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*R. v. Jacob*, 2002 YKTC 15

Date: 20020219

Docket: T.C. 01-00252

Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

**(Before His Honour Chief Judge Barry Stuart)**

**REGINA**

**v.**

**MARCELLUS NORMAN JACOB**

KEVIN DROLET

APPEARING FOR CROWN

NILS CLARKE

APPEARING FOR DEFENCE

**REASONS FOR SENTENCE**

**Initial Comments:**

[1] Marcellus Jacob, 21 years old, raised as a ward of the state until age 18, will spend up to eight years in jail for a horrible crime.

[2] His sentence sets a precedent for the next case. There will be a next case. There have been many other similar cases. There are right now, within our communities, within our institutions, children, young boys, young men, with stories similar to Marcel Jacob. Unless we change what we do -- we as families, communities, professionals -- there will be many more "next cases". How many Marcel Jacobs do we need before we appreciate that if we always do what we have always done, we will always face what we always face -- the next case to sentence, the next victim to heal.

[3] The next case, like so many before, will leave in its wake the broken lives of victims; shattered families; angry, fearful and frustrated communities; burned out, despairing professionals, and young men sitting in jails, growing more disconnected, more hopeless and ultimately more dangerous.

[4] The next case will bring out angry, fearful, frustrated friends and family of the victim and citizens demanding retribution. Punishment is sought as a quick fix for anger and fear. It never is -- either a quick fix or a solution for very much.

[5] I have always known that harsh sentences garner public support for the judiciary. I have also always known that when a youthful offender returns to his community older, more disconnected and dangerous after a long jail sentence and commits another, often more vicious crime, few will blame the

court. They should. The finger of public condemnation shifts to corrections. The court can elude public disapproval for the next offence, as most will recognize we did our job -- we imposed the very harsh sentence the community sought. The cycle persists, as the community again calls for a harsh sentence. The next case involves a new victim, a different, usually more serious crime, but the same offender.

[6] There is hope we all might probe this tragedy to find what is necessary to prevent at least some of the parade of "next cases". We must do more than debate whether the sentence should have been more or less. We must all do the demanding, difficult moral work to question whether what we are now doing is contributing to the next case.

[7] There is little doubt the community and families of both the victim and offender can justifiably find fault with the system. Within the system, from social workers, to the court, every hand along the way contributed, in part, to the tragedies surrounding this case. We, within the system, cannot deny our responsibility. We must learn from our failures.

[8] But the failures that led to this crime do not pile up only at the doors of the agencies and professionals involved. The family of the offender, his immediate and larger community can also not deny their responsibility and must try to learn from this case.

[9] The victim's impact statements and the comprehensive documentation of Marcel's history provided by counsel and the probation officer warrant more than conventional reasons for a sentence. This history blatantly documents how all of us -- family, community, institutions and professionals -- have failed to provide Marcel Jacob with a decent chance to be a healthy member of our community, and failed to prevent the harm that everyone knew, or should have known, Marcel Jacob could wreak on his community. It is not possible to brutalize a young child without expecting an equal measure of brutality in return. Brutalized young people, male or female, will return the brutality in kind, either upon themselves, upon others, or both.

[10] I have seen too many "next cases" to merely sentence Marcel and move to the next day, the next case. In this judgment, I have indulged my frustration and sadness by exceeding the conventional practices framing sentencing decisions. I do so fully aware that in moving beyond the tacit boundaries limiting judicial comment, my actions will be read in many quarters as reprehensible. I do so without seeking to blame anyone, but rather to gain a better understanding of how the court failed and hopefully to challenge all of us to debunk the myths that retain failed practices and perpetuate an incessant stream of next cases. This stream of next cases flows from the very same sources and carries us to the same repetitive suffering. It is because the means lie within our reach to prevent this suffering that the suffering is tragic.

[11] Perhaps at some level, as I dug through the documents provided by counsel and the probation officer, I was looking for someone to blame. How could the widely documented problems facing Marcel not have been addressed? There must be someone, maybe several, who failed to carry out their responsibilities. I found no one. I did find many who valiantly tried, but had neither the resources, skill, nor support to generate change in Marcel's life. Along Marcel's journey to his crime there are many stories of family members, community members and professionals who tried but failed to make a difference.

[12] While I found no one to single out for blame, it became obvious in pouring through the documents that there is a clear villain. Once I have worked through the conventional sentencing circumstances, I will try to expose this villain. There are clear reasons why Marcel became the next case, why so many other young people wait their turn to be the next case.

### **The Offence:**

[13] The heinous details of the offence cannot be related without unduly impacting on the dignity of the victim. In setting out the factual foundation for sentencing, only the principal facts are recounted.

[14] Mr. Jacob broke into the victim's home some time after 1:00 a.m. He pulled his T-shirt over his head to hide his identity. Carrying a knife, he woke the victim from a deep sleep. For the next two or three hours, holding the knife over her, he ordered her to carry out numerous deplorable, degrading acts. These acts included multiple physical and sexual assaults. The repeated sexual assaults included using various objects to penetrate the victim anally and vaginally. He used duct tape to bind her hands and feet, and to cover her eyes and mouth, leaving only her nose exposed.

[15] At one point, when her head was covered with a blanket, Mr. Jacob began sawing through the blanket near her neck. He sawed off most of her waist-length hair that she had worn for 22 years. At this point, the victim was convinced that she was "as good as dead". Mr. Jacob sprayed chili pepper in the victim's nose. She could hardly breathe. By forcing the inhalation of several noxious substances, such as lamp oil, chili powder, hair spray and perfumes, he caused the victim's lungs to burn and become asthmatic. At times, he violently jerked her shoulders from behind, causing whiplash in her neck.

[16] When she heard no more noise in the house, she struggled free of the duct tape and fled to the street.

[17] Numerous bruises and cuts covered her body. Her lungs were weakened and burned. Skin and eyebrows were removed when he violently ripped the duct tape off. The physical injuries were serious, but not permanent. The emotional and spiritual damage may last a lifetime.

[18] The numerous times and methods of physical and sexual assault over a protracted period, the use of a weapon, and several life-threatening actions combine to classify this offence within the category of "worst case".

[19] The horrific sexual assault is compounded by breaking and entering into the victim's home in the middle of the night. As a consequence, the victim has lost any sense of safety that a home generally provides. His disrespect for the victim extended to her home, as he wantonly ransacked the premises. Finally, his threats to harm her if she reported the incident to the police further traumatized the victim.

### **The Victim:**

[20] The factual details in each case only tell a part of the victim's story. The full impact of the crime can never be captured. For many victims, the impact of crime can insidiously permeate their lives every day, in ways that others cannot anticipate or appreciate. It is rarely possible for anyone within the justice system or the victim's circle of friends and family to fully comprehend the impact of crime, especially serious crime. Consequently, our individual and collective response to victims is rarely appropriate, rarely sufficient to restore their lives to any semblance of normalcy. For many victims, the difficult struggle to regain their lives can be lonely and profoundly challenging. For all of us -- justice professionals, family and friends of victims, and offenders -- facing up to and appreciating the damage crime imposes is essential to realize many of the stated objectives of responding to and preventing crime. A victim's healing journey can be significantly advanced by everyone understanding the impact of crime. Taking time to hear and appreciate the impact of crime on victims is crucial in each case for at least four reasons:

- **1. Fostering Experience of Justice** - Victims must be able to participate in the

decision-making process of sentencing in a manner that is meaningful to, and needed by them. In the past, the state has appropriated more control and responsibility from the victim over the decision-making in sentencing than can be justified on any grounds. While necessary to leave the ultimate responsibility for the decision with the court and retain the primacy of the state voice in sentencing, the victim must be afforded a meaningful opportunity to participate if justice, as well as the law, is to be served. Justice, and especially a take-away experience of justice, arises as much from the sentencing process as from the sentence.

We do appreciate that the process of a trial is the product. That is, without the numerous *Charter* protections and procedural rules that ensure the trial process is fair, the product of a trial would be unacceptable. In sentencing, however, we have yet to fully appreciate that process is product. That is, we fail to appreciate that for all participants the space and manner created for their participation is as instrumental to the pursuit of justice as the outcome. If the voice of victims is not meaningfully engaged then in the aftermath of a sentencing decision, there is little chance they will leave with a sense of fairness or justice.

The minimal resources made available to communities and victims to participate provide no basis to generate a sense of fairness about, or instill a sense of responsibility for, outcomes. If victims and communities are not competently engaged in the process, they will have little constructive connection to the outcome.

- **2. Making Offenders Aware** - Offenders are rarely exposed to the tragedies they cause. If offenders can avoid exposure to the pain they cause, they can cling to their rationalizations for crime. The pain of victims, like a razor, cuts through rationalizations offenders employ to explain their actions. Offenders immersed in the game-like nature of the adversarial system need to confront the human dimension of their actions. No one can as vividly cut through the morass of legal procedures and games to lay bare the human suffering of crime than those who suffer from crime. Without experiencing crime's human dimension, offenders may never be sufficiently jolted out of their self-protective reality to appreciate the larger reality of their actions.

Foolishly, the justice system excessively depends upon punishment to instill in offenders the motivation to change. Our embarrassingly high and readily overlooked recidivist rates unmistakably reveal the folly of our expensive, excessive dependence upon punishment to change behaviour. Hearing and facing up to the full human suffering left behind in the wake of their crimes can generate the profoundly new perspectives offenders need to change their behaviour.

I'd done -- like lots of stealing from rich people's places -- like lots. Never bothered me -- you know, they had so much stuff. Now I think, like, every day what I did, eh? They were crying -- like, really hurt by what I did. I just never thought they would be so scared of me -- of people like me -- because I'd been in their house, eh. (Offender, after Circle, 1999)

In this case, the victim impact statements and the excellent presentation of the victim's situation by Ms. Forde, the victim services worker, may significantly influence Mr. Jacob's appreciation of the tragedy left behind him. Appreciating the suffering he caused can be an important continuing influence on his motivation to fully engage the difficult treatment needed to return to society as a safe and positive addition to his community.

Jan Forde, the victim services worker, called the victim of this crime a "survivor". Without the courage, wisdom and determination she displayed during two to three hours of unmitigated hell, she would not be alive today. We can only hope this same courage, wisdom and determination will carry this survivor through the challenges of her healing journey. With an abiding respect for what she has faced and will face, I will also refer to her as a survivor in the remaining parts of this judgment.

The survivor was afforded an opportunity to speak directly and chose not to. Her circumstances were clearly set out in her impact statement and through the testimony of the victim services worker. These sources articulated clearly what the offender needed to hear.

This judgment will be a part of his prison file and before any parole board in the future. To keep the impact of his crime as a reminder of why he must pursue treatment, I include relevant parts of her impact statement. There is no more direct or eloquent way to express the pain and suffering this crime has caused:

This would take a book written over the rest of my life. My emotional reaction is typical of survivors of trauma involving near death. I am unnaturally afraid, terrified even, under what before the attack were normal, positive situations. I am afraid to be in my own home alone, especially at night-time and that makes it, at times, impossible for me to sleep. I have disturbing dreams. I don't sleep deeply. I am hyper vigilant a lot of the time. I find myself peeping outside of the windows regularly to see if anyone is lurking around, to see if there are footprints on the patio. I keep all of my doors and windows closed and locked. I am terrified to leave my own home on foot, alone, in broad daylight -- it is not even an option for me. I am a prisoner in my own home. Things that used to be freedom, like going for walks, or gardening in my yard, or taking the garbage out ... when I'm alone, I just can't do them. This incident has curtailed my freedom of movement. I won't walk to the end of my driveway. I can only leave my home in a cab or if a friend is with me. My mailbox is right outside my front door. I couldn't check my mail after the assault. I do now, but I have to peep through the window first to see if anyone is around before I can open the door. When the house makes a noise, I hit the ceiling. In other words, I have very exaggerated startle responses. I am frequently in a state of high anxiety and have frequent panic attacks. Also, my ability to deal with normal day-to-day stresses has been lessened.

Being in normal social situations makes me extremely tense at times, like going to a social function. I no longer feel comfortable in public situations, in any situation where I don't know everyone. Trusting people is an issue for me. I don't trust people and society as I use to. I still freak out getting into a cab with a male driver if I don't know him.

...

Towards the end, not long before he finally left, I was certain he intended to kill me before he left. I begged him not to, telling him my daughter needed me.

...

I no longer feel safe in my own community. Subsequent attacks on other women in the community were triggers for me and severely hampered my efforts to normalise my life. I feel a great fear and distrust towards most men. I feel I have lost much of my joy of life and find I need to work very hard to regain it. This is something that consumes most of my time on a daily basis.

When somebody commits a crime, he has not just broken the law: he's broken a person along with it.

Ms. Forde indicated there is a high correlation between Post-Traumatic Stress Disorder (PTSD) and sexual assaults, especially assaults involving cruelty, degradation and threats to life. PTSD can deny the capacity to function in society. These major debilitating effects of PTSD can last a lifetime. While in jail, Marcel should be informed of precisely what the dysfunctional life of someone suffering from PTSD involves. He needs to clearly understand the harm he inflicted does not end when he walked out the door. Just as the harm inflicted on him by his uncles and others dramatically changed his life, his crime has dramatically changed the life of his victim.

- **3. Measuring the Severity of Crime** - In addressing many of the sentencing principles, the court must be acutely aware of the specific impacts of the crime on victims and on the community. After hearing the legal facts surrounding numerous crimes, after reading numerous pre-sentence reports and psychological assessments, victim impact statements and various supporting documents, and after listening to countless submissions from counsel, judges may not fully appreciate the uniqueness of each case if the victim's voice is left out. As difficult as it may be, judges must also be aware of the human dimensions of each case. Sentencing must never become a mechanical, arithmetic calculation. If justice is to be pursued, the human dimension in each case must be understood and embraced.

While impartiality may be challenged by exposure to the raw human dynamics of each case, both fairness and justice are sacrificed if for the sake of impartiality judges are sanitized from the full human dimensions of a crime. Respect for the court is not achieved by sanitizing the process, but by providing the requisite training and support for judges to develop the difficult but essential ability to act with appropriate measures of impartiality and fairness when considering a sentence that fits all the circumstances of the offence, offender, victim and community.

- **4. Community Awareness** - The community must hear from the victim. Crime, in many ways, isolates a victim from the community. Communities need to hear from the victim to be fully cognizant of what needs to be done in the community to prevent similar acts and to know what is needed to support this survivor and other victims and survivors.

A community cannot know how to offer support if they do not understand the specific impact of a crime. The impacts will be different, and the need for support will be different. This survivor eloquently articulated the need for many sectors of the community to be uniquely sensitive to her situation. For example, young aboriginal men need to know why they may experience a negative feeling from this survivor. She stated:

I am incredibly sensitised to the presence of native people, particularly young native males. It is irrational, but it is a big trigger for me. It causes great fear and tension, which has robbed me of taking normal pleasure in social situations.

[21] For many victims, ongoing victimization can be caused by misinformed friends and families responding in inappropriate ways. They too need to hear from the victim to understand a victim's circumstances and how to properly provide the love and support a victim needs. Again, the words of this survivor illustrate the need for all friends and family to be informed:

The emotional shock that close friends and family members experienced as a result of the attack was and continues to be extremely distressing to me. I find that certain people avoid me now. I think it is because they don't know how to react. They don't know what to say to me, so they avoid me and say nothing and it makes me feel ostracised. As a direct result of the attack, my daughter has suffered severe stress, lost her job and she has distanced herself from me. This has caused me a lot of grief.

[22] While court is often not the best place to gain a better understanding of the victim's circumstance, it is for many in the community the only place. Many should be prompted by what happens in court to seek more information through victim services about how to be supportive and respectful of victims.

[23] **Summary - Victim** - The full reach of the adverse impacts of any crime can never be measured. Each day of the victim's life will bring a new impact until, with help from family, friends and professionals, a victim can walk through life relatively free from the chronic oppressive nature of such crimes. For many, it is a relative freedom, a relative return to normalcy; some never fully regain their lives.

[24] Further, the impact can never be adequately measured because it extends well beyond the victim to family and friends. In this case, the impact on the survivor's daughter illustrates the insidious reach of violent acts. Her daughter had intended to be home that night. What happened to her mother, and imagining what could have happened to her, has traumatized her. Further, she is plagued by wondering if she may have prevented this crime had she been at home. While such thoughts are not warranted, they are common. The daughter has been unable to work and has needed professional counseling.

[25] The statement of her father, the survivor's former spouse, reveals the pain of family members that emanates from such violent crimes:

I have also been adversely affected by this conduct myself in that I have had to watch the impact that this has had on my daughter and have struggled to help her deal with it. It is simplistic to say that, as a parent,

one hopes for the best for one's children in their lives and one wants to protect them from any form of difficulty. One also realizes as an adult with experience of the world that that is not always possible. But this event is not one of the normal life experiences that one expects one's family to have to deal with.

[26] In each case, while different, the impacts of crime need to be known by the court, by friends and family of victims, by offenders and by the community. The effects of sexual assaults on mental health and overall emotional well-being can be more serious than any physical injuries (*Sexual Assault: The Impact on Health*, Ontario Women's Directorate, March 3, 2002). Justice L'Heureux-Dubé, in dissent in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 657, reflected on why, for women, sexual assault is "not like any other crime":

Perhaps more than any other crime, the fear and constant reality of sexual assaults affects how women conduct their lives and how they define their relationship with the larger society."

[27] Marcel must learn to appreciate that he has not only placed fear into his victim's life, but has raised the fear of all women in the community. There is no means for anyone to fully comprehend the damage such crime generates within the lives of victims, within the lives of all women.

### **The Offender:**

[28] The deplorable nature of the crime and its tragic consequences for the victim can readily foster an irrepressible hunger for revenge and a staggering incredulity about what could drive anyone to such savagery against a stranger. Part of the answer lies in the tragic history of the offender -- a history that will temper most appetites for revenge.

[29] The sentencing guidelines emanating from the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 668 and *R. v. Wells*, [1998] 2 S.C.R. 514 call upon the court to consider the dysfunctional backgrounds of offenders in developing an appropriate sentence. To gain a better comprehension of Marcel Jacob's personal history, all court records were gathered and made available to counsel and to the court. The history of Marcel's life as a Crown ward provided by Mr. Harder, a social worker, while very disturbing, was specifically written to provide a "positive record of Marcel's life" while in the care of the department. Mr. Harder testified such "positive" renderings of the personal history of permanent wards are given to children when they reach the age of 18 and are no longer cared for by the department. His report did not, he testified, accurately describe the difficult placements Marcel Jacob had throughout his care by the department, nor deal with the incidents of sexual abuse Marcel suffered.

[30] While all of these accounts do not tell the full story, the story they do tell reflects the kind of dysfunctional background that fostered the concerns raised in *R. v. Gladue*, *supra*. Further, this history provides some possible explanations for his profound anger and wanton violence.

[31] Mr. Jacob was born on August 20, 1980 in British Columbia. His mother, Joan Jackson of Kwanlin Dun, was 18 years old, and his father, Norman Jacob of Lillooet, British Columbia, was 19 years old. Before he was seven months old, his parents left him to be cared for by his maternal grandparents, Dolly Jackson of Carmacks and Louis Smith of Kwanlin Dun. Dolly and Louis were already providing care for their two children and six of Dolly's nine children from her previous marriage. Joan Jackson was a stepdaughter of Louis Smith.

[32] Within the first year in the home of his maternal grandparents, Family and Social Services became involved. Once, Marcel was discovered in the home unattended by any adult. Twice, he was admitted to the pediatric ward for ailments that reflected possible neglect (iron deficiency anemia). Over the next several years, numerous complaints about neglect and inadequate care were investigated. In 1982, Mr. Jacob, then almost two years old, was found "alone in a bedroom in an unsanitary condition with a board across the door".

[33] Life got worse -- a lot worse -- for Mr. Jacob. At age three, he was almost run over by a bus. The bus driver found him lying in the middle of the road and took him to child protection services. When the Department of Indian Affairs stopped providing child support payments to Dolly and Louis Smith to care for him, he was transferred to his mother and father. Within a few months he was returned to Dolly and Louis because he had been physically abused by his natural parents, Norman and Joan. Very shortly thereafter, Norman and Joan moved into Louis and Dolly's home. That did not last. Norman was reported for beating up Marcel with a thick stick. Norman was kicked out of Louis and Dolly's home for this beating and other incidents of mistreating Marcel.

[34] The physical abuse did not cease with the removal of his natural father. Shortly after Norman's departure, Marcel was taken to the emergency ward for injuries believed to be caused by physical abuse. That same year, 1984, an aunt at nine years of age, died from falling off a water truck in the back yard of Louis and Dolly's home. Another uncle died of exposure after drinking. Marcel is now four years old.

[35] Over the course of the next five years, Marcel principally lived with Dolly and Louis. During this period, he is repeatedly taken into, or voluntarily placed in, the care of the department. Dolly and Louis' home, the only family home Marcel knew, was not just chaotic due to the number of children, but in this home he was severely victimized by his family. The information before the court indicates Marcel was sexually and physically abused by uncles living in the home. Often neglected, emotionally and physically, when he became too difficult, or simply too much to look after, he was given to, or taken by, the department. When Dolly was "broke and overwhelmed", Marcel was dropped off at the department for months at a time.

[36] The records are full of references to circumstances in this home that indicate extensive and continual neglect of Marcel's basic needs. Nothing in the evidence suggests this home provided, or could provide, a nurturing home for any child, but especially for a child abandoned and brutalized by his natural parents. Since 1981, doctors, public health nurses, teachers, foster parents and people in the community have reported to the department various concerns about the abuse and neglect Marcel suffered.

[37] In 1986, Tom Bergie, an alcohol and drug counselor for Kwanlin Dun, was eager to adopt Marcel. Dolly refused, claiming that Joan, Marcel's mother, wished to care for Marcel and was returning to Whitehorse to do so. Joan did return in 1986, but never managed to move beyond her alcohol and drug abuse to even begin to care for Marcel. Given what happened to Marcel after 1986, one wonders what chances Marcel might have had for a different life if any caring, competent adult, like Mr. Bergie, had been given a chance to provide the loving home Marcel never had. There is nothing in any of the materials to suggest anyone ever provided any sustained love for Marcel, or that Marcel bonded positively with anyone as a parent.

[38] After 1986, Marcel is bounced through several foster and receiving homes. By 1987, there are repeated problems at school and in the community. The problems involve stealing from teachers, neighbours and local stores, severe temper tantrums, skipping school, smearing feces on walls, property damage, inappropriate sexual activities, cruelty and violence to other children and committing acts of cruelty to animals. In 1988, his teacher observed that:

He has been through a great deal of stress and unhappiness. Time is crucial in getting him the professional help he desperately needs. This

is a little boy who deserves something good to come into his life.

[39] Nothing good does come into his life. His principal caregiver, his grandmother, Dolly Smith, dies in 1988. He is taken into care again. Dr. Kinkaide, a psychologist, in June 1988, after assessing Marcel, found that he "exhibited significant emotional disturbances which were exaggerated by the death of his grandmother" ... suffering from "pervasive fears re: physical safety and abandonment, he views the world as a cold place from which he expects harm to himself from unknown sources." During this assessment, Dr.

Kinkaide provided a TAT card showing a little boy and asks Marcel to tell a story about this little boy. This is the story Marcel tells:

He is thinking about my mom. He is thinking about my dad. He is thinking about my real mom, she died. He is thinking about me [sic] real dad and he in [sic] thinking about my real dad [Louis Smith]. He is crying. He wishes his mom could come back. He misses her. He is going to be stealing, no one is ready to feed him, no one is ready to get his socks on, no one combs his hair, no one gets him cleaned up for school, he goes to school dirty. Someone is ready to steal him a killer and he kills him and get his meat, cuts him open and cooks his meat. If he does that Lord will punish him. Nobody loves this little boy. He cries and cries.

[40] The psychologist concludes "Marcel clearly identifies with the character in the picture."

[41] Mary Anne Lewis, a social worker, reported in 1988 that Marcel exhibited a "wide range of behaviour indicative of an emotionally disturbed child," including inappropriate sexual behaviour with other children. Ms. Lewis found that Marcel reported he "wants to die".

[42] The court, in reviewing all of these reports, noted "he trusts no one, he has no attachment to anybody" and recognized that something must be done (Deputy Judge Hudson, as he then was). Within the next year, Marcel's case bounced through the hands of four different judges.

[43] In 1989, Marcel's mother died from hepatitis, secondary to alcohol and intravenous drug abuse. She was 26. He was told of her death on his ninth birthday. Marcel's younger brother, Walter, and younger sister, Tamara, had been separated from Marcel and taken into different homes outside the Yukon some time shortly before or after his ninth birthday.

[44] Foster parents Mr. and Mrs. Cohoon, regarded as "extremely committed parents," sought to adopt Marcel. However, they understand adoption would cut them off from the resources the department provides to meet the special needs of Marcel. They could not raise him without that help. The adoption did not proceed. Soon after, the Cohoons pass out of Marcel's life. In 1989, Marcel is taken into permanent care of the department. He is nine years old.

[45] During this next period of his life, the causes of his chronic anti-social behaviour begin to be assessed. There are strong suspicions, but no formal assessment that he is FAS or FAE. At the time of his birth, his mother was heavily addicted to alcohol and drugs.

[46] Ritalin, a drug for attention deficit hyperactivity disorders, is prescribed. This drug regime, however, is terminated -- not because it failed to assist him, but because he "began giving pills to other children in the group home". He was also treated with anti-depressant medication. This was also terminated, despite knowledge that he becomes depressed during the months of July and August, as his mother's death occurred close to his ninth birthday in August. [Marcel committed this crime in July.]

[47] In care, he exhibits severe temper tantrums, aggressive physical and inappropriate sexual behaviour towards other children, and cruelty to animals. At some stage while in care, he alleges he was sexually abused in a foster home. Placed in a therapeutic foster home until November 1990, Marcel "made excellent progress". This placement was terminated due to his voyeurism targeted on the female foster parent. His next placement was in Edmonton in a therapeutic residential setting. The problems continued, especially problems related to inappropriate sexual behaviour with young boys and girls. In 1995, he is returned to the Yukon and placed with an elder on a trapline near Mayo. This ended with yet another incident of inappropriate sexual behaviour with two young girls on a visit to town.

[48] By April 1995, Marcel is back in Alberta. This time he is placed at the William Roper Hull Home in Calgary, an institution specializing in dealing with young people with sexually inappropriate behaviour. He did not last long. At this institution, the severity of his aggression increased. He was moved to a secure

facility in November 1995. In February 1996, Marcel was transferred to yet another institution, the Bosco Home in Edmonton, Alberta because it was concluded he needed a program with an ability to treat his inappropriate sexual behaviour.

[49] His behaviour continued to be replete with "physical aggression, property damage, unauthorized absences, sexually inappropriate conduct, and threats to staff".

[50] In October 1996, Marcel had exhausted the patience and resources at the Bosco Home. He was returned to Whitehorse and placed back in the house of his grandfather, Louis Smith -- the very same home he was taken from in 1989 and the home in which he was neglected, physically and sexually abused. The reports indicate the uncles who had sexually abused him had moved out. Whether they still frequented the home is not known.

[51] No follow-up treatment was provided for the abuse and neglect he suffered arising from being neglected, physically and sexually abused, nor for his sexually inappropriate behaviour between the time he left Edmonton and the time he was relocated in the home of Louis Smith.

[52] In Alberta he began his criminal record. In less than a year, he amassed a young offender record for 10 criminal convictions and spent several short periods in jail. Despite several recommendations for treatment from both Alberta institutions, nothing is done to address the problems Marcel increasingly displayed.

[53] Back in Whitehorse, his criminal activity continues. In just over a year, he amasses 20 criminal convictions. By November 1997, he is boarding in a home on his own. He is not attending school, nor is he working. His schooling ends at grade 10. He is just "hanging out", with "relatively little in the way of intensive, direct stricture and reprimand". He is now 17.

[54] In November 1997, the first of two assessments of Marcel by Dr. Williams, takes place. He is referred to Dr. Williams by the department to determine:

- · Marcel's risk level with respect to physical and sexual misconduct
- · whether there had been a satisfactory resolution of his own abuse
- · how best to assist him during the balance of his time in care

[55] Dr. Williams concluded in 1997 that:

- · Marcel's sexual identity has not been clarified
- · in his relationships, he has an elevated need to exert dominance and control
- · Marcel feels rejected and abandoned

[56] Dr. Williams assessed Marcel as a "moderately high risk for continued delinquency and anti-social behaviour". He also concludes that Marcel has "come to see the world as a rather hostile place in which toughness and power are requisite survival tools". Dr. Williams recommended six things be done:

- 1) Unsupervised involvement with children, and especially with the children living in the boarding house, be addressed.
- 2) Reconnect Marcel with his First Nation heritage to provide a sense of continuity, identity and purpose.
- 3) Upgrading vocational and educational skills be provided through the Yukon Achievement Centre.
- 4) Aptitude testing.
- 5) A trial of art therapy developed to determine the potential for further therapeutic intervention.

- 6) Engage Marcel in the psycho-educational component of Youth Sex Offender Treatment Program.

[57] Based on the evidence before the court, none of these recommendations were implemented.

[58] Dr. Williams testified that if the interventions he recommended in 1997 had been carried out, the very disturbing overall nature of Marcel he found in his 2001 assessment may have been prevented. In July 1998, the state, Marcel's parents for most of his life, terminates its involvement. Marcel has reached the statutory limit for state care. Marcel is 18.

[59] At the time of this offence, Marcel is not in school and not working. He has no significant marketable skills, no work history and the equivalent of a grade 10 education. He is supported by social assistance and stealing to support his significant alcohol and drug addiction. His home is a hotel room. He has not received the treatment recommended for the neglect, abandonment, and sexual and physical abuse he suffered. His anger, inappropriate sexual behaviour and substance abuse have not been dealt with in counseling or treatment programs. On all of the evidence, it appears none of the issues -- documented numerous times by numerous professionals -- have been effectively addressed. Numerous recommendations were not implemented, even though he was in the permanent care of the state until 18 years of age. He is living without any of the rigid supervision that was recommended years earlier. Although on a conditional sentence at the time of this offence, nothing in the evidence suggests he had been rigorously supervised.

[60] In 1997, Marcel was assessed by Dr. Williams as someone with "a potential for misbehaviour along sexual lines. Such sexual problems, were they to occur, would be most likely to take the form of opportunistic and intrusive kinds of inappropriate behaviour." In his second assessment in 2001, in the wake of a vicious rape, Dr. Williams finds numerous latent serious psychological issues. He categorizes Mr. Jacob as a high risk for further sexual offences, and he believes he suffers from a mixed personality disorder that features traits of a borderline psychopathic disorder. The dramatic differences in these assessments could be a function of two things. First, incomplete information was made available for the assessments. Dr. Williams, in 1997, was not given a copy of Dr. Kinkaide's 1988 assessment. In 2001, Dr. Williams was not given a copy of his prior assessment of Mr. Jacob in 1997. Dr. Williams had forgotten he had previously assessed Marcel. Second, not enough time is invested in making the assessment. In cases involving longstanding abnormal and potentially dangerous behaviour, assessments should include not just a full examination of the records but interviews with key people, and more than one interview with the subject. These assessments must be comprehensive and above all else every reasonable effort must be made to act on the recommendations.

[61] Without the necessary support systems of family, community, friends or professional services desperately needed to diffuse his well-documented capacity for sexually inappropriate and aggressive expression, Mr. Jacob, living alone in the community, was a ticking bomb. He had been through more than a dozen placements before he was 18. Numerous professionals had worked with him or assessed him. Everyone knew his propensity for violence and for sexually inappropriate behaviour. No effective intervention occurred to help him change or to prevent further anti-social behaviour.

[62] Dr. Kinkaide, one of many to assess Marcel and to make recommendations that for the most part were not followed, noted in 1988 that Marcel was a "very charming, pleasant boy". What happened to this boy? He never found the help he needed to overcome the abuse heaped upon him by those who never had been made accountable for their actions in the way Marcel will now be made accountable for his actions.

### **Primary Considerations in Sentencing - Aggravating Circumstances:**

[63] **Offence** - The following aspects of his offence are significant aggravating circumstances: use of a knife; multiple, repeated, protracted and horrible sexual assaults; binding victim in duct tape; violent physical assaults; threats of death; wanton ransacking of home, and the break and entry into a home.

[64] **Impact of Crime** - Previously, the impact of this crime on the victim and the community was described. These impacts constitute substantial aggravating circumstances.

[65] **Break and Enter Into Private Dwelling** - This is the third conviction for break and enter. The maximum penalty for break and enter into a private dwelling is life imprisonment. Courts have generally regarded break and enters into private dwellings as property offences. The seriousness of the offence has primarily become directly related to amount of property loss incurred by victims. This is a grievously wrong direction from the intent of the legislation.

[66] There is a good reason why the maximum sentence for a break-and-enter-into-private-dwelling is substantially higher than the maximum sentences for a break-and-enter into any other kind of dwelling (14 years). It has little to do with property losses and everything to do with the harm caused to the sense of safety and well-being that people derive from their homes. Although the property loss may be insignificant, the injury to emotional well-being can be enormous. Losing a sense of safety, privacy and security in one's home can inflict emotional injuries that last for years -- for a lifetime. Personal lives can be severely disrupted by a break and enter that removes a beer from the fridge, and especially a break and enter that violates the sanctity of a bedroom.

[67] Sentencing must regard a break and enter to a private dwelling in the same manner as any violent personal assault when there is any evidence of harm to the emotional well-being of victims. In this case, the victim's loss of safety in her own home is poignantly articulated in her victim impact statement:

After the assault, I was unable to return to my home, because of the violent and terrifying nature of the incident that took place in it, and the resultant traumatised state that I was in. I stayed at Kaushee's Place for about one and a half weeks to give my emotions time to stabilise somewhat. It took a long time for me to begin to feel safe in my own home again. The fear of having my home invaded again is ongoing.

[68] The emotional suffering of the victim emanates from both the acts of sexual assault and the break and entry to her home. Breaking and entering at night into the victim's home profoundly compounded the horrific nature of the sexual assaults. In this case, the break and entry into the victim's home is a substantial aggravating factor.

[69] **Criminal Record** - At age 21, Marcel has been convicted 20 times as a youth and 12 times as an adult for criminal offences. Fines, probation, conditional sentences, jail sentences, open and closed custody have all been tried. He has been convicted 10 times for breaching terms of probation or undertakings.

[70] Despite a long history dating back as early as age 7 of documented inappropriate sexual behaviour, this is his first conviction for sexual assault. There are no adult convictions for assaults. This is his third conviction for break and enter. Except for an assault and uttering threats convictions as a youth, his criminal record consists principally of process violations and property offences. This case constitutes his first very serious offence. He has never been sentenced to a long period of imprisonment.

[71] **Status at Time of Offence** - Two months before this offence, Mr. Jacob was given a four-month conditional sentence for a break and enter. This sentence was collapsed and Mr. Jacob served the remainder of this sentence in jail.

[72] A conditional sentence trusts offenders to take advantage of the opportunity to serve a jail sentence in their community. This trust entails expecting an offender to respect this opportunity by avoiding any behaviour that endangers his community. When this trust is violated by committing another substantive offence, especially the same offence, the sentencing for the new offence must treat this breach of trust as a substantial aggravating factor.

#### **Primary Factors - Mitigating Circumstances:**

[73] The serious nature of the offence and the horrendous impact on the survivor emasculates the usual significance accorded to mitigating circumstances. The cumulative effect of all mitigating circumstances cannot change the need for a penitentiary term, but can reduce the length of the term.

[74] **Youth** - In sentencing young, immature offenders the paramount consideration must be their immediate rehabilitation (*R. v. Demeter and Whitmore* (1976), 32 C.C.C. (2d) 379 (Ont. C.A.) at 381). However, when the offence is as serious as in this case, rehabilitation of youthful offenders cannot be paramount (*R. v. Leask* (1996), 112 C.C.C. (3d) 400 (Man. C.A.)), but remains important. It is the long-term perspective that retains rehabilitation as a significant, but not paramount, consideration in sentencing youth for serious offences. To simply close the prison door for decades on a young life essentially closes the door on any hope the youth will graduate from prison capable of leading a fruitful life. If there is any prospect of rehabilitation, it must be tried. To do otherwise denies most of the potential of a young person to change and will probably bequeath to a community, years later after prison, a person less likely to be a productive citizen and more likely to be much more dangerous than when first taken from his/her community. Public safety in the long view is best served by probing any opportunity for rehabilitation.

[75] While Marcel's crime demands a clear denunciatory sentence, his youth and immaturity warrant according some consideration to rehabilitation and to what the future may be for him and for his community. These conflicting considerations -- rehabilitation and punishment -- can be achieved by imposing a penitentiary sentence but reducing its length to preserve both his hope and his capacity for a fruitful life.

[76] Marcel is much younger than his age. His emotional and intellectual challenges, lack of social skills, and the absence of any constructive family, peer or community guidance, combine to severely hinder his ability to function in, understand and respect the larger world around him. At this stage in his life, after so many years in care, a long jail term would extinguish any hope of Marcel learning the skills and respect essential to function in society.

[77] **First Custodial Sentence** - The presumption against incarceration of youthful, first-time offenders is rebutted by a serious offence. However, the same underlying considerations that gave rise to this presumption continue to apply in considering the length of a jail term. This will be Marcel's first penitentiary terms and his first lengthy period of incarceration. In *R. v. Childs* (1984), 52 N.B.R. (2d) 9 (C.A.), a 22-year-old offender sentenced to 25 years for six offences, including robbery, kidnapping and extortion to 25 years had the sentence reduced to 12.5 years, principally because of her youth. Marcel's youth and inexperience with long jail sentences does not justify reducing his sentence by half, but does justify some reduction.

[78] **Mental Capacity** - The assessments reveal psychopathic tendencies and multiple personality disorders. While no assessments have been made concerning Fetal Alcohol Syndrome Disorder (FASD). His mother had an overwhelming addiction to drugs and alcohol, and his history is full of symptoms suggesting FASD. Despite being found to have average intelligence, Marcel's ability to appreciate cause and effect, and to make appropriate choices may be undermined by FASD.

[79] For these reasons, and many others, Marcel may not have the same mental capacity expected of all citizens to fully appreciate how to make prudent choices and to anticipate the consequences of bad choices. His mental disabilities cannot excuse his behaviour but can partially explain his grossly aberrant behaviour.

[80] **Guilty Plea** - Even if inescapably caught, a guilty plea in a sexual assault case will always be a mitigating factor. Being forced to relate details of a sexual assault in a public courtroom can deepen the harm of the assault for some victims. A guilty plea prevents the harm caused by waiting for, and participating in, a trial. Further, a guilty plea marks a clear acceptance of full responsibility. For these and other reasons, a guilty plea is a significant mitigating factor.

[81] **Contrition** - Marcel apologized in open court for his behaviour. This too has a mitigating influence on sentence. Contrition, remorse and an unqualified apology mark for the victim and court a clear acceptance of responsibility. The sincerity of contrition, while manifested in words is, in the long run, best measured by conduct. What Marcel does to pursue treatment to deal with longstanding behavioural issues will speak clearly to the victim and his community of the genuine quality of his contrition and apology.

[82] The evidence surrounding his remorse and commitment to treatment raises doubt about his sincerity. When dealing with a psychologically undeveloped young person, especially someone like Marcel, who is emotionally disadvantaged, and to some degree mentally disadvantaged, it can be difficult to draw clear conclusions about remorse (*R. v. E.L.D.*, [1992] B.C.J. No. 1696 (C.A.) (QL), at 7). As Mr. Edzerza testified, Marcel, who has not known love or respect, may need to learn the very basic elements that constitute remorse. His stated remorse may be as sincere and genuine as he is capable of providing now. If the treatment takes, he may gain a deeper, better understanding of remorse.

[83] **Community Input** - John Edzerza, a very respected member of Marcel's community and a longstanding, tireless worker on various community issues related to children, public health and justice, addressed the court. He apologized on behalf of Marcel's community to the survivor and her family for the harm they have suffered by a member of Kwanlin Dun. This apology marks both the community remorse and the acceptance of Marcel by the community. There are many challenges facing this community, and they have a long way to go to achieve the overall community well-being they seek. However, it is efforts such as John's in this case, that are hallmarks of the potential Kwanlin Dun has to set the example of community involvement for all other Yukon communities, First Nation or not, to follow. Until communities accept their responsibilities, no amount of investment in formal justice services will make a significant difference in the overall well-being of a community. Rather, the less responsibility the community takes and the more the state assumes, the more community wellness will suffer.

[84] Mr. Edzerza noted that because Marcel has "known only abuse and never really known love, he does not know what love means ... Since no one has given him love or respect, he does not have any sense of respect or love for others." This observation accords with Dr. Williams' finding that Marcel is "limited in his capacity to experience feelings, such as true empathy and remorse".

[85] Mr. Edzerza was not attempting to excuse Marcel's behaviour but to explain why Marcel seems so disconnected from the enormity of his crime. Mr. Edzerza stressed the need for Marcel to be given opportunities to learn about his traditions. Through traditional teachings, Mr. Edzerza believes Marcel can gain perspective and balance in his life.

[86] In many respects, John Edzerza's perceptions and recommendations were as valuable as Dr. Williams'. His participation was welcomed. More participation from the community will be essential for Marcel to maximize any potential to change the destructive path he currently walks. Marcel's underlying anger and rebelliousness can best be tempered by the support and care of a family and community -- something he has not previously experienced.

[87] **Remand Time** - His remand time of six months is credited as a year of jail time.

[88] **Failure of State to Effectively Intervene** - While court actions did not begin to involve Marcel in any significant manner until he was seven, he had been brought to the attention of child protection authorities and been in their care for short periods since he was a baby. From the files, it appears that at least 42 different social workers, child protection officials, foster parents, youth workers, probation officers, psychologists, judges and JPs have dealt with Marcel. He was assessed for many different things, some things more than once.

[89] He has been sent or recommended for treatment over a dozen times. From the files, it appears that no follow-up or progress reports have been filed about any interventions or treatment proposed or

undertaken in his life. Despite being sentenced to probation numerous times by several judges or Justices of the Peace, his probation orders have not been reviewed before the court.

[90] There is no evidence that the department as Marcel's parent followed up in a sustained manner any of the recommendations stemming from professionals in the institutions in Alberta or from psychologists they hired. No programs, no special arrangements were in place when Marcel, at 16, was placed back in his grandfather's home -- the very home in which he was physically and sexually abused as a child.

[91] When Marcel turned 18, as the Yukon law requires, the department, Marcel's parent for most of his life, ceased their responsibility. He was released from their care and left to fend for himself, which he miserably failed to do. Given his background and immediate circumstances, he was a sure bet to fail miserably.

[92] There was no evidence of any significant preparation for his transition from departmental care to being on his own that encompassed the longstanding problems in his life. No one who knew what the department knew could reasonably not believe Marcel without a highly structured environment was a high risk to offend.

[93] The evidence overwhelmingly reveals the state had ample notice of the need to intervene in Marcel's life, ample opportunity to do so, and failed to do so. Marcel's defiant, rebellious and stubborn refusal to adhere to treatment opportunities made it exceedingly difficult to find and keep Marcel in treatment. Given the high risks he posed to society, more effort and certainly more effort after 16, before and after being terminated as a state ward was required.

[94] While impossible to apportion responsibility to any one person or agency, collectively the state must carry some of the responsibility for Marcel's circumstances -- circumstances that contributed directly to his behaviour in committing this hideous crime. The state now seeks to punish Marcel for behaviour that, in part, the state's failures have caused. The state's failures make Marcel less accountable to the state for violating it's laws, but he is no less accountable to himself or to the survivor for the harm he has caused.

[95] **Primary Principles** - Based on all of the mitigating and aggravating circumstances, the following principles primarily, but not exclusively, shape the sentence.

[96] **Specific Deterrence** - While specific deterrence for sexual offenders is always an important factor, adding significant time to a penitentiary term solely to achieve general deterrence is of questionable value (*R. v. E.L.D.*, supra, at 8). No one must doubt that such behaviour, regardless of the personal history or any other circumstances, will not be tolerated. More than anyone else, Marcel must be acutely aware that an unquestionably harsh penalty will sanction such behaviour. He cannot now or ever in the future call upon the injustices in his life to explain or excuse such behaviour. Barbarism must be clearly condemned by words and actions.

[97] **Public Safety** - Jail has a purpose. When offenders have not received or will not attend to treatment necessary to remove the danger they pose to the public, jail ultimately must be utilized. The enormity of this offence, in some ways, measures the enormity of the treatment needed. Until the treatment is successfully undertaken, Marcel remains a danger to himself, to women, and to his community.

[98] Marcel did not ask for the family that abused him. His childhood history draws out compassion from the coldest heart and calls for justice. He will never receive justice for what has happened to him. Time and events have buried any prospect of affording Marcel a sense of justice for what happened to him as a child. While Marcel's life is a saga of injustices inflicted upon him, these injustices cannot secure his freedom as long as he remains a danger to society.

[99] Now, his crime undermines the compassion his childhood warrants. Compassion for, and acceptance of, him within our communities can only come when he has demonstrated his genuine

contrition by diligently engaging in the treatment needed to remove the safety risks he currently poses to society.

[100] **Rehabilitation** - Counsel and the probation officer have invested significant efforts to ascertain what treatment is available in prison. Mission and Mountain Institutions offer the high risk sexual offender anger management and substance abuse programs in a culturally sensitive manner to begin Marcel's healing journey. His healing journey will take time, extensive professional help and persistent family and community support. If Marcel makes the effort to pursue professional help to awaken a spiritual sensitivity and connect to his cultural roots, his family and community must do their part by offering him the steadfast support he will need to secure and maintain the chance he has never had for a healthy life. The investment he makes in himself must in turn be matched by an investment in him by his family, community and state.

[101] His family and community investment must begin now by reaching out to him. Someone in his family and someone from his community must write, call and visit him. Just as his words must be translated into action, so must the words of his family and community be translated into action. They owe him at least that much. If Marcel tries to rehabilitate himself, they too must try to connect and support him. The state, through probation or corrections, should provide financial assistance to his family and community for phone calls and visits. This investment is crucial. Ensuring a constructive family and community connection for Marcel will be critical in securing Marcel's rehabilitation and therefore in securing public safety.

[102] We speak of rehabilitation, of protecting the public, but the justice system often simply moves individuals like widgets through an assembly-line process. In that process, jail simply moves the widgets (offenders) out of sight for a period. Without investing in family and community reintegration, jail bestows upon future justice officials and generations the difficult problems we could not, or did not, successfully address. To prove the genuineness of our words about rehabilitation and public safety, the justice system must dramatically improve our capacity to persist, long after sentencing, in the work needed to bring the young and old, women and men, back from jail into our communities in a good way. That work begins, not when they leave jail, but when they enter jail. If we seek to have offenders return to our communities, we must go to jail with them, be with them and demonstrate our genuine desire to reconnect them to our families and communities. If the families and communities leave this difficult work to the state, they cannot expect, and do not deserve, to find an offender capable of returning as a person willing and able to respect our needs. If we do not respect and serve their needs while being punished, we cannot expect them to serve ours when they have finished their punishment. It is not a distinct two-stage process -- first punishment, then reintegration. Reintegration must accompany punishment. Without immediate, genuine efforts to reintegrate, punishment alone will generate greater disconnection from family and community, and thereby greater risks of further danger. People disconnected from families and communities are dangerous. Our jails are full of dangerous people -- people whose dangerous inclinations have been increased by the system that requires punishment to be inflicted before any reintegration efforts are made. If reintegration and support begin only after jail, for many it will be too little, too late.

[103] **Consideration of Case Authorities** - In recognizing the multiplicity of relevant factors to consider in each case, courts have acknowledged that a standard brand, one-sentence-fits-all approach undermines the purpose of sentencing principles and serves neither justice nor fairness. Sentencing is an inherently individualized process as the sentence must fit the crime, offender and community (*R. v. Gladue, supra; R. v. C.A.M., [1996] 1 S.C.R. 500* at 567). Each sentence must be primarily shaped by the specific circumstances. The sentences in similar cases can be instructive, but cannot be as determinative of the outcome as the specific circumstances. Counsel provided several cases for consideration.

- *R. v. Schafer*, [2000] Y.J. No. 7 (Terr. Ct.) (QL) - The offender, 22 years of age, used a knife in the home of the victim to carry out a sexual assault. The offender, intellectually challenged, was extremely intoxicated. He was sentenced to two years less a day followed by an extensive and demanding three-year period of probation. He had spent four months in custody.

Unlike Marcel, Mr. Schafer's prospects for rehabilitation were extremely high, and his family and community actively involved in developing and supporting his rehabilitation. Mr. Schafer immediately accepted responsibility and apologized to the victim. He had earnestly pursued all rehabilitative opportunities while in remand.

While Mr. Schafer's record was worse, the circumstances of the offence were not. The sentence accorded Mr. Schafer was primarily directed to rehabilitation. Mr. Jacob's sentence is primarily directed at specific deterrence and accountability. The more aggravating circumstances of Mr. Jacob's offence, coupled with the less promising prospects for his rehabilitation and the relative lack of family and community support combine to call for a different sentence. It must also be noted that a three-year demanding probation regime, which substantially limits Mr. Schafer's liberty imposes significant obligations and places Mr. Schafer at risk for further incarceration upon a breach, adds a substantial punitive punch to Mr. Schafer's sentence.

- *R. v. Kodwat*, [1989] Y.J. No. 121 (Terr. Ct.) (QL) - Mr. Kodwat, 17 at the time of the offence, was raised to adult court. He was sentenced to two years, plus three years probation, for sexual assault on an eight-year-old child and a 25-year-old woman. Given the seven months the offender spent in remand, the court considered the sentence equivalent to 3.5 years. No weapons were involved.
- *R. v. Priske*, [1994] Y.J. No. 181 (Terr. Ct.) (QL) - Mr. Priske, age 36, with previous recent convictions for sexual assault, was sentenced after a trial to five years for sexual with a weapon. He had spent a year in remand; accordingly, his sentence was effectively seven years. The sexual assaults persisted for several hours. There were no mitigating factors considered by the court, other than the remand time.
- *R. v. E.L.D., supra.* - The offender, 16 years old, was sentenced to four years for sexual assault with a gun, and break-and-enter. The victim was six months pregnant at the time. McEachern C.J.B.C., in dissent, due to the age of the offender, believed the sentence should be reduced to two years.
- *R. v. G.E.W.*, [1993] B.C.J. No. 1297 (C.A.) (QL) - The offender, 26 years of age, with a recent previous conviction for assault with a weapon, was sentenced to four years in jail for sexual assault. The victim was brutally beaten. The accused was not remorseful.
- *R. v. J.E.A.*, [1999] B.C.J. No. 1661 (C.A.) (QL) - Mr. J.E.A.'s sentence, 14 years for sexual assault to run concurrently with a 20-year sentence for armed robbery, continued a pattern deeply riveted into his life of serious crimes and lengthy jail sentences. Now 35, he has spent only three years outside of prison since he was 16. He was on statutory release from prison when these offences were committed. The offender had no support from his community and little, if any, contact with his family. His only two brothers are also in prison. The psychological assessment revealed he was "ill equipped to deal with the challenges of every day life" (at para. 24). His low self-esteem explains, in part, his severe dependence upon drugs and alcohol. Mr. J.E.A. was considered to have "only the slimmest chance of changing his behaviour" (at para. 64). This offender has and will probably continue to spend most of his life in jail. This may well be what Mr. Jacob faces if he does not fully engage the treatment options now available, and if his family and community do not reach out a hand to pull him out of the quagmire that kept Mr. J.E.A. locked into the only life he can now handle -- jail.
- *R. v. Jones*, [2000] B.C.J. No. 1216 (C.A.) (QL) - The offender, pretending to be a police officer, used a gun in robbing and sexually assaulting the victim. The offender, 20 at the time of the offence, pled guilty and was given an overall sentence for all offences of 15 years. The victim was hogtied and sexually assaulted. The offence was premeditated and regarded as a sophisticated

planned robbery. Prospects for rehabilitation were not a mitigating factor. The offender was on probation at the time of the offence.

[104] These cases illustrate the individualized nature of sentencing. However, they also reveal several common themes. Only in exceptional circumstances can a sexual assault with a weapon be considered for anything but a penitentiary term. If the offender is young and some reasonable prospects for rehabilitation exist, the length of the sentence is reduced. Conversely, the degree of violence and other aggravating circumstances surrounding the offence can substantially increase the sentence.

[105] The variety of sentences used in sexual assault cases will appal victims if they believe the sentences relate to any measurement of their experience. To each victim, her experience is the worst-case scenario. When courts call some a worst case and others not, the distinction can disrespect a victim's experience. It is not meant to do so. What is meant is merely a judicial objective rendering of the physical violence involved. It may well be a questionably useful practice, since in most cases the emotional and spiritual harm, while less tangible, is often the most significant, lasting harm victims suffer. Overall, the most important differences in sentencing centre around rehabilitation. This is a factor that victims, often more so than the general public, and apparently more than the media, appreciate. Many victims who have experienced the severe, encompassing pain of sexual assault do not want any other woman to suffer the same experience.

[106] Rehabilitation, if the prospects are reasonable, can afford an effective means of protecting others. However, the best possible prospects for rehabilitation cannot obviate the need for a punitive sanction for violent sexual offences, but can reduce a jail sentence to keep alive reasonable prospects for rehabilitation. We must not sacrifice the long-term prospects of preventing further victims to satisfy our immediate needs for retribution and punishment. In all violent, senseless crimes, such as this one, there is a powerful desire to find an immediate outlet for understandable anger and pain. What we do in that moment measures the character of our society, of ourselves. No one can reasonably believe that becoming a judge magically removes any of the full range of human emotions. Judges feel pain, anger and the urge for an immediate sanction. Judges also need to step back, seek a broader perspective and come to terms with what a just society would require, not only of its judges but of all of us.

#### **Sentence:**

[107] The sentence has five components: compensation, DNA order, firearms prohibition, jail term and parole recommendations. While the [Criminal Code](#) and the Supreme Court of Canada call upon the courts to consider the larger context of the offender, crime and community in considering what sentence to impose, the resources available to the court in imposing a sentence have not significantly changed. The courts do not have the resources to implement a sentence that embraces the needs identified from the larger contextual analysis of the criminogenic factors. We are left, as in this case, with the same limited and blunt sentencing tools to complete the refined reshaping of circumstances we are asked to and need to do.

[108] Compensation - It is never possible to measure the magnitude of harm to victims of sexual offences. There are no finite boundaries that contain, by time or intensity, the ramifications spiritually, emotionally, mentally or physically of the harm imposed. Trying to compensate harm can offend victims, as the compensation provided suggests the harm can be measured financially. Further, the very restricted amount a criminal court can offer is potentially insulting to the victim.

[109] This compensation order is more for the offender than for the victim. It is in principle, not in amount -- a reminder for Marcel of the harm he has caused and although a token amount, it is as well an opportunity for Marcel to acknowledge in a tangible way his contrition.

[110] I expect Marcel to begin, even while in jail, to pay this compensation order. It may become necessary for his family and community to help him take on this obligation in a way that marks their

acceptance of Marcel as one of their responsibilities. A compensation order is ordered in the amount of \$1,000 for the victim to cover some of the property damage caused during the crime.

[111] Firearms Prohibition - The serious nature of the offence, coupled with the use of a weapon, warrants a lifetime firearms and ammunition prohibition.

[112] DNA Sample - This offence calls for Marcel to provide a sample of his DNA as soon as possible to the police.

[113] Penitentiary Term - The overall jail term is recorded as eight years, consisting of a one-year credit for remand time and an imposed jail sentence of seven years in a federal penitentiary.

[114] The seriousness of this crime reduces the mitigating influence that usually flows from the principles of *R. v. Wells*, [1998] 2 S.C.R. 514 and *R. v. Gladue*, *supra*. Further, the seriousness of the crime substantially removes any mitigating influence on the sentence arising from the state's and court's failure to effectively intervene much earlier in his life. While the factors in this case cannot warrant an alternative sentence, they do warrant a modest reduction in the jail time imposed, and particularly warrant making an extra effort to provide as much assistance as possible to Mr. Jacob to ensure he now can access the treatment he needs. The diligence he applies to his rehabilitation must be matched by the state's diligence to help him leave jail and return to the community with much greater prospects than he has now in leaving his community.

[115] Ms. Geddes, in her thorough pre-sentence report, described the comprehensive and intensive programs at federal penitentiaries that Mr. Jacob needs to complete before being released.

[116] Dr. Williams believes Marcel has average intelligence. Jan Forde, his social worker, in 1998 believed he suffers from FASD. He needs to be assessed to determine if this belief is correct. He has been diagnosed with ADHD. All possible learning disabilities that may impede his capacity to benefit from treatment must be known to ensure the programs are suitably matched to his learning abilities.

[117] Dr. Williams' conclusion that Marcel now presents a high risk for violent recidivism compels the justice system to make every effort to ensure his time in jail is not dead time. We cannot again fail to effectively intervene in his life. Matching Marcel to the treatment and support he needs, in a small way redresses the injustices he has endured, affords Marcel the chance to be productive, and redresses the risks Marcel poses. His rehabilitation calls upon everyone -- his family, community, the justice system, and especially Marcel himself -- to diligently assume their respective responsibilities.

[118] Parole Recommendations - If Mr. Jacob applies himself to the treatment programs he is assessed to require, in the very least to include programs for substance abuse, anger management, high-risk sex offender treatment, life skills and job skills, it is my recommendation that he be given full consideration for an early parole. His earnest efforts to pursue his rehabilitation will mark the genuineness of his contrition and the level of his commitment to his community. He has a moral duty to take all of these programs. He knows the savagery his anger can cause. If he does his part, hopefully his family and community will do their part in providing steadfast support. Given his young age and the tragedies in his life that undermined his potential for a productive life, if he does apply himself to treatment, he warrants the chance that a parole can provide to be released before he has lost hope, before he is institutionalized. It is now in Mr. Jacob's hands to earn an early parole. If he does the work on himself, I strongly support an early parole. If he fails to do this work, he will remain a high risk to re-offend and parole is not recommended.

[119] Marcel's future is his own to make or destroy. I hope he can find the strength and support to take charge of his life and move beyond the handicaps of his childhood, beyond blaming what happened to him for what he does to others. May he learn to cherish and respect life -- his own and others'.

**Conclusion:**

[120] We see in our court both the beginning and the end of tragic stories, over and over again. The story begins with taking a child into the permanent care of the state because the child's family has failed to provide the basic level of care. The story ends when the child, years later as a young man, is sentenced for a terribly violent crime, or as a young woman, has her child taken into care. This is a common story. There are exceptions. However, some exceptions differ only in the degree of sad or tragic events that characterize their lives.

[121] The parade of children from broken homes, to permanent care, to substance abuse, to dysfunctional lives, to crime, and ultimately to jail, and/or to parent children, who in turn feed the system with another round of permanent wardships, seems endless; seems diabolically planned to employing an ever-increasing number of professionals. From the perspective of the bench, the frustration, anger and despair in this tragic and senseless parade generates an overwhelming desire to blame the department that cares for these neglected children as they evolve into dysfunctional and, at times, very dangerous young adults, or to blame correction agencies that send offenders back to the community to offend again. It would be easy to blame these agencies, but it would be wrong to do so. In over 20 years, I have never found a single social worker or correction officer who did not stretch beyond their resources to make a difference. Many were burned out by the overwhelming challenges they confronted and accepted.

[122] If blame is being passed out, no one can elude taking their share. The parents whose neglect caused their child to be taken into care, the extended family and community who failed to become involved, all of the professionals -- public health workers, social workers, teachers, police officers, probation officers and, yes, judges -- who have done our job in the same old way, all of us must share the blame for the endless parade of children through our hands and into dysfunctional lives. By now, we should know better. We must do much better.

[123] To do better, we need to stop looking for someone to blame. Scapegoating will dig us deeper into our abysmal incapacity to make a difference. To do better, we need to share a systemic understanding of the larger process. We need to understand that what each does, connects to what others do and creates a pattern. The pattern influences each of us in ways that are often not apparent. To do better, we need to take more than an isolated snapshot, frozen around one case or one event, as the basis for understanding what to change. We will not understand what to do unless we understand the larger ramifications of our actions that play out over years, if not generations.

[124] The tragedy in this case, as in the case of so many young people like Marcel Jacob, is not that any one person failed to do their job -- everyone may have done their specific job, but collectively we failed to the job required to make a difference. Until we slow down, step aside from the crush of daily challenges, to acquire a systemic understanding, we will each continue to do our job well, but continue to fail to do the job needed to change the endless parade of devastated lives.

[125] Currently, we are not wired to learn from our failures, from each other, or to work with each other. We stay hidden within the boundaries of our jobs as if these boundaries were divinely inspired and sanctified by the deity of precedence and authorized practices. It is not, as many feel, a sacrilege to step outside these boundaries. It is in the face of our failures morally repugnant to remain within these arbitrary boundaries. These boundaries secure the truncated division of responsibilities that sustain institutions and the powers these institutions bestow upon us. They are not shaped to fit the challenges of the real world, only to fit the challenges we define and often inadvertently create.

[126] Until we question these boundaries by a systemic analysis of what we do and open ourselves to approaches without precedent, we will get the same results we usually get. There will be more victims and more Marcel Jacobs and more victims. Indeed, there are more young men like Marcel currently working their way through our institutions and communities. There are alternatives -- feasible, readily within our reach, if we begin to reorder our resources to redress, not perpetuate, the problems we encounter.

[127] "The enemy is us." The villain in this piece, as in so many other cases, is no one person, no one agency or department, but rather the system. The fragmented, truncated system that has no integrated vision or holistic approach is the villain. The system we accept so readily and tinker with wee changes to address its massive failings is the paramount contributing cause of Marcel's circumstances.

[128] No other system, public or private, could fail as much as we do and be sustained. What other system is rewarded by failure? The higher the crime rates, the more violent the offences the more funding we receive. It is not too outlandish to suggest failure is our business. We take in those who fail in life and remove for many any lingering hope of being anything more than a failure in life. We take the very young who are beginners at failing and help them become proficient at failing. The more they fail, the more work we have, the more resources we need. We are in the failure business, not because anyone wants to be, but because no one can marshal the clout to revamp the deficiencies that permeate the entire system. Within the system, we advertently and inadvertently protect our power base. Part of our protective strategy resides in blaming others for the systems failure, much like I have done in this case by wondering what happened to Marcel in care. Yet, who placed Marcel in care? Who sentenced Marcel numerous times? While criticizing someone else for not forwarding Dr. Williams' earlier assessments, I fail to criticize why the court has not developed a computerized check of all files and reports that pass through our hands. We have become so accustomed to blaming someone else that, like any tired cultural rituals, blaming others has become the subject of standing jokes. The courts accept as an occupational hazard that the police or media will blame the court for crime. Yet amidst all the blame-passing, nothing really changes. There are changes to be sure, but nothing really changes. Mostly, tinkering takes place. Worse, someone within the system initiates a change that contravenes changes someone else is making. Often, we oppose change within the system not because the change is bad, but because either it did not originate from us, or did not formally receive our blessing.

[129] How can a system remain so robust when no one can make the case it is succeeding and everyone can agree it should be doing much better on almost every front? When the evidence for changing to a holistic, coordinated, value-based approach is so overwhelming, how can the justice system remain a jungle of complex, disjointed interactions that preserve numerous self-serving fiefdoms, all with different values, different objectives? When the public has not merely challenged, but penetrated and participated directly in the shaping of other public processes (Education, Health, Environment, Labour Relations, etc.), how has the justice system managed to keep the public at its outer gates, misinformed and ineffective in changing our arcane processes? We have achieved, often despite our best intentions to be otherwise, a level of excellence in maintaining the status quo, despite constant external pressures to change. Yes, there have been changes, but nothing that fundamentally changes our outcomes. Marcel Jacob and many others may go through different steps, but they still get to the same destination -- crime, progressively more serious crime. There are many reasons why the system persists:

- 1. Entrenched Expenditure Patterns - There have never been any fundamental shifts in expenditure patterns that are sufficient to alter outcomes. None are planned. A very small fraction of the justice budget is spent on prevention. A pittance will be spent on training and resourcing communities to be actively engaged in the justice system. More money will be spent on providing for and training professionals in the justice system to work with communities than will be spent on enabling communities to assume meaningful responsibility for crime within their community.

We have more law enforcement professionals than we need and less community based support and treatment professionals than we desperately need. We are building increased capacity to incarcerate people who direly need treatment facilities, not jails. As long as we keep investing in the existing system in the same old ways, the same old outcomes will continue. No one wants to sacrifice their budgets to advance an overall change.

- 2. No Vision - There are many different visions, but no pan justice system vision. Without an overall vision, there will never be a coordinated plan. Without a plan (and, of course, the will to carry it out), there will never be a change in expenditures. We do not have an overall justice steering committee. We once did -- it met and did not meet again. At the ground level, the people

in the field struggle to work together. Perhaps therein lies the only hope for change, but these folks change almost as often as the players on professional baseball teams. I have never met anyone in the field who, after three years, does not cry out for a coordinated vision and plan. By then, they are usually burned out or transferred.

- 3. Ever-Changing Professionals - I once counted 36 different justice or related officials that worked in one rural community over a two-year period. I thought this was outrageous until someone in the community reviewed the count -- I was short by at least a dozen. No community-based partnership can survive when the justice partners change so frequently. To work, partnerships take time to build the trust to build cooperation and a common cause. In Marcel's community, the lack of effective community involvement in his case can be partly explained by their chronic struggle to build relationships with new justice officials. Just as the community learns to trust and work with a justice professional, they are gone. Often, it is an internal institutional need that forces the change. In the justice system, our internal priorities are rarely superseded by the best interests of a community.
- 4. Disrespect for Community Voice - We are getting much better at listening to the community, but we have so far to go. We don't even know how far we must go, yet we take such pride in thinking we have made vast improvements. Listening is only a small part of respect. The larger part requires sharing responsibility for decisions and finally changing expenditure patterns to advance shared objectives. Thus far, very little effective shared responsibility has taken place, as the changes in expenditures fail to significantly fund the ability of communities to participate. Until we accept that legal solutions do not begin to solve social problems, our expenditures will continue to advance inappropriate legal solutions. Most communities, once attuned and engaged with community justice issues, begin to realize they need less of what we sell and more social change expenditures. Some communities recognize investing in community activities that enhance social capital more effectively reduces crime than investing in more justice resources. Can we do what is required to enable the community to be a full partner if that means sharing power, giving up power and, even more difficult, reducing our budgets to build up theirs?

If we genuinely seek a substantial, meaningful partnership with communities, we must find substantial, meaningful resources to fund their participation. Currently, communities are not sufficiently funded to sustain their successful initiatives or to retain or attract the excellent community people who have come forward to make a difference in the lives of their young men, like Marcel. When the system talks through a constantly changing voice, nothing changes except the voice. We, the justice system, are so well resourced, we can remain in place while talking of change for so long that we burn out community volunteers who think when we talk about change, we will change. We might even mean what we say about change, but because we have no common vision, no plan, all we can really deliver to the community is talk. Sometimes we deliver enough money to set them up for failure, but never enough for them to realize their full potential in shaping what happens in their community.

[130] These are but a few of the complex, reinforcing reasons why the justice system, despite its failings, withstands so many pressures for deep-rooted change. The system survives because many believe it is either not failing or that it can do no better. The media focus on sensational crime, coupled with a misinformed understanding of what causes and prevents crime and what makes communities safe, perpetuates the belief that "the system has its problems, but is doing the best it can". Some believe more enforcement and punitive resources would shore up its failings.

[131] The cultivated public dependence on justice professionals has resulted in delegating too much responsibility to the state. The public for the most part has not fully appreciated the costs of their disengagement from taking their share of responsibility for crime.

[132] Further, the public cannot imagine what an alternative might be. What you cannot imagine, you cannot seek. What you only know, you want to keep. They certainly cannot imagine that the principal

alternative might be a process that depends primarily on their involvement in a truly community-based justice system. This alternative is the only way to give many young men, like Marcel, a very different life than what he has received thus far within the current system.

[133] Finally, there is no effective lobby pressure for change. The public may not like what they have, but without a vision to work towards, no sustained lobby force can evolve. So the system, enshrouded by its complex, mysterious ways, and freed of any informed and sustained criticism due to the public's apathy and absence of an imagined alternative, not only perseveres, but flourishes. Failure is an accepted standard of performance for the justice system (but not for any community alternative).

[134] Yet in the wind are more than just whispers of change coming from every direction. Some within the justice system embrace the changes, some oppose them. For me, Marcel Jacob pushed me over the edge. He was born and grew up within the system on my watch.

[135] No one I have known within the justice system would have knowingly participated in the steps that produced Marcel's behaviour. Yet, we all did. We all did because we pay too much homage to the system. We believe too much in small changes, too much in our good intentions, too much in our professional training, too much in our power. We are wrong to be so complacent with tinkering. It is time -- past time -- to step out of our cocoons. We cannot stop the next Marcel Jacob with good intentions, nor with small changes. We need to accept the discomfort that will come with deeply rooted change, as we fully engage each other and the community in building a common vision. I believe there will always be a need for what the justice system currently offers, but it can no longer be the only, or the most dominant, approach to the underlying causes of crime, to the conditions that generate so many "next cases", like Marcel Jacob.

#### **Recommendations/Grist for Dialogue:**

[136] In making the following recommendations, I overstep the boundaries that precedent -- not reason -- has imposed upon the court. I am aware that criticism, even rejection, of these recommendations may stem from the making, not the merits of these recommendations. These recommendations stem from my frustration and from realizing that judges, like professionals in all institutions, have too much power and that families and communities have too little power.

[137] Flowing from these criticisms of the system, I offer recommendations, hoping to contribute to a dialogue about change. We can no longer fail to do anything about our failing system of justice. But first, a few qualifiers:

- My criticism has not been provoked by the lack of professionalism or earnest efforts by anyone in the system. Rather, it is partly because of the high level of their skills and the genuine care for the people they deal with every day that I have spoken out, hoping to provoke the changes needed to give them the room and the resources to do what they know is needed to make the system better and to fully work with communities. It is a wonder that they show up every day to make a difference, in the face of so many failures, of so many children that exceeded their capacity to reach and change.
- These recommendations must be tempered by the perspectives of others. Within the system and within communities, only a collective search for understanding of our interactions will produce a set of recommendations that encompass the systemic changes required to prevent the endless parade of tragic children through our hands and onto their seemingly inevitable tragic fate. So these are not so much recommendations as they are grist for the genuine dialogues desperately overdue within the system and with other agencies and communities.

[138] We rarely address the underlying causes of crime. Most causes are highly visible, etched indelibly in the stories of each offender, of their families and their communities. These are stories of abuse, family breakdown, poverty and social isolation. When censored for our failure to address these causes, we claim

there is little we can do. Each year we often secure more resources, simply to maintain the same failed approach. So the cycle continues, dragging offenders, their families, communities, all of us, deeper into the pervasive costs of crime. Increasingly, a high rate of failure is accepted as inevitable. Our most significant adjustment to failing is to invest more in the same approach that produced a failure.

[139] The justice system alone cannot stop this cycle. The state, even if it finally turned from its turf-conscious, truncated approach to an integrated systemic approach, could not stop this cycle. The cycle can be stopped -- but only if we turn to address the causes and not the symptoms; only if we recognize that professionals and state agencies cannot do the work that communities and families must do, only if we accept that legal solutions have never, and can never, solve social issues, and especially only if we acknowledge that simple solutions, like punishment, exacerbate rather than solve complex social problems.

[140] There is hope, but it does not lie with more justice resources -- it lies with less. It lies with a different approach, with different objectives, different resources, different people. It lies with giving a greater voice to communities and to those skilled in rehabilitating individuals, families and communities. Let us embrace crime as an opportunity to understand what is wrong, not just with an individual like Marcel, but with our system that would enable Marcel to become so estranged from us that he could commit such a crime. Let us use crime as an opportunity to discover what is wrong with our institutions, with our communities that hindered our ability to intervene long before this crime.

[141] I can accept why so many are angry. His crime was unacceptable. I cannot accept that this public anger should focus only on Marcel. If it does, we will learn nothing. Marcel is, in many respects, a product of our systems, of our institutions, of empowering professionals to do the work that families and communities must do. Marcel vividly represents a failure we all must share. We have all failed. His family, his community, all the institutions and professionals who touched his life -- all of us own a part of the failure that led to his crime. I do not seek to excuse Marcel, but rather seek to ensure we do not ignore our share of the responsibility and do not fail to learn from the case what we need to do to prevent the next case.

[142] Let us not overlook the court's failure. He had been through our hands many times as a child, in protection cases, and many times as a young offender. Marcel was born, abused, taken into care, abused himself and others numerous times before committing this horrible crime. All of this occurred while I was on the bench. I belong to the system that failed to intervene, failed to tap into the pain he suffered before he unleashed that pain on someone else. I feel, in part, responsible. His case prompted an examination of other files. There are many similar patterns of young people who grew up, and are now growing up in the system, many headed for the same violence and self-destructive behaviour as Marcel. This realization, and the belief that we can do better, led me to write beyond conventional reasons for a sentence. I did so, in an attempt to share what working in the system and being in the communities has taught me, and because I believe the court owes the survivor and other victims much more than a legal analysis of the case. I did so because Marcel and other young people like him need a better chance. In the end, perhaps I have written for no one else but me. I needed to do more than simply sit at my station in the process and do my "job" -- passing yet another young man with a troubled past off to jail and to a more troubled future.

[143] Finally, for me, this case marks a deeper recognition of the greater need to build constructive connections within communities than to build state-dominated justice resources. Communities, not the state, must lead the "sea change" needed to foster community well-being.

[144] My first recommendation asks each of us not to be defensive. My view is not that all we do is flawed, but rather that we have the potential to do much better. Consider that what we may regard as "great work" may be only mediocre in comparison to what we might collectively achieve. Similarly, consider what we do not believe is "broken" in what we individually do might be seriously flawed when understood beyond the immediate moment the problem is in our hands. Thus, we need not be defensive about what we do, but rather be open to how much more can be achieved working together in an integrated system than what we can achieve working alone.

[145] When we focus only on what we do, we lose our sense of responsibility for the ultimate failed outcomes of the process. In confronting a failure, we think we did our job and aggressively look to others to cast blame. As long as we react in this way, we will be, and our institutions will be, learning disabled. An inability to gain a systemic understanding is an endemic, fatal learning disability that plagues all truncated processes.

[146] Second Recommendation - Directly related to the first, until we extend our understanding of what we do beyond the parameters of our responsibilities, we will not see the value of holistic responses. Senge, in his seminal work, *The Fifth Discipline* (P. Senge, *The Fifth Discipline: The Art and Practice of The Learning Organization* (New York: Doubleday, 1994)), captured the essence of this barrier to constructive change:

We learn best from experience, but we never directly experience the consequences of many of our most important decisions (at 23).

[147] In granting a permanent order, a judge believes the best interests of a child has been served. We do not directly experience the consequences of this decision on the lives of the parents, extended family or the community. How do parents feel being told they have failed as parents? What then happens to their lives? What impact is there on communities when many of their children are taken into care? Davis Inlet did not happen overnight. Telling a family, a village they cannot raise a child, and telling them that over and over again in each case has implications well beyond our direct experience. A judge rarely directly experiences or appreciates the experience of a child in permanent care. What do judges know about the impact of being told at 18 by the state that the permanent care order has run its course, that the protective care of the state as parent is terminated? What do we know about the struggles to find work, without job skills, without education? What do we know about emerging from jail with no one to meet us except old drinking buddies that take us back to a lifestyle we desperately seek to avoid but have no support to do so? Further, what do we know of the working worlds of the professionals we expect to transform an offender's lifelong habits and attitudes into the stuff that makes for transformation into a positive member of a community?

[148] We need to extend our understanding of our impact beyond the horizon of our individual roles in processing cases. To do this, we need to take time to interact with others and to develop feedback loops, both negative and positive, to constructively influence our perspective and thereby our decisions. Most important, we need to invite all voices into a dialogue about change. Each voice must be respected. The voices must span the entire system and reach deeply into our communities -- from offenders and victims to voices from the business, faith and professional communities. Any change that only involves the "justice professionals" cannot amount to much more than tinkering. Fundamental change calls for all of the "village" to be involved, and to share responsibility.

[149] Third Recommendation: Involvement of State Agencies - It may be that the department of child protection did more than the evidence revealed. The courts can only respond to the evidence presented. The department had to know Marcel's history was a crucial part of this case. Such histories have been a central part of sentencing for many years. Specifically, the department must have known Marcel's background in their case was relevant, since a social worker testified and provided a background history. If they did not know, that is unfortunate, but not understandable.

[150] In the future, the department should be formally notified by Crown counsel that the history of an offender presently or previously in their care will be addressed in sentencing. This will avoid unwarranted censure of their care and serve the best administration of justice by prompting the department to assist in providing relevant sentencing information.

[151] Fourth Recommendation: Responsibility Beyond 18 - It may bear repeating that the villain is not the department responsible for child care. The villain is the system. The part the department plays in the system has attracted more attention than warranted only because their piece of the system was exposed by the evidence. If all parts of the system had been equally exposed, their responsibility would be seen as no

greater than anyone else. Further, it is also worth repeating that criticism cannot be leveled at individuals. Everyone did much more than their resources and job descriptions allowed. The criticism is leveled at the inflexible laws and the inappropriately divided responsibilities that the laws generate. This recommendation addresses one such law, the law that requires a Minister to terminate their responsibility as a parent when their ward is 18 (in some cases 19).

When the minister becomes the guardian of a child, he has full parental rights and shall exercise full parental responsibilities (emphasis mine) (*New Brunswick (Minister of Health and Community Services) v. M.L.*, [1998] 2 S.C.R. at para. 18).

[152] Neither the best interests of a child or of society can justify the Minister arbitrarily abandoning his/her full parental responsibilities to a child at 18 years of age. Crown wards, in many cases, more so than other children, need care and guidance beyond the age of 18. Society condemns any parent who abandons their child to the street, yet the state does precisely that to their children.

[153] It has been acknowledged in other cases by the department that their statutory obligations as parents for children in care involves teaching right from wrong, moral guidance, education, emotional and financial support -- indeed, all the daily care and nurturing that society expects from natural parents. It is much more than simply clothing, feeding and housing permanent wards that is required and expected. A permanent wardship is permanent. Until the child or young person is reconnected to a healthy parent or family, there cannot be a sudden termination of parental responsibilities. Such termination cannot serve either the best interests of that child or the best interests of society. The best interests of the child cannot be served by growing up, knowing that when they are 18, they are out on their own. Just like any other family, some can survive on their own by 18, some cannot. Those children who grow up in care far too often demonstrate by their presence in criminal courts that they cannot survive on their own. Marcel Jacob is not the only Crown ward who, either just before or just after being released at 18 to live on their own, has committed a serious offence.

[154] There must, in some cases, be direct extensive involvement of all state agencies beyond the age of 18 and in others some arrangement in the context of parent-child must persist between the state and a child until there is clearly no further need. How many children in their 20s, and even 30s, when facing a crisis turn to parents. These may be parents that have not been close to them for years. Sometimes just knowing someone will be there, if needed, is enough. Some foster parents do this on their own. Some may need continuing state financial help to be able to respond to a former foster child. A plan must be in place for the surrogate parental role of the department to extend beyond 18 years old. It will be much less of a dangerous risk to society, and much less expensive if some connections as parent-child are maintained. The state should meet the same standard in terminating their care that they had to meet in taking the child into care: is it in the best interests of the child that care be terminated?

[155] Fifth Recommendation: Child Advocate Needed - At some stage, Marcel's anger and defiance may have overcome all reasonable efforts to involve the treatment he required. That may explain why so little effective intervention took place. However, on the evidence, it is also possible that Marcel fell through the cracks within the fragmented structures that governed his life in care. Many different officials have unchecked discretion in deciding what services will be provided. Who raises a stink if appropriate services are not provided to a child in care? What clout does a social worker have to press for a child's priorities that may conflict with management priorities or exceed current resources? What can give sufficient profile to a permanent ward's needs to prompt reasonable responses?

[156] At a very young age, Marcel obviously needed help -- significant help. Sexual abuse of young boys within families renders them unable to handle any stress without becoming "frankly psychotic" (Dr. C. Kempe, "Sexual Abuse, Another Hidden Pediatric Problem" in Cook, J.V. and R.T. Bowles, *Child Abuse: Commission and Omission*, (Butterworths: Toronto, 1980) at 107). Abused children become aggressive and full of hatred (Reid, T.J., *The Aggressive Characteristics of Abused and Neglected Children* (1997) 33 *Journal of Clinical Psychology* at 1140). Intervention in the lives of sexually abused children should be initiated as soon as possible, otherwise the resultant behavioural changes may become severe (Reid, *supra*,

at 1141). A failure to treat children who are sexually abused "is a far more serious social act than failure to punish the perpetrator" (Kempe, *supra*, at 107).

[157] A child advocate uncompromisingly targeted on Marcel's needs may have generated the pressure needed to ensure timely and appropriate treatment interventions for his trauma as a victim may have prevented his journey into his own sexually inappropriate and ultimately violent behaviour. Once in care, there is no one whose singular focus is the child's best interests and whose job is imposing unrelenting pressure to advance a child's best interests. Regular reviews conducted by a child advocate might help flush out problems that, for many reasons, do not attract either the prompt or full attention the best interests of a child warrants. Each child in permanent care should have a child advocate to conduct periodic checks to ensure that child's best interests are not overlooked or lost amidst the pressing concerns of handling many children in care. Children in care are subject to the power of numerous departmental officials who "exercise unchecked discretion in determining when services shall be given and from whom they will be withheld" (Polica, J., *Professional Abuse of Children*, in Cook & Bowles, *Child Abuse, supra*, at 78). The fragmentation of authority compounds the propensity for agency officials to incorporate many institutional constraints into deciding what services or treatment children in care will receive (Polica, *supra*, at 78).

[158] There were many junctures in Marcel's journey through the over-burdened, multi-layered child protection process when the tenacity of a child advocate, armed with any one of several reports, might have made a difference for Marcel, for his victims, and for his community.

[159] The size, complexity and fragmented nature of our processes renders many of us participant observers. We participate a little, do our part, as the system carries children and parents along past our station, and often recycles them past us again and again. Our inputs are marginalized by countless other decisions made with little regard or understanding of previous decisions. In many instances, it is not just the child's best interests but in the best interests of all society (including many professionals restrained by the bureaucracy) that a child advocate can act.

[160] Sixth Recommendation: Integrated Planning - The system desperately needs to work through a common vision to an integrated plan. It is scandalous that we spend well in excess of \$40 million on justice and related expenditures without one. Without an integrated plan, we persist in maintaining longstanding failed programs and readily abandon successful new programs that are not entrenched in the mainstream. Without a plan, without common objectives, there is little to collectively evaluate. We do what we do, chiefly because we have always done so, and because we have always done so, it is readily protected in annual budgetary wars.

[161] The Marcel Jacobs within our system are victims of the lack of an integrated plan. Imagine for a moment that the cumulative effect of all the abuse youth such as Marcel endure creates a festering mass of anger, pain, frustration, and an irrepressible yearning to strike out at authority. Think of this mass as a large rock -- so large that no family, no community, no professional, no agency can alone lift this rock to a better place. Everyone tries. Repeated efforts leave them exhausted, burned out, despairing and resigned to failure. Yet if all took on the challenge in a coordinated effort, the rock can be moved. Marcel was too much for his family to manage. He was too much for social workers, probation officers, judges, psychologists -- too much for any one person or agency to manage alone. So many times in dealing with young people like Marcel everyone struggles essentially alone, without an integrated effort that reaches far beyond the specific resources they possess. They all do their jobs, but the job needed to make the difference does not get done. As long as we fail to work together, we will fail to make a difference.

[162] It does not matter where we start. Pick any community. We need to start somewhere to forge a common vision and an integrated plan that encompasses the entire "village" in not just identifying what must be done, but in sharing the work of making the plan work. We must all go into the planning process prepared to accept all or part of what we offer may not be as important as we believe and may not be needed at all. Above all else, we must make a special effort to bring new players into the process. Without them, change will be unlikely, and be once again more tinkering. Teachers, faith community leaders, business leaders, youth leaders - everyone must realize a healthy community can only be secured through

their participation. The health of their community is directly related to the extent of their participation. The more they rely on the system, the less likely community well-being will improve. When Marcel's mother lost her way due to substance abuse, I fervently believe had everyone been involved then, Marcel would not have grown to be the immovable "bad rock" he became, and the harm he suffered would not have been taken out on his victim. It is not just the Marceles of our community that benefit from integrated planning that involves all the community, but all of us, especially those who should never be victims.

[163] Seventh Recommendation: Follow-Up - If a "system" denotes effective, coordinated, and integrated actions designed to achieve a common objective, then the justice system is certainly not a "system". There is little that is effectively integrated or coordinated and any notion of a shared common objective is a pretense. Marcel's history within the justice system eloquently manifests the debacles that are far too often the product of the lack of any comprehensive coordination. In sentencing Marcel, much was made by the Crown of Dr. Williams' salient conclusion in 2002 that Marcel is a high risk to sexually re-offend. That is not the first time that Dr. Williams made this observation, nor the first time a professional made this observation. Sexually inappropriate behaviour was noted in 1988. In 1995, Ron Baron agreed "with past reports [on Marcel], which suggest that [sexualized behaviour] should be the main focus of treatment ... there is a significant probability that he will re-offend sexually." The system knew. We knew as early as 1988 that something must be done about Marcel's inappropriate sexual activity. We knew that nothing had been effectively done to redress these longstanding problems when the department terminated their responsibility as parents for Marcel when he was 18. The justice system knew his potential for sexually inappropriate behaviour had not been addressed each time he was sentenced after leaving the care of the department.

[164] In part, because of the limitations of the law, the justice system could not do much as Marcel rejected overtures and opportunities for treatment. Yet these limitations do not fully explain why effective intervention did not happen. Part of the explanation lies in the lack of coordination within the justice system, part with the lack of integration of many different government services, part with the court's inability to see and dig deeper into the larger context of an offender's life and part with the failure to respect, support and engage meaningful community involvement. There is much more we can do, but there never seems to be a sufficient sustained will to do more than keep on, keeping on with the same old, same old disjunctive practices. We get away with being horribly dysfunctional because to the uninformed eye we appear to be functional. We like to imagine that Marcel is an exception that fell through the cracks of an otherwise wonderful system. If we took a more exacting, critical look at ourselves, we would discover his case is not the exception -- the cracks are full of Marcel Jacobs.

[165] It is a simple recommendation -- one that reflects standard practices in any private organization. Can we not at least coordinate our actions to ensure effective follow-up on any problem highlighted in any part of the system? At least enough follow-up that responds to a warning that a young boy poses a risk to sexually offend before we are faced with sentencing a young man for doing what everyone warned he would do.

[166] Eighth Recommendation: Holistic Approach - Marcel was born into a dysfunctional family. He bounced in and out of care before finally becoming a permanent ward. Child protection agencies face impossible choices. What can be done when families want to care, seem to care, but never quite provide the consistent care required? Without the support of extended families and the community, social workers must make what is tantamount to an all-or-nothing choice -- permanent care or leave the child in the home. Families fearful of losing their children hide information, become uncooperative, and if need be, lie to avoid state intervention. The evidence rarely reveals the real truth. Judges can be induced to return children into homes that, on only part of the story to go by, appear to be safe. If a holistic approach engaged a broader spectrum of family and community resources, a broader spectrum of choices could evolve that could generate less adversarial game-playing. For Marcel, a broader family and community approach might have flushed out the truth about his family circumstances in a way that might have precipitated the help the family needed to function effectively to at least retain the connection to Marcel. An holistic approach calls upon all members of the family and community to take much greater responsibility. In Marcel's case, no one seemed to be sufficiently involved to assist the department with very tough choices.

[167] The evidence reveals that after Marcel was 16 little, if any, treatment was offered and no sustained treatment regime addressed the specific impact of the pain and abuse inflicted upon Marcel. The interventions to deal with his aggressive and sexually inappropriate behaviour were not sustained. The evidence suggests many of the treatment interventions in earlier years were terminated because as early as 10 years old Marcel's behaviour exceeded the coping capacity of those programs.

[168] The failure to treat Marcel cannot be solely laid at the door of the department. Family and community involvement, a better informed, more engaged judiciary and the integrated services of many departments and agencies could have, in the very least, assisted the department in many ways that might have overcome Marcel's defiance and any other barriers to meeting his treatment needs.

[169] Ninth Recommendation: More Support for FASD Issues - For some reason, the official government report on the magnitude of FASD problems in the justice system, while apparently completed, has not been released. Whether it is 30 percent or 70 percent of the cases in our system, it is a significant -- arguably the most significant -- problem we face. If, as I believe, a high percentage of the offenders we sentence to jail are FASD, we need to significantly realign what we do in sentencing. If the numbers are as high as some suggest (one school official estimated 75 percent of the children in one community school are FASD), the entire system needs to urgently develop a coordinated response.

[170] It is not clear -- it rarely is -- whether Marcel is FASD. If he is, that will fundamentally affect what treatment programs will be effective. In the very least, there must be a concerted effort to identify any FASD conditions in order to prudently invest scarce treatment resources. We need to approach FASD as a community problem, in ways that induce mothers to share information about their children, and in ways that everyone assumes responsibility for preventing and for helping families to care for their children (and adults) affected by FASD.

[171] If Marcel is FASD and that had been known at the outset, many of the frustrated attempts at treatment might have been avoided. More appropriate treatment approaches might have made a difference. Marcel's rejection of some and the failure to gain anything from other treatment programs may have arisen not from truculence and defiance of authority, but from his frustration in not being intellectually capable of coping with the treatment program's presentation style and content.

#### **Post Script:**

[172] More ground was covered in this judgment than was needed to sentence Mr. Jacob. However, this case revealed that there is much about our practices that needs to be dug up and replanted with different approaches. The awareness of a need to change what we do was vividly generated by the excellent work of counsel. In comprehensively carrying out the mandate of *R. v. Gladue, supra*, they provided the larger context that surrounds the offender, victim and community. In this larger context, the responsibility of the family, community, state and court for what happened was exposed. These recommendations aspire to provide a long overdue dialogue among all participants to apply ourselves with the same diligence to change our behaviour as we now ask of Mr. Jacob. If we fail to do so, we are all at a high risk of repeating the same conditions that sent Mr. Jacob out into our community as a ticking, dangerous bomb.

[173] In a good way, I would like to blame the excellent work of counsel, the victim support worker, Ms. Forde and the probation officer, Ms. Geddes for prompting this unorthodox and, to be sure, in many quarters, inappropriate detour beyond conventional boundaries. I take the blame, with gratitude for their perhaps inadvertent inspiration that generated this detour.

[174] Finally, my gratitude to the registry staff, whose work was instrumental in gathering the court history. They provide, as always, a level of excellence in their work despite their demanding work environment.