br>• Reading of test or exam to student<br>• Assistive devices or adaptive equipment such as calculators, reference charts, spell checkers, computers, voice to text software<br>• Verbatim scribing<br>• Alternative test formats including audiotapes, oral, computer, type of exam or test |

Proportionality in Actions by Government

The actions taken by the Government and its delegatee such as school boards must be proportional to the objective to be achieved, failing which it is discriminatory and in breach of the Charter. The issue of proportionality was dealt with by the Supreme Court of Canada in *Irvin Toy*[29].

At para. 75, the majority judgment of Dickson C.J., Lamer and Wilson JJ. noted that on the one hand, the objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation and, on the other hand, to protect a group that is most vulnerable….

At para. 76 of *Irwin Toy*, the following statement was made by the majority, namely:

> The second part of s. 1 (that is, of the Charter) and s. 9.1 test involves balancing a number of factors to determine whether the means chosen by the Government are proportional to its objective. As Dickson C.J. stated in Edwards Books and Art Ltd., supra, at p. 768:
>
> > …the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights. (my emphasis)

As noted in para. 78 of the judgment in *Irwin Toy*:

> The party seeking to uphold the limit must demonstrate on a balance of probabilities that the means chosen impair the freedom or right in question as little as possible. (my emphasis)

Further, at para. 79 of *Irwin Toy*, Dickson C.J.A. expressed an important concern about the situation of vulnerable groups (at p. 779):

> In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons ... Thus as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. (my emphasis)

Further in that regard, I refer to the decision by the Supreme Court of Canada in *Brooks*[30]. The unanimous judgment of the Supreme Court of Canada was delivered by Dickson C.J. At p 1234, Dickson, C.J. quotes with approval *C.N.R. v. C.M.H.R., supra,* as follows:

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[29] *Irvin Toy Ltd. v. Québec (Attorney General)* [1989] 1 S.C.R. 927
[30] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219

> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. (my emphasis)

The issue of proportionality was also recently dealt with by the Supreme Court of Canada in *Treasury Board*[31].

The facts very briefly are that in 1988, the Government of Newfoundland signed a pay equity agreement in favour of female employees in the health care sector. Subsequently, the Government in 1991 introduced *The Public Sector Restraint Act* that deferred from 1988 to 1991 the commencement of the promised pay equity increase. The justification was that the Government was experiencing a financial crisis unprecedented in the province's history. The Supreme Court of Canada held that section 9 of *The Public Sector Restraint Act* was constitutional, even though section 9 infringed section 15(1) of the *Canadian Charter of Rights and Freedoms*, since that infringement could not be saved under section 1 of the Charter. Section 15(1) rights are subject to such reasonable limits provided by law as can be demonstrably justified as stated in section 1.

In justifying its decision, the Supreme Court found that government's response to its fiscal crisis was proportional to its objective. The pay equity payout of $24 million represented a significant portion of the budget and its postponement was rationally connected to averting a serious financial crisis. Secondly, it found that the Government's response was tailored to minimally impair rights in the context of the problem it confronted. Finally, it determined that on a balance of probabilities the detrimental impact of delay in achieving pay equity did not outweigh the importance of preserving the fiscal health of the provincial government through a temporary but serious financial crisis.

The Court further found that the test in *Rex v. Oakes*[32] which is based on the text of section 1 of the Charter provides the proper framework in which to consider what the doctrine requires where legislative action is alleged to come into conflict with entrenched constitutional rights.

The Supreme Court, in its reasons in *Treasury Board,* stated that there are two questions to be answered:

1. Was there such a financial crisis as would constitute undue hardship to the Newfoundland Government in being obliged to honour the payment in question.

2. Was the action taken by the Government of Newfoundland:

(a) proportional to their respective objectives

(b) were actually connected one to the other and

(c) only minimally impaired rights.

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[31] *Newfoundland (Treasury Board) v. N.A.P.E.,* [2004] 3 S.C.R. 381
[32] *R. v. Oakes,* [1986] 1 S.C.R. 103 (the *Oakes* test)

In *Treasury Board*, Binney J. at p. 4 noted that the Court is required to consider what sort of government fiscal crisis is sufficient to justify limiting a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*.

He also stated that this case was one of those "exceedingly rare cases" where the financial crisis facing the Government was so severe that it was about "the province's ability to deliver on some of its basic social programs such as education, health and welfare".

It is against this background that Binney J. (at p. 12) outlined the five related questions that must be considered in order to determine that what was done by the Respondent could be justified pursuant to section 1 of the Charter so that section 15(1) would not apply, namely:

> 1. Does the law address a sufficiently important legislative objective? "It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial." (*Oakes*, at pp. 138-39)
>
> 2. Is the substance of the law "rationally connected to the objective"? (*Oakes*, at p. 139)
>
> 3. Does the law impair the right no more than is reasonably necessary to accomplish the legislative objective, i.e. impair "as little as possible the right or freedom in question"? (*R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at p. 352)
>
> 4. Is there proportionality between the effects of the legislation and the objective which has been identified as of "sufficient importance"? (*Oakes*, at p. 139)
>
> 5. Even if the importance of the objective outweighs the adverse effect of the measure on protected rights, do the adverse effects of the measure outweigh its "actual salutary effects"? (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 888)
>
> (my emphasis)

The Court answered all of these questions in the affirmative with the result that it acknowledged that the Government had fulfilled all the requirements of it by section 1 of the Charter and therefore it was justified in the action it took.

At para. 64 of the judgment in *Treasury Board*, the Court notes that elected governments must be accorded significant scope to take remedial measures even if the measures taken have a significantly negative effect on a Charter right. However it is subject to the further very important statement that the measures taken must be proportional, both to the fiscal crisis and their impact on affected Charter interests.

As noted in para. 97, the Supreme Court concluded in *Treasury Board* that there indeed was an exceptional financial crisis that called for exceptional response. Therefore in doing what it did and proportionately so, the Government had discharged its onus under the *Oakes* test.

Because of the particular set of facts in *Treasury Board*, it would be very rare indeed for any province to face the fiscal situation that faced the Province of Newfoundland in that matter. Therefore, in my view, *Treasury Board* is severely limited in its application by virtue of the specific set of facts.

The *Treasury Board* decision makes clear the extremely difficult barriers a Government would have to overcome in order to deprive any individual of the right to equality as guaranteed by section 15 of the *Charter* and is even more so when the individual is doubly vulnerable, namely a child with disabilities, and totally dependent upon others to secure its rights.

Non-delegable authority of Government in respect to its delegatees failing to provide accommodation to special needs students up to the point of undue hardship.

It is most important to remember that the right to equality under The Charter of Rights and Freedoms is a constitutional right and the right not to be discriminated against under Human Rights Codes (the "Code") is a quasi-constitutional right. This means that these rights are superior to any other legislation and can` only be taken away under the most limited circumstances.

The foregoing must be kept in mind in considering the extent to which a government remains responsible (non-delegable duty) under a provincial school act (or any other act such as the *Indian Act*) for the provision of an appropriate education to children and youth when by the same Act much of that responsibility is also given to school boards.

The matter of the all embracing, superior and continuing authority of a provincial ministry of education was dealt with in the decision of the British Columbia Supreme Court by Shaw J. in *Her Majesty the Queen in the Right of the Province of British Columbia as represented by the Minister of Education* and *Frederick Moore,* 2001 39 C.H.R.R. D/208 and at 2001 B.C.S.C. at 336. I represented the Intervenor, Learning Disabilities Association of Canada, at the hearing of the matter by the British Columbia Human Rights Tribunal. The complainant was successful in his action against both the Government and the School Division.[33] The latter both appealed and the Judicial Review will be held later this year.

Mr. Justice Shaw at para. 19 found that the Ministry's duties and responsibilities are far broader than simply providing funding. In para. 20 of the judgment, Justice Shaw referred to sections 167(1) and 168(1) of the *School Act* and noted that the duties and powers under the foregoing sections are separate and distinct from the Ministry's responsibility to provide funds to the boards of school districts. In para. 21 he noted that the funding responsibilities are set out in section 108 of the Act. In para. 2 Shaw J. stated:

> It will be noted that under s. 108(6)(a)(ii) above, the Ministry may tell school boards to spend a certain amount of money to provide programs or services to "special needs" students."

In para. 3 Shaw J. notes that the boards of the school districts also have statutory powers and duties.

In para. 25 of his judgment, Shaw J. notes that s. 75(1) referred to in para. 23 as follows:

> These words make it quite clear that the powers of the boards are subject to other provisions of the Act (including those I have already cited and to any orders made by the Minister.

At para. 26 Justice Shaw concludes as follows:

[33] *Moore v. B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580

Based on all the above provisions of the School Act I conclude that the Ministry's powers extend well beyond the funding of the school districts. It follows that allegations of discrimination against the Ministry cannot be limited to the use or misuse of the funding power.

As was stated by Justice McLachlin in the decision of the Supreme Court of Canada in *Bazley, supra*, the care of vulnerable children is a critical area of human conduct. Accordingly, a special duty of care must be exercised by all levels of government and its respective delegatees in carrying out their responsibilities, whether under the *Indian Act* or the *School Act*, to vulnerable children such as those with FASD.

Therefore, there are two determinative factors in assessing whether the Ministry has a non-delegable duty under the *School Act* or under the *Indian Act*, for that matter. The first factor is whether the Ministry exercised paramount authority, at least to some extent, and the second is the particular vulnerability of those individuals who come under its jurisdiction.

A recent decision by the Supreme Court of British Columbia in Hewko[34], seemingly contrary to the decision by Justice Shaw in *Moore, supra*, raises questions as to whether there is indeed non-delegable responsibility by the Ministry for the failure of the school system to provide *Moore* with the individualized services he needed and in a timely fashion. This will be the subject of further consideration in the Judicial Review of the *Moore* decision next fall. Therefore, this paper will only deal with the non-delegable authority of the Minister under the *Indian Act.* Under the *Indian Act* the Minister may establish such schools or may request the Province to educate such children.

In that regard, I would like to first refer to the decision in *Plint*[35], which has particular relevance for Indian children who come under the jurisdiction of the *Indian Act*.

This is a decision of the British Columbia Supreme Court. Very briefly, this case involved a series of sexual assaults committed by the defendant Plint against the Aboriginal plaintiffs and the nature and extent of the responsibility of the United Church of Canada and of Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development for those assaults.

Of particular relevance is the judgment of the Court dealing with a non-delegable statutory duty found at section. 249. The governing statute in *Plint* was the *Indian Act*, S.C. 1951, C29. With respect to the schools operated pursuant to that Act, section 249 states as follows.

The Indian Act, S.C. 1951, c. 29 provides with respect to schools:

> 113. The Governor in Council may authorize the Minister, in accordance with this Act,
>
> (a) to establish, operate and maintain schools for Indian children,

[34] *Hewko v. Her Majesty the Queen in the Right of the Province of British Columbia as represented by the Attorney General of British Columbia and the Board of School Trustees of School District No. 34 (Abbotsford).* This was reported in 2006, BCSC 1638.

[35] *W.R.B.* v. *Plint (BCSC)* [2001] B.C.J. No. 1446

(b) to enter into agreements on behalf of His Majesty for the education in accordance with the Act of Indian Children, with

…

(v) a religious or charitable organization

114. The Ministry may

(a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with the schools,

(b) provide for the transportation of children to and from school,

(c) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations, and

(d) apply the whole or any part of moneys that would otherwise be payable to or on behalf of a child who is attending a residential school to the maintenance of that child at that school.[36]

Chief Justice Brenner addressed himself to the argument that the respondent Canada had advanced, namely that because of the use of the word "may" in the foregoing sections *Plint* was distinguishable from *Lewis*[37] where the Supreme Court of Canada found the statutory responsibility in that case to be non-delegable based on the fact that the relevant legislation was mandatory by use of the word "shall". In *Plint* the Chief Justice found that because of the pervasive control granted by Parliament in the language of the Act to Canada, despite the use of the word "may" instead of "shall", that control was consistent with a delegable statutory duty.

What is of interest and as found at paragraph 255 is the statement by the Chief Justice:

> While there is no doubt that Canada had the statutory authority to enter into the educational contracts with the religious organizations, its statutory duty in respect of Indians was not thereby vacated.

Further, [259]

> Given the very high standard of care imposed on Canada under the provisions of the Indian Act and given the virtual absolute control over the lives of native peoples conferred in Canada under the legislation, I conclude Canada failed to discharge its statutory obligation to the plaintiffs in this case. (my emphasis)

[36] These provisions of the *Indian Act* are very similar to provisions in the *School Act* of British Columbia

[37] *Lewis (Guardian ad litem of) v. British Columbia,* [1997] 3 S.C.R. 1145

In further support of his finding in this regard, Mr. Justice Brenner quoted the case of *M.B. v. British Columbia*[38], which arose by virtue of a judgment against the Crown arising from a sexual assault by a former foster parent. The Chief Justice found that Canada in that case owed a duty of special diligence to the plaintiffs and he concluded it fell short of discharging its duty in that case.

The next issue that I want to deal with in respect to the non-delegable responsibility on the part of the Federal Ministry regarding Indian children and the Provincial Ministries regarding all special needs children, is that educational programs must be provided in a non-discriminatory manner.

The definition of "discrimination" by the Supreme Court of Canada can be found in *Brooks, supra,* namely:

> ...discrimination may be described as a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

If a Federal Ministry decides to provide a service, such as public education for Indian children, it must ensure that the service is provided in a non-discriminatory manner. The Ministry cannot avoid this responsibility by deflecting it on to those groups to whom it has designated as being the custodian for such child for the purpose of receiving an education.

The last issue on this subject is that not only can the Government not evade its responsibility under the Charter and Human Rights Codes by delegating its duties, but the delegatee exercising statutory duty also cannot do so.

In that context, I would refer to the 2000 decision by the Supreme Court of Canada in *Blenco*[39]. The majority decision of the Court was given by Bastarache JJ.

At para. 35, Justice Bastarache stated:

> Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. This was confirmed by La Forest J. speaking for the unanimous Court in *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624. (my emphasis)

Justice Bastarache quotes with approval Professor Hogg from his work Constitutional Law of Canada (3rd ed.) 1992 (loose leaf), Volume 1 at pp. 34-8.3 and 34-9 as follows:

> Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority. (my emphasis)

And at para. 40, Justice Bastarache stated:

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[38] *M.B. v. British Columbia,* [2003] 2 S.C.R. 477
[39] *Blenco v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307

> The state has instituted an administrative structure, through a legislative scheme, to effectuate a government program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny…. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny…. (my emphasis)

I believe that the cases earlier cited make it clear that there is a non-delegable duty on the part of the government of Canada under the *Indian Act* to see to it that all children and youth with FASD receive effective services delivered by properly trained professionals in a timely fashion, in the school system as well as other child service systems. This is not happening and there is very little prospect that it will happen within the reasonable future. Parents of such children may very well come to the realization as have groups of parents of other special needs children across Canada, that the only way to make governments live up to their responsibilities for FASD children and youth is by taking legal action.

Use of Canada's International Human Rights obligations to advance the rights of Aboriginal FASD children

The question that next arises is the use of Canada's International Human Rights obligations as represented by Treaties and United Nations Declaration on the Rights of Indigenous Peoples[40] to advance human rights of Aboriginal individuals with FASD.

With regard to the Indigenous and Tribal People Convention enacted by the United Nations, and which came into force on the 5th of September 1991, reference should be made to the following Articles in order to determine the precise undertakings by the governments who are signatories in respect to the indigenous peoples of their country. It has yet to be ratified by Canada.

Pursuant to Article 2: 1 and 2(a), a signatory state has the responsibility to develop with the indigenous peoples a coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. Such action shall include measures for ensuring that indigenous peoples' benefit on an equal footing from the rights of opportunities which national laws and regulations granted to other members of the population.

Pursuant to Article 3, a signatory state guarantees that indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

Article 5 of this Convention requires that a signatory state shall be required to recognize and protect the social, cultural and religious and spiritual values and practices of the indigenous peoples and due account shall be taken of the nature of the problems which face them both as groups and as individuals.

The foregoing provision in Article 5 has particular resonance in respect to aboriginal peoples suffering from Fetal Alcohol Spectrum Disorder.

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[40] United Nations High Commissioner for Human Rights, http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument (Accessed Feb 28, 2007)

Not only is the signatory government required to take particular notice of the unique problems suffered by such aboriginal peoples, but pursuant to Article 7, sub 2, the improvement of the conditions of life and work and levels of health and education of the indigenous peoples and with their participation and cooperation shall be a matter of priority and plans for the overall economic development of the areas they inhabit. Furthermore, special projects for the development of the areas in question shall also be designed as to promote such improvement.

With respect to the matter of adequate health services, Article 25 requires that signatory governments shall ensure that health services are made available to the peoples concerned or shall provide them with resources to allow them to design and deliver such services under their own responsibility so that they may enjoy the highest attainable standard of physical and mental health. Again, this is particularly relevant to the profound difficulties currently facing individuals with FASD.

In order to assure that the guarantees of equality and equity, Article 26 of this Covenant requires that signatory governments shall take measures to ensure that indigenous peoples have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community. Furthermore, in the same context, Article 27 requires that such education programs and services shall be developed and implemented to address the indigenous person's special needs.

By way of additional emphasis to the rights of indigenous peoples guaranteed by the foregoing Convention, on December 18, 1992, a Declaration was passed by the United Nations titled "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", Resolution 47/135[41].

Pursuant to Article 4, sub 1 of this Declaration, signatory States shall be required to take measures that ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law. This precisely reflects the guarantees contained in section 15(1) of the *Charter*.

The next issue to be addressed is the extent to which Courts in Canada will consider and apply such Treaties and Declarations.

Professor Craig Scott of Osgoode Hall Law School, York University, in his paper titled "Advancing Economic, Social and Cultural Rights: Implementing International Human Rights Standards into the Legal Work of Canadian Human Rights Agencies[42],", delivered at a conference convened recently by the Ontario Human Rights Commission, Legal Services Branch commenting on the recent Supreme Court of Canada decision in *Baker*[43], posed the following questions that have to be addressed by virtue of *Baker*:

1. How and to what extent can an international treaty be used to interpret a domestic statute?

[41] Office of the United Nations High Commissioner for Human Rights, www.ohchr.org/english/law/minorities.htm (Accessed Feb 28, 2007)

[42] Professor Craig Martin Scott, "Advancing Economic, Social and Cultural Rights: Implementing International Human Rights Standards into the Legal Work of Canadian Human Rights Agencies", http://osgoode.yorku.ca/osgmedia.nsf/research/scott_craig_m (Accessed Mar 5, 2007)

[43] Baker *v*. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

2. Can international rights law structure or constrain domestic executive discretion?

3. What problems might this present?

The federal government in the *Baker* case argued that until the legislature clearly incorporates international conventions, they do not have the force of law in Canada. Professor Scott noted that adoption of the federal argument would leave only the *Charter* route and there are not many *Charter* cases that reflect the impact of international rights law. The result of the federal argument would be that the effect of international human rights law on domestic law would be virtually eliminated. As Professor Scott noted, the Supreme Court rejected this argument in *Baker* and stated that a ratified treaty may be used to interpret domestic standards. Professor Scott's view of the decision is that the court is saying that when invoking the values and principles of international human rights law, even without clear obligation to do so since they may not have been incorporated in domestic law, there still may be room to use them at the domestic level.

Professor Scott suggests that there are four doctrinal signals by the Supreme Court as a result of these recent decisions, namely:

1. Even before the *Baker* case the court spoke of a "duty to subscribe to avoid conflict" with international treaties.

2. A connection exists between international human rights treaties and the *Charter*. These treaties are fused in a sense with our constitutional values.

3. International human rights law has begun to focus on the link between the duty of giving effect to the treaties and the remedies for human rights violations. For example, the preamble to the Ontario *Human Rights Code* links the United Nations Declaration on Human Rights to the legal framework of Ontario.

4. Individual statutes can signal even greater normative effect even if they do not explicitly incorporate international treaty obligations.

In the 2002 Canadian publication <u>Regulatory Board and Administrative Law Litigation</u>, at page 310 there is an excellent article by Gerald P. Heckman of the Faculty of Law, Queen's University, Ontario titled "International Human Rights Law Norms, The Charter and Discretionary Powers". He takes a somewhat more positive view of the Supreme Court of Canada's decision in *Baker, supra.* It is his view that the Court endorsed the presumption that holds that domestic law, including ordinary statutes and the Charter should be interpreted and applied in a manner that upholds rather than violates Canada's international treaty obligations. Under this approach, Canadian decisions makers should have regard for the values underlying the provisions of ratified but unimplemented international human rights conventions, which resonate with fundamental Canadian values. As Mr. Heckman further comments, fundamental values are only one boundary to the exercise of such discretion.

The Supreme Court of Canada, in its 1989 decision in *Slaight*[44] has indicated international norms could be relevant in determining the boundaries set by the *Charter* on the exercise of discretionary power. In *Suresh*[45]*,* the Court confirmed and formalized this approach

[44] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

[45] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3

by directing that no interpretation of certain *Charter* rights would be complete without a review of the underlying international norms. In *Suresh*, the Supreme Court, in its strongest statement yet on the role of international law and *Charter* interpretation, decided that it would not interpret certain sections of the *Charter* without considering “the various sources of international human rights law, declaration, covenants, conventions, judicial and quasi-judicial decisions of international tribunals and customary norms. The Court decided it would consider norms derived from unimplemented human rights treaties as persuasive but not necessarily binding.

Since I first prepared this paper, two additional commentaries on this subject have come to my attention. First are remarks by Chief Justice Beverley McLachlin of the Supreme Court of Canada given at the 2005 Lord Cook Lectures in Auckland, New Zealand, December 1, 2005 titled "Unwritten Constitutional Principles: What's Going On". At page 22 of her remarks, she states:

> I return to the question: how can unwritten constitution principles be identified? The answer is that they can be identified from a nation's past custom and usage: from the written text, if any, of the nation's fundamental principles; and from the nation's international commitments. Unwritten principles are not the arbitrary or subjective view of this judge or that. Rather, they are ascertained by a rigorous process of legal reasoning. Where, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognize it. This is not law-making in the legislative sense, but legitimate judicial work.

For discussion of the Canadian context, Chief Justice McLachlin referred in her paper to Chapter 14 of the text The Unity of Public Law (Oxford: Hart Publishing, 2004) by Jutta Brunnée and Stephen J. Toope titled "*A Hesitant Embrace*: Baker *and the Application of International law by Canadian Courts*"[46].

The authors wholeheartedly agreed with Justice LeBel of the Supreme Court of Canada that what was needed most in the growing domestic engagement with international law is greater analytical rigor. They note that especially in the context of customary international law, domestic courts participate in the continuous weaving of a fabric of international law. The authors argue that it is not enough to treat all normative threads as potentially persuasive but mandatory since over time the former approach risks weakening the fabric of the law. Their concern is that if international law is merely persuasive, it becomes purely optional and can be ignored at the discretion of the judge. The article deserves your consideration for many reasons, not the least of which is their consideration of several inter-related questions[47], namely:

- When is international law directly applicable in Canada?
- To what extent are the legal effects of international law in Canada dependent upon its domestic implementation?
- What constitutes implementation?

[46] The text by Brunnée and Toope can be secured from the Saskatchewan Legislative Library.

[47] Brunnée and Toope, at pp. 360 - 361

- Under what circumstance can international law that is binding on Canada have legal effects in Canada?

- Under what circumstances, if any, can international norms that are not binding on Canada or not legally binding at all have legal effects in Canada?

A new text by Stanley Corbett titled "Canadian Human Rights Law and Commentary"[48] deals with the relationship between domestic and international human rights laws in Canada, and would be most useful in addressing this most important issue.

In closing, I quote one more comment from Chief Justice McLachlin's extraordinarily perceptive paper, found at page 28 of her paper:

> Judicial conscience is founded on the judge's sworn commitment to uphold the rule of law. It is informed not by the judge's personal views, nor the judge's views as to what policy is best. It is informed by the law, in all its complex majesty, as manifested in the three sources I've suggested.

The sources identified by her were usage and custom, values affirmed by relevant textual constitutional sources and principles of international law endorsed by the nation. In the pursuant of social justice for all Canadians we should use her words as a very useful signpost.

With all of this, the ultimate questions that still must be answered are: What is it going to take to make sure recommendations by all the major organizations representing the disabled particularly those with FAS/FAE across Canada are responded to appropriately and in a timely fashion. What is it going to take to make sure that governments at all levels in the very near future provide the necessary resources?

Governments' ethical, moral and, ultimately, legal responsibility is to do what is necessary so that every disadvantaged person receives services appropriate to their specifically identified and individualized needs so that they can take the fullest advantage of that available to all other Canadians. If we fail to do what is necessary to achieve this purpose, then the right to equality as promised by the *Canadian Charter of Rights and Freedoms* and as confirmed by the Supreme Court of Canada, will be nothing but ashes in the mouths of disabled persons in Canada, particularly those with FAS/FAE.

If governments fail to do what they are obliged to do - then they are truly not accountable. And if they are not accountable - then democracy in Canada becomes a pale imitation of what it is supposed to be.

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[48] Corbett, Stanley M, **Canadian Human Rights Law and Commentary**, (Canada: LexisNexis Canada. 2007)