

Fetal Alcohol Spectrum Disorder and the Adult Criminal Justice System in Canada

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Fetal Alcohol Spectrum Disorder and the Adult Criminal Justice System in Canada

by the
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Foreword

The following two quotations sum up why ACLRC originally decided to write a report on adults with Fetal Alcohol Spectrum Disorder (FASD) who become involved in the criminal justice system. While there seem to be a number of programs and legal decisions that address youth with FASD who become involved in the justice system, we noted that less has been done to adequately address adults with FASD. This report is intended to highlight some of the important issues adults with FASD continue to face when they are involved with the criminal justice system.

“The vast majority of people afflicted with FAS or FAE in this world are not children, but adults. ... It’s a facile but short-sighted policy to act as though FAS is an issue confined to children under twelve years old, or to women. ... we must redefine FAS as an issue that cuts in varying but real ways across every sector and age group of the population, both genders, all social and economic demographics.”

- Michael Dorris, “Introduction” in Ann Streissguth and Jonathan Kanter, eds., The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities (Seattle: University of Washington Press, 1997) at xxiv.

“I realized that in the industrialized world, a large proportion of those countless people living on the fringes of society are not there because they have inferior genes. They are not inherently lazy, stupid, or evil – although their learning and behavior problems make them appear that way. The root of the problem is not childhood neglect or abuse, although for many, disruptive families have compounded their problems. They live in self-perpetuating ignorance, poverty, and crime because they came into the world with permanent neurological damage that could have been prevented. Most are never diagnosed, and when their specific problems and needs are not addressed:

- *adoption into loving homes often cannot help them;*
 - *Head Start programs are often ineffective in helping learning and behavior problems;*
 - *special-education and behavior programs in school frequently cannot help them;*
 - *traditional psychotherapy approaches rarely work;*
 - *the usual twelve-step approach to addiction and alcoholism is unlikely to be effective;*
 - *existing prisons and penitentiaries can do little more than warehouse criminal offenders with FASD, keeping them from committing crimes until they are released.”*
- Bonnie Buxton, Damaged Angels: An Adoptive Mother Discovers the Tragic toll of Alcohol in Pregnancy (New York: Carrroll & Graf, 2005) at 59-60.*

- Linda McKay-Panos, 2017

Executive Summary

The following report examines fetal alcohol syndrome disorder (FASD) and the central issues that FASD accused face in the criminal justice system in Canada. These issues include making false confessions, being “unfit to stand trial” (UST), being “not criminally responsible (NCR) on account of mental disorder”, sentencing options and issues, and the effectiveness of incarceration and treatment for FASD people.

The first two chapters of this report focus on the nature of FASD. Chapter One outlines the different disorders that form FASD, the etiology (medical causes) and prevalence of FASD, the process for diagnosing FASD, the primary and secondary disabilities that people with FASD can have, the characteristics of FASD that lead to criminal behaviour, the invisibility of these characteristics, and arguments under the *Canadian Charter of Rights and Freedoms (Charter)* that FASD prisoners are mistreated in the criminal justice system. Chapter Two examines the issue of assessment of FASD. FASD assessments may be relevant to determine both the criminal intention of the accused and to the ultimate sentence that the accused receives. Although it is recommended, judges are not required by the *Criminal Code of Canada* to order medical assessments for FASD when they believe that a party involved in a case (accused, victim, or witness) has FASD. Moreover, it is difficult for a person with FASD to rely on *Charter* provisions in order to get an FASD assessment. This difficulty arises from the fact that one must pay for an FASD diagnosis, given that such a diagnosis is not provided for by provincial health care, and given that the *Criminal Code* does not grant jurisdiction to a provincial court judge to order the province to expend funds to carry out an FASD assessment. Chapter Two also examines several cases in which courts choose not to order an FASD assessment to assist them in determining sentences that take into account the FASD of the accused adult. It is evident that FASD assessments are generally unavailable for FASD accused.

Chapter Three looks at the issue of false confessions. People with FASD, because of their low-level intelligence resulting from permanent brain damage, are vulnerable to giving false confessions to police officers when they are arrested. In so doing, they are more likely to self-incriminate (deliver statements that will incriminate themselves, whether or not they are true or false). Everyone in Canada has a right to the privilege against self-incrimination. This means that individuals can choose not to proffer any information to the police that might aid in their prosecution. This privilege is coincidental with the right to remain silent upon arrest, and this also constitutes a right to security of the person, which is guaranteed under section 7 of the *Charter*. Therefore,

the fact that people with FASD are more likely to self-incriminate and give false confessions is a *Charter* issue and thus important. This chapter explains how people with FASD should be given more substantial explanations of the privilege against self-incrimination to ensure that they understand their rights. It also shows how the privilege of self-incrimination can require a more substantial explanation to FASD accused. We also look at the “common law confessions rule”, along with a handful of cases to illustrate this rule. This rule can help protect people with FASD against self-incrimination. This rule precludes admission into evidence of an accused’s statement to a person in authority unless the Crown can establish beyond a reasonable doubt that the statement was made voluntarily. This chapter also talks about the strategies that police officers can use when interviewing accused, complainants or witnesses with FASD. With respect to victims and witnesses with FASD, the *Criminal Code* has some provisions that are intended to protect witnesses with physical and mental disabilities.

Chapter Four talks about the situation of accused who are unfit to stand trial (UST) and how FASD accused fall into this category. FASD accused are not always found UST, however, because their mental deficits are not always severe enough to prevent them from meeting the requirements of fitness. A person determined to be UST can receive either a conditional discharge or detention in a hospital. He or she cannot receive an absolute discharge, though, because such a determination requires that the accused was tried for the offense. This is obviously not the case for someone who is UST because he or she has not yet gone to trial and has therefore not been tried. FASD accused determined to be UST cannot therefore receive an absolute discharge. FASD people generally remain UST because the intellectual impairments that make them UST generally result from permanent brain damage. This means that FASD accused generally will not have the opportunity to become “fit to stand trial” and thus not have the opportunity to be tried for an offense, nor possibly gain an absolute discharge. UST accused can remain within the criminal justice system indefinitely, even if they do not present a threat to public safety. This is also an infringement on a UST accused’s section 7 *Charter* rights to liberty and security of the person because it does not represent the least restrictive mode of infringement of the person’s rights. The *Criminal Code* only allows for UST accused to receive a stay of proceedings. This in itself is difficult for FASD accused to receive though, because the Court can use its discretion in determining whether to conduct an inquiry into whether a stay is merited.

Chapter Five discusses the conditions necessary for someone to be determined (not criminally responsible) NCR on account of mental disorder. These conditions include that a person has committed an act while suffering from a mental disorder and

that the mental disorder has rendered the person incapable of appreciating the nature and quality of the act or omission or has rendered the accused incapable of knowing that the act was wrong. An FASD accused satisfies these conditions because of his or her low level of intelligence and lack of understanding of when an act or omission is wrong, particularly from a moral point of view. This chapter shows, through analyzing a handful of cases, that FASD alone is rarely sufficient for a verdict of NCR. However, FASD in conjunction with intellectual impairments or mental illness can fulfill the requirements of the *Criminal Code* section 16 NCR defence. Courts and Criminal Review Boards (CRB) refer accused for assessment to forensic psychiatrists, who cannot diagnose FASD and are not necessarily trained to recognize FASD characteristics. People with FASD who also suffer from intellectual impairments or mental illnesses are categorizable within the forensic psychiatric system, whereas people who suffer only from FASD are not always categorizable in this way. This means that people with FASD do not come under the jurisdiction of forensic psychiatric institutions and do not qualify for support from community living organizations. People with FASD can thus receive sentencing that is not the least restrictive on them, given that they may not be eligible for support from community living organizations. This is a violation of their section 7 *Charter* right to liberty and security of the person.

Chapter Six examines how the status of FASD impacts the sentencing of an FASD accused. Essentially, FASD is a mitigating (partly excusing) factor for sentencing, but only to judges who understand the characteristics and deficits of FASD offenders. Traditional principles of sentencing do not apply to people with FASD. People with FASD should have different sentencing. Some cases, such as *R v Creighton* and *R v Harris*, which are examined in this chapter, point towards the Crown having a duty to help people with FASD by not recommending punishment and thus not violating the accused's section 7 and 15 *Charter* rights. The Court can order conditional sentencing. Breaches of conditional sentences can result in the offender being sent to prison. Offenders cannot be forced by Canadian courts to go to a mental health institution. As a result, large numbers of mentally disordered offenders are incarcerated in correctional facilities that cannot provide the mental health care they require. However, conditional sentences can involve going to mental health institutions, but people with FASD rarely benefit from these institutions because they are rarely designed to accommodate the needs of adults with FASD. The success of conditional sentence orders for people with FASD depends on management of the offender within the restrictions set out by the order. In making the determination of whether to order a conditional sentence, courts look at the likelihood of the offender re-offending, the level of remorse by the offender, and other factors.

They do not, however, always consider the effectiveness of the management system for the offenders.

Chapter Seven examines the effectiveness of incarceration and treatment for FASD accused. It may be thought that incarceration of FASD offenders is effective, but in reality, it is not. This is due to the fact that incarceration does not fulfill the objectives of denunciation, deterrence or rehabilitation, which are necessary for an FASD offender. Also, correctional services personnel have not received consistent and widespread training on how to monitor people with FASD. Furthermore, correctional services establishments do not provide people with FASD with the rehabilitative programs and treatment necessary for their growth and personal development. Programs and treatment that FASD offenders should receive include anger management treatment, and social, life, communication, organizational, and cognitive skills programs. After correctional services, people with FASD should be monitored and have ongoing social and life skills training.

Chapter One: Fetal Alcohol Spectrum Disorder

Terminology

The diagnosis of *fetal alcohol syndrome* (FAS) involves the following criteria: 1) prenatal or postnatal growth impairment, 2) facial anomalies, 3) central nervous system impairment, and 4) confirmed or unconfirmed maternal alcohol exposure.¹ The facial anomalies consistent with FAS include short palpebral fissure (eye slit) length, smooth or flattened philtrum (the groove that runs from the nose to the upper lip), flat midface, and thin upper lip. Central nervous system impairment “can present as microcephaly, structural brain anomalies, and various neurological or behavioral signs such as gait problems, hyperactivity, attention deficits, learning disabilities, or mental retardation.”²

Fetal alcohol effects (FAE) is the term used to refer to central nervous system impairment in the absence of facial anomalies or growth impairment. FAE is no longer current terminology; the preferred terms are partial fetal alcohol syndrome and alcohol-related neurodevelopmental disorder.³

Partial fetal alcohol syndrome (pFAS) is based on evidence of two of the facial anomalies, central nervous system impairment, and confirmed maternal alcohol exposure.⁴ pFAS is not a milder form of FAS, although the presence of alcohol-related damage is not as physically obvious, neurological damage resulting from central nervous system impairment can be just as severe.

Diagnosis of *alcohol-related neurodevelopmental disorder* (ARND) requires evidence of central nervous system impairment and confirmed maternal alcohol exposure.⁵ Like pFAS, ARND is not a milder form of FAS. While the physical features associated with fetal alcohol damage may only be present to varying degrees in people diagnosed with FAS or pFAS, central nervous system impairment and resulting neurological damage is present in all those affected by *in utero* alcohol consumption. Those who suffer with pFAS or ARND can be as affected in their adaptive functioning as those who suffer with FAS.

¹ Albert E Chudley et al, “Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis” (2005) 172 Can Med Assoc J S1 at S11 [Chudley et al].

² Sarah N. Mattson and Edward P. Riley, “Neurobehavioral and Neuroanatomical Effects of Heavy Prenatal Exposure to Alcohol in Ann Streissguth and Jonathan Kanter, eds., *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997) at 3.

³ Julianne Conry and Diane K. Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Maple Ridge, BC: British Columbia Fetal Alcohol Syndrome Resource Society, 2000) at 11 [Conry and Fast].

⁴ Chudley et al, S 12.

⁵ Chudley et al, S 12.

Alcohol-related birth defects (ARBD) refers to a list of congenital anomalies (including malformations of the heart, skeleton, liver, eyes, and ears) that likely result from *in utero* alcohol consumption.⁶ The existence of these anomalies is not in itself a basis for diagnosis of FAS, pFAS, or ARND.

Fetal alcohol spectrum disorder (FASD) is an umbrella term referring to the various diagnoses related to *in utero* alcohol consumption, but is not itself a diagnostic term. Throughout this report, FASD will be used to refer to all those who suffer from fetal alcohol damage, particularly when a specific diagnosis has not been made.

Etiology and Prevalence

Alcohol is one of a small number of identified teratogens. A **teratogen** is a substance that causes permanent defects in a developing fetus.⁷ Alcohol attacks the developing central nervous system, causing malformations and neurobehavioral dysfunction.⁸ Compared to other abusive substances, alcohol causes the most severe neurobehavioral defects.⁹ Consumption of alcohol during pregnancy is currently the most prevalent cause of intellectual impairment,¹⁰ far surpassing congenital conditions such as Down syndrome and spina bifida.¹¹ Unlike other causes of intellectual impairment, fetal alcohol damage is completely preventable.

It was once thought that the placenta acted as a barrier between a pregnant woman and her fetus, protecting the fetus from harmful substances in the mother's system. Now research has shown that the placenta readily absorbs alcohol. Once alcohol crosses the placenta, it can induce chromosomal abnormalities and enzymatic malfunction in the developing fetus, resulting in malformation, dysmorphism and growth deficiencies.¹² In addition, alcohol causes oxidative stress, effectively depriving

⁶ Chudley et al, S 12.

⁷ Bonnie Buxton, *Damaged Angels: An Adoptive Mother Discovers the Tragic toll of Alcohol in Pregnancy* (Toronto: Alfred A. Knopf Canada, 2004) at 46. Other teratogens include thalidomide, codeine, and toluene; while undeniably affecting fetuses, substances such as tobacco, caffeine, marijuana, cocaine, and heroin do not cause permanent birth defects [Bonnie Buxton].

⁸ Rae Mitten, "Fetal Alcohol Spectrum Disorders (FASDs) and the Justice System" in Commission on First Nations and Métis Peoples and Justice Reform, Final Report Volume 2, section 9 at 5, online: Government of Saskatchewan Justice and Attorney General <<http://www.justice.gov.sk.ca/justicereform/volume2/12section9.pdf>> [Rae Mitten].

⁹ Rae Mitten, section 9 at 5.

¹⁰ Rachel Greenbaum and Gideon Koren, "Fetal alcohol spectrum disorder: New diagnostic initiatives" (2002) 7:3 *Pediatrics & Child health* 139 at 139.

¹¹ Rae Mitten, section 9 at 6.

¹² Rae Mitten, section 9 at 7.

the developing brain of sufficient oxygen,¹³ and resulting in permanent, irreversible brain damage.

Alcohol can affect the developing fetus at any stage of pregnancy. The specific teratogenic effects on the fetus will vary according to when alcohol is consumed. For example, damage causing the facial anomalies that signal FAS occurs during the first trimester. Because the brain and central nervous system develop throughout the nine months of gestation, alcohol consumed at any point during pregnancy can damage the fetus's brain. FAS has been diagnosed in children whose mothers drank only during the first few weeks of pregnancy before they knew they were pregnant.¹⁴

It is a common misconception that only women who drink heavily can cause fetal alcohol damage to their babies. Even small amounts of alcohol can have a devastating effect, depending on when the alcohol is consumed, how much alcohol is consumed at a time, and what other factors contribute to the development of the fetus. Women who do not drink habitually but who binge drink (five or more drinks over a few hours) at least once during the pregnancy can cause irreparable damage.¹⁵ In the case of women who do not drink habitually, lower concentrations of alcohol (one or two drinks over a few hours) are less likely to cause as much damage,¹⁶ but there is no known amount of alcohol that can be considered safe. Complete abstinence from alcohol during pregnancy is the only way to prevent FASD.

Alcohol-related damage varies significantly between individuals, and does not depend solely on the amount and timing of maternal alcohol exposure. Other factors can exacerbate the effect of the alcohol on the developing fetus. The presence of other drugs, such as nicotine, cocaine, and heroin, which are not themselves teratogens, can influence alcohol's teratogenic effect. The mother's age and diet play a role. Societal factors such as poverty, lower level of education, and limited access to pre-natal and post-natal medical care can increase the likelihood and severity of FASD, as can

¹³ Rae Mitten, section 9 at 7.

¹⁴ Bonnie Buxton at 135-136. Buxton describes a mother who did not normally drink, but drank to excess on two occasions before she realized she was pregnant. Her son has been diagnosed with pFAS and has an IQ in the low 70s. Another mother consumed four or five drinks over several hours on four separate occasions in the first six weeks of her pregnancy. Although the mother abstained from alcohol for the rest of her pregnancy, her daughter nevertheless suffered fetal alcohol damage.

¹⁵ Rae Mitten, section 9 at 4: "Binge drinking quickly raises the blood alcohol concentration (BAC), accelerating the teratogenic effects of alcohol. The unborn's BAC does not dissipate, as the fetal liver is not functioning to metabolize alcohol; therefore, alcohol remains in the fetal system much longer than it remains in the mother's system, with concomitant increased damage to the fetus."

¹⁶ Bonnie Buxton, at 84-86.

environmental factors such as paternal drinking, custody changes, stress, abuse, and neglect.¹⁷

Another common misconception is that FASD occurs only in lower socioeconomic classes and disadvantaged populations. Many of the contributing factors are more prevalent in disadvantaged populations, and significantly in Indigenous communities, and the rate of FASD is often higher in these communities when compared to the population at large.¹⁸ Indigenous leaders have recognized this problem, and are addressing the prevalence of FASD in their communities.¹⁹ However, FASD is not specific to any ethnocultural background or class. Fetal alcohol damage occurs in all races, cultures, socioeconomic classes, and communities.

The rate of FASD in Canada is estimated at nine per 1000 live births²⁰. In the United States, the rate of FASD is estimated at 9.1 per 1000 live births, of which one to three per 1000 have full FAS.²¹ A study conducted in an isolated Indigenous community in British Columbia estimated the FASD rate at 190 per 1000 live births, while another study of Indigenous children in the Yukon estimated the prevalence rate at 46 per 1000 live births.²² It is difficult to accurately report the prevalence of FASD because diagnosis is complex and many adults who were not assessed for FASD as children remain undiagnosed. Estimates vary widely and more research is required, but clearly FASD affects a significant portion of the population in North America. It is estimated that one in 100 North Americans are likely to have some degree of fetal alcohol damage.²³

Diagnosis

The most visible defects associated with FASD are learning disabilities, intellectual impairment, reduced cognitive and adaptive functioning, and socially inappropriate behaviours. Those who are born with the physical defects associated with FASD, such as growth restriction and dysmorphic facial features, often outgrow these

¹⁷ Chudley et al, S1-S2.

¹⁸ Chudley et al, S5-S6. Also, disadvantaged populations are more likely to be “under the microscope” of social service agencies, making their problems more visible, while middle-class and upper-class families are more able to hide both their children’s health problems and their own substance abuse.

¹⁹ The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada, 2015), Call to Action 34.

²⁰ Public Health Agency of Canada, *Fetal Alcohol Spectrum Disorder (FASD): A Framework for Action*, (15 March 2012), online: <<http://www.phac-aspc.gc.ca/publicat/fasd-fw-etcaf-ca/framework-eng.php>>.

²¹ Sampson PD, Streissguth AP, Brookstein FL, Little RE, Clarren SK, Dehaene P, Hanson JW, Graham JM, “Incidence of fetal alcohol syndrome and prevalence of alcohol-related neurodevelopmental disorder.” (1997) *Teratology* 56(5) 317-326.

²² Chudley et al, at S1.

²³ Bonnie Buxton, at 45.

physical characteristics. By adulthood, all but the most severe fetal alcohol damage is generally invisible. Many people with FASD also suffer from a wide range of mental health problems. As a result of these factors, FASD is often misconstrued as discoverable through psychiatric assessment, when in fact, FASD requires a medical diagnosis.

Most expertise in the area of fetal alcohol damage resides in the field of developmental paediatrics. FASD was first discovered in 1973 when two dysmorphologists at the University of Washington discovered a pattern of growth deficiency, facial anomalies, and central nervous system impairment among 11 unrelated children of alcoholic mothers from three racial backgrounds.²⁴ As knowledge about the syndrome spread, paediatricians began to diagnose their young patients, and therefore, clinical knowledge of FASD has grown with the children who were originally diagnosed. Any physician can perform the physical examination necessary to determine whether FASD is present, as long as they are trained to distinguish the characteristic features of FASD from other medical conditions.

The diagnosis of FASD is complex and takes into account physical features, cognitive defects, and neurobiological and behavioural characteristics. In addition to a physician trained in FASD diagnosis, the ideal diagnostic team includes a psychologist, occupational therapist, speech-language pathologist, and case management coordinator (nurse or social worker).²⁵ Other professionals may also contribute, including addiction counselors, cultural interpreters, mental health workers, psychiatrists, vocational counselors, nurses, geneticists or dysmorphologists, and neuropsychologists.²⁶ People familiar with the patient's behaviour and development, such as parents or caregivers, teachers, childcare workers, family therapists, and probation officers may provide valuable information that will inform the diagnosis.²⁷

Physicians assessing for FASD will measure height and weight to detect growth deficiency, defined as height or weight below the 10th percentile or a disproportionately low weight-to-height ratio.²⁸ They then measure the palpebral fissures (from the inner corner to the outer corner of each eye) to determine if the width of the fissure is at or below the 3rd percentile. Smoothness and flatness of the philtrum and thinness of the upper lip are located on a 5-point scale. Medical assessment also includes testing fine

²⁴ K.L. Jones et al, "Pattern of malformation in offspring of chronic alcoholic mothers" (1973) 1 *Lancet* at 1267–1271.

²⁵ Bonnie Buxton, at S3.

²⁶ Bonnie Buxton, at S3.

²⁷ Bonnie Buxton, at S3.

²⁸ Bonnie Buxton, at S8.

motor skills, gross motor skills, reflexes, and hearing.²⁹ Deficiencies in any of these areas are common characteristics of FASD.

Psychological testing that measures functional capabilities is necessary to assess the degree of central nervous system impairment. Neuropsychological tests assess basic central nervous system skills (perceptual, visual-spatial, linguistic, mathematical, social-emotional, memory and attention).³⁰ Those with FASD generally have deficits in attention, visual-spatial memory, verbal learning, and visual-motor integration.³¹ Intelligence tests measure “the ability to adapt to one’s environment,” which requires the “capacity for learning, planning, abstract reasoning, application of prior learning, and the integrated coordination and use of component skills.”³² Intelligence testing can reveal developmental disability (defined as an overall IQ below 70 and significant impairment in adaptive behaviour) co-existent with FASD. In conjunction with academic achievement tests, intelligence tests can also reveal learning disabilities (significant discrepancies between general intellectual ability and achievement in a specific area). Academic achievement tests measure the basic educational skills of reading, writing and arithmetic. Those with FASD generally have low educational attainment in basic skills, particularly math and the skills that underlie reading.³³

In addition to cognitive functioning, it is important to measure adaptive functioning. When fetal alcohol damage is present, average or above average IQ can co-exist with profound disabilities in performing daily tasks. Adaptive behaviour tests measure independent functioning (including hygiene, feeding, travel, money management), social functioning (including communication skills, social interaction, and sexual behaviour), and school or vocational functioning.³⁴ These tests can reveal intellectual impairment and can help to assess potential for independent living.³⁵

Diagnosing FASD in adults tends to be much more challenging than diagnosing children. The growth deficiencies and facial dysmorphology that signal FASD in children will often correct themselves by adulthood. Reviewing childhood pictures and medical records can aid assessment, but because many adults with FASD had unsettled

²⁹ The Asante Centre for Fetal Alcohol Syndrome, *What is involved in an FASD assessment at the Asante Centre?* online: the Asante Centre <<http://www.asantecentre.org/involved.html>>.

³⁰ Robert J. Williams, “The Role of Psychological Tests in FAS/E,” in Jeanette Turpin and Glen Schmidt, eds., *Fetal Alcohol Syndrome/Effect: Developing a Community Response* (Halifax: Fernwood Publishing, 1999) 44 at 51 [Robert J. Williams].

³¹ Robert J. Williams, at 51.

³² Robert J. Williams, at 48.

³³ Robert J. Williams, at 50.

³⁴ Robert J. Williams, at 46.

³⁵ Robert J. Williams, at 47.

childhoods, living with either adoptive parents or a series of foster parents, and have become alienated from their families, these documents are often unavailable. While diagnoses of pFAS and ARND require maternal alcohol exposure to be confirmed, this is not always possible. Most adults with FASD did not grow up with their biological mothers.³⁶ When the biological mothers severely abused alcohol, they are often dead by the time their children reach adulthood.

Provincial health care systems do not fund FASD assessment for adults.³⁷

Primary Disabilities and Co-Morbidities

A 1995 study of 661 people diagnosed with FAS or FAE, ranging in age from six to 51, found that the average IQ score for subjects with FAS was 79, while the average IQ score for those with FAE was 90.³⁸ The average score on Adaptive Behaviour quotient was 61 for subjects with FAS and 67 for those with FAE. An IQ of 100 indicates normal intelligence, and a score of 100 indicates normal adaptive functioning.³⁹ Even when fetal alcohol damage does not result in an inordinately low IQ, adaptive functioning is still severely compromised.⁴⁰

In addition to adaptive behaviour, individuals with FASD exhibit deficits in the areas of language, reasoning, attention, and memory. Fetal alcohol damage can lead to speech delay and difficulties in articulation, receptive and expressive language skills, word comprehension, and articulation disorders⁴¹. Children with FASD can display a misleading facility with language, but their peer interaction is usually poor. They also

³⁶ Bonnie Buxton at 50. A study of children in the care of child protection services in Southern Alberta found that 70% of the children in permanent care and therefore available for adoption had FASD.

³⁷ The Asante Centre for Fetal Alcohol Syndrome, *Assessment and Diagnosis*, online: The Asante Centre for Fetal Alcohol Syndrome <<http://www.asantecentre.org/adults-youth/assessmentdiagnosis.html>>; Manitoba FASD Centre, *Assessment and Diagnosis*, online: Manitoba FASD Centre <<http://www.fasdmanitoba.com/assess.html>>.

³⁸ Ann Streissguth et al, "Primary and Secondary Disabilities in Fetal Alcohol Syndrome," in Ann Streissguth and Jonathan Kanter, eds., *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997) 25 at 33 [Ann Streissguth et al].

³⁹ Ann Streissguth et al at 33.

⁴⁰ Jan Lutke & Tina Antrobus, "Fighting for a Future: FASD and 'the system': adolescents, adults and their families and the state of affairs" (Paper delivered at Forum of Connections: Serving Adolescents and Adults with FASD, Surrey, British Columbia, June 19 & 20, 2004) [unpublished, available online: Connections <http://www.fasdconnections.ca/HTMLobj-1807/fighting_for_a_future.pdf>] at 15 [Jan Lutke & Tina Antrobus, *Fighting for a Future*]: "In almost all other individuals, whether handicapped by some other mechanism or not, IQ and AQ are within a couple of points of each other, compliment each other and work together to create a whole, allowing for independent functioning. One of only a couple of exceptions to this is FASD. The gap between IQ and AQ is huge in FASD, anywhere from 10 to 60 points."

⁴¹ First Nations and Inuit Health Committee, Canadian Paediatric Society, First Nations, Inuit and Métis Health Committee, *Position Statement fetal alcohol syndrome*, online: Canadian Paediatric Society <<http://www.cps.ca/en/documents/position/fetal-alcohol-syndrome>>.

generally display deficits in syntactic and semantic aspects of language use, and their articulation and oral motor skills and verbal learning abilities are generally poor.⁴² Abstract reasoning and conceptual thinking are difficult for those with FASD. They have problems connecting cause and effect, generalizing information from one situation to another, and problem solving. Empathizing with others or imagining the perspective of another is almost impossible for those with FASD. They are easily distracted and have difficulty understanding time. Both short-term memory and long-term memory tend to be very poor.⁴³

People with FASD suffer from a host of other illnesses and disabilities. The vast majority of those diagnosed with FASD are also diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD). The unique type of ADHD seen in FASD individuals is possibly caused by prenatal alcohol exposure and does not respond well to medication; indeed, medication can make it worse.⁴⁴ Of the multitude of people diagnosed with ADHD in childhood, it is not inconceivable that many suffer from undiagnosed FASD.⁴⁵ In addition to ADHD, people with FASD are often diagnosed with other psychiatric disorders, such as bipolar disorder, clinical depression, or Reactive Attachment Disorder (RAD). Many individuals with FASD are developmentally disabled (IQ below 70 and significantly compromised adaptive behaviour), and many have learning disabilities. Most individuals with FASD “have some degree of sensory integration disorder (SID), due to overload of the senses, causing difficulty with processing incoming information.”⁴⁶ Defects in eyesight (myopia, astigmatism) and hearing are common, as is hypersensitivity to touch. Other difficulties co-morbid with FASD include sleep disorders,

⁴² Bharti Katbamna, *Fetal Alcohol Syndrome: Effects on the Auditory System* (22 November 2010), online: AudiologyOnline < http://www.audiologyonline.com/articles/article_detail.asp?article_id=2348>.

⁴³ Jan Lutke, “Spider Web walking: Hope for Children with FAS Through understanding” in Ann Streissguth & Jonathan Kanter, eds, *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997) 181 at 183. Memory problems come from the way information is stored in brains damaged by fetal alcohol: “People with FAS often have difficulty with storage, integration, or retrieval of information, and this difficulty has a negative impact on one’s ability to adequately and accurately address a situation requiring a response. For people with FAS, information sometimes is stored in a random, haphazard fashion, with no predictable order.”

⁴⁴ Jan Lutke & Tina Antrobus, *Fighting for a Future* at 18.

⁴⁵ Jan Lutke & Tina Antrobus, *Fighting for a Future* at 18. See also Teresa Kellerman, FASD in the Court System: Factors to Consider for Adolescents and Adults in the Court System with Fetal Alcohol Syndrome Disorders, [unpublished, available online: FASSTAR ENTERPRISES < http://www.fasdconnections.ca/HTMLobj-1807/fighting_for_a_future.pdf >] [Teresa Kellerman]. Teresa Kellerman speculates that some people with FASD are also misdiagnosed as having cerebral palsy or Asperger’s syndrome, because symptoms of these disorders can mask the symptoms of FASD.

⁴⁶ Teresa Kellerman.

immune system deficiencies, dental problems, malformed ears, allergies, and respiratory problems.⁴⁷

Secondary Disabilities

In contrast to the permanent and irreversible primary disabilities arising directly from central nervous system impairment, the secondary disabilities associated with FASD arise after birth and “presumably could be ameliorated through better understanding and appropriate interventions.”⁴⁸ During a 1995 study at the University of Washington FAS Diagnostic Clinic, 415 children and adults diagnosed with FASD took part in a life history interview designed to evaluate functioning in ten major areas: household and family environment, independent living and financial management, education, employment, physical abuse, sexual abuse and domestic violence, physical, social and sexual development, behaviour management and mental health issues, alcohol and drug use, legal status and criminal justice involvement, and companionship and parenting.⁴⁹

The study revealed a pattern of common life experiences among the subjects of the interviews. By the far the most prevalent secondary disability was mental health; over 90% of the subjects reported suffering from at least one of a long list of mental health problems.⁵⁰ Most of the adult subjects had difficulty holding a job or living independently.⁵¹ Disrupted school experience, substance abuse, confinement, and inappropriate sexual behaviour were common issues.⁵² A significant portion of the subjects had experienced trouble with the law; 60% of those aged 12 and over had been in trouble with authorities, charged with a crime, or convicted of a crime.⁵³

The study also examined the risk factors exacerbating the secondary disabilities and the factors protecting against secondary disabilities. Perhaps the strongest protective factor is diagnosis before the age of six.⁵⁴ Other factors include living in a

⁴⁷ Marie Hay, “A Practical Roadmap for the Imperfect but Practical-Minded Clinician” in Jeanette Turpin and Glen Schmidt, eds., *Fetal Alcohol Syndrome/Effect: Developing a Community Response* (Halifax: Fernwood Publishing, 1999) 26 at 28-33.

⁴⁸ Ann Streissguth et al, at 27.

⁴⁹ Ann Streissguth et al, at 31.

⁵⁰ Ann Streissguth et al, at 33.

⁵¹ Ann Streissguth et al, at 34. Eighty percent of those aged 21 and over experienced problems with employment and 80% experienced dependent living.

⁵² Ann Streissguth et al at 34. Of those aged 12 and over: 60 % had either dropped out of school, had been suspended, or were expelled; 30% had problems with drugs and or alcohol; 50% had been incarcerated or received inpatient treatment for mental health, alcohol or drug problems; and 50% reported having repeated problems with one or more of 10 inappropriate sexual behaviours.

⁵³ Ann Streissguth et al, at 34.

⁵⁴ Ann Streissguth et al, at 35.

stable, nurturing home without frequent changes of household, and not being a victim of violence.⁵⁵ In addition, being eligible for and receiving services for developmental disabilities is a strong protective factor. Conversely, an IQ of over 70 increases the risk for a higher level of secondary disabilities. Suffering from pFAS or ARND rather than FAS also exacerbates secondary disabilities, most likely because pFAS and ARND are less visible than FAS. Those with pFAS or ARND rather than FAS suffer from a higher rate of all the secondary disabilities, other than mental health.⁵⁶

The most crucial risk factors affecting the level of secondary disabilities are lack of access to services and the lack of understanding about FASD. Ann Streissguth writes,

The permanent, organic brain damage of people with FAS and FAE is often 'hidden' in that it often does not conform to current system guidelines for providing services, such as having a low IQ score, a debilitating physical handicap, serious mental illness, or even an FAS face (and diagnosis). By understanding the devastating secondary disabilities that characterize most individuals with FAS/FAE, and by understanding the intrinsic and extrinsic risk and protective factors that exacerbate or ameliorate these disabilities, we should be able to improve the quality of life for people with FAS and FAE and their families, and reduce costs to society.⁵⁷

Characteristics that Can Lead to Criminal Behaviour

People with FASD are consistently described as impulsive. They are sociable but exhibit very poor social judgement. They are suggestible and easily manipulated. They have few inhibitions. They are unable to perceive danger or predict the consequences of their actions. They have a high tolerance for pain. They have trouble understanding the concept of money and the concept of other people's property. They often have problems with anger management. They have difficulty understanding personal boundaries, particularly with regards to sexual behaviour. They are very susceptible to becoming addicted to alcohol and drugs. These characteristics amount to a "recipe for disaster" in terms of criminal activity and recidivism.⁵⁸

Many individuals with FASD begin to steal at an early age. This should not necessarily be viewed as delinquent behaviour, because their actions lack the intention to break rules or cause harm to the victim of the theft. Rather, thefts result from an

⁵⁵ Ann Streissguth et al, at 36.

⁵⁶ Ann Streissguth et al, at 36.

⁵⁷ Ann Streissguth et al, at 39.

⁵⁸ Caron Byrne, "The Criminalization of Fetal Alcohol Syndrome (FAS)", (Discussion Paper, Vancouver, British Columbia, 2001, revised 2002) [unpublished, available online: The Asante Centre for Fetal Alcohol Syndrome <<http://www.asantecentre.org/legal.html>>] at 2 [Caron Byrne].

inability to appreciate the money value of objects or to understand the perspective of the owners of the objects. FASD individuals often lack the conceptual ability to place themselves in the shoes of another person and realize how their actions might affect others. Even when they understand that theft is inappropriate, they lack the foresight to predict the consequences of their actions. When they want or need something, they may lack the ability to conceptualize options other than the obvious one of taking it.

Living with FASD is frustrating and often overwhelming. Along with gaps in their memories and flaws in their cognitive abilities, those with FASD experience significant delays in their emotional and social development. These delays lead to immaturity and inadequate control over emotions, particularly anger. Some individuals with FASD react aggressively and even violently in stressful situations. Because they tend to be very sensitive to stimuli, they can “overreact to noises, lights, touch by becoming disruptive, anxious or even aggressive.”⁵⁹ Many FASD individuals find it hard to concentrate in rooms with too much clutter, too many objects on the walls, or too much furniture. They become anxious in bright, crowded places, such as shopping malls or public transit. It is not difficult to imagine how a relatively innocuous encounter could quickly devolve into a conflict ending in assault charges.

Often FASD individuals are involved in sexual assault cases, either as victims or perpetrators. Their poor judgment, difficulty understanding social cues, and their desire to please make them particularly vulnerable to victimization. Adults may function emotionally at the level of children but nevertheless have normal physiological development.⁶⁰ They have adult bodies with adult sexual desires, but the emotional maturity of children. They have poor impulse control and poor judgment, and cannot always control their sexual behaviour.

Invisibility of FASD Exacerbating Involvement with Criminal Justice System

Adults with FASD are disabled due to permanent brain damage, but they do not necessarily look like they have a disability. They may display erratic behaviour, speech, and demeanor during encounters with police officers, lawyers, or judges, but these eccentricities are easily blamed on drug or alcohol abuse, mental illness, or bad attitude. The underlying brain damage is more difficult to detect. Many adults with FASD reveal no clues that they suffer from a disability in their demeanor or speech. Police officers, lawyers and judges would have no reason to suspect that their behaviour is the result of brain damage rather than willful misconduct. Because their disability is invisible, the

⁵⁹ Teresa Kellerman, at 2.

⁶⁰ Teresa Kellerman, at 1.

criminal justice system holds individuals with FASD to the same standards as normal offenders. They are expected to understand their rights (e.g., to speak with counsel, to refrain from speaking with police, to plead innocent), to comply with conditional sentence orders and probation orders, to make logical decisions, and to learn from punishment. People with FASD have great difficulty meeting these expectations.

Fetal alcohol damage affects receptive language skills disproportionately to expressive language skills. An individual with FASD may be able to communicate quite well and use a wide range of vocabulary, even though he or she does not understand what others are saying, particularly in the case of abstract language or idiomatic expressions. They may appear to understand much more than they actually do.⁶¹

During interviews with police or with counsel, offenders or witnesses with FASD have a tendency to misrepresent or confabulate. They have very poor memories, they are very suggestible, and they are often eager to please authority figures. As a result, they may present multiple versions of events, or they may agree to whichever version of events they think the interviewer wants to hear. False confessions and false accusations are not uncommon.⁶²

Many offenders with FASD receive conditional sentence orders or probation orders, but their faulty memories and their difficulties with time mean that they find it almost impossible to comply with these orders. Breaching conditions and failing to attend probation appointments result in new charges, inevitably leading to harsher sentences and more breaches. An offender with FASD cannot be expected to comply with conditions or probation orders unless they have enough supervision and support. Individuals with FASD fare better in all aspects of their lives when someone else structures their time and activities. Ideally, individuals with FASD would receive the help of an “external brain”: someone available 24 hours a day, seven days a week to help them deal with daily tasks. This degree of support would help offenders with FASD comply with their sentences and would prevent them from committing new offences.

The premise underlying sentencing in criminal justice is the notion that punishment will teach offenders that when they commit crimes they must suffer the consequences. Criminal sentences are designed, among other things, to deter and rehabilitate offenders. If an offender is unable to connect the punishment with the crime, however, sentencing does not fulfill its purpose. Individuals with FASD lack the cognitive ability to understand that their actions have consequences, that the conditions

⁶¹ Caron Byrne, at 2.

⁶² Conry and Fast, at 38.

they are expected to comply with, or the carceral sentence they are expected to endure, is directly related to the criminal activities they engaged in at some prior time. No amount or form of punishment will reform an offender with FASD. Unless the proper support, supervision, and structure are in place to prevent an individual with FASD from committing crimes, their involvement with the criminal justice system will continue.

Adults with FASD cannot conform to the standards of responsible, independent behaviour expected of them. As a general rule, they cannot control their impulses or make appropriate decisions, especially when they find themselves in new, confusing, or frustrating circumstances. Not all adults with FASD are developmentally disabled, and not all adults with FASD suffer from psychiatric disorders. But almost every adult with FASD is unable to function independently. Without externally imposed structure and without continual supervision, adults with FASD are at a high risk for engaging in criminal activities. It is imperative that everyone involved with criminal justice, from police officers, to lawyers and judges, to corrections personnel and parole officers, learn about fetal alcohol damage and understand the factors and characteristics that lead so many adults with FASD to become enmeshed in the criminal justice system.

Appropriateness of using IQ to determine eligibility for benefits

Often people with FASD do not receive the support they need to function in society. Community Living British Columbia (CLBC) made a decision to deny support to Fahlman, a developmentally disabled man, when he turned 19. An application for Judicial Review for that decision was brought in *Fahlman (Guardian ad litem of) v Community Living British Columbia*.⁶³ CLBC looked at three criteria to determine whether support would be given to adult applicants: whether the onset of the disability occurred before the age of 18; whether there were significant limitations in two or more adaptive skills areas; and whether the person's IQ was below 70.⁶⁴ Fahlman suffered from FAS, ADHD, and a form of autism. He had significant adaptive deficiencies and was unable to live independently. His adoptive parents were unable to care for him at home, due to his size and emotional volatility. He was living in a cabin and receiving seven hours per day of one-on-one support that enabled him to live somewhat independently.⁶⁵ He met the first two criteria, but because his IQ was approximately 79, he was advised that funding for the daily support he was receiving would be discontinued when he turned

⁶³ *Fahlman (Guardian ad litem of) v Community Living British Columbia*, 2007 BCCA 15, 63 BCLR (4th) 243 [*Fahlman (Guardian ad litem of)*].

⁶⁴ *Fahlman (Guardian ad litem of)*, at para 18.

⁶⁵ *Fahlman (Guardian ad litem of)*, at paras 3-7.

19.⁶⁶ His adoptive mother searched for alternative sources of support within the community, but none were available. CLBC's psychiatrist recommended that the supports currently in place should continue, because in their absence the plaintiff "would be extremely vulnerable to his own aggressiveness and impulsivity" and could do "significant harm to himself and the community."⁶⁷ The British Columbia Supreme Court (BCSC) issued an order of *certiorari* rejecting the CLBC's original decision. The BCSC ordered a reconsideration. The Court held that the decision was *ultra vires*, (without jurisdiction) because it was based on unauthorized delegation of authority since the *Community Living Authority Act* did not list IQ as a criterion for receiving support.⁶⁸ The CLBC appealed the decision, but the Court of Appeal dismissed the appeal.⁶⁹ Although the BCSC's decision vindicated Fahlman, the CLBC may be able to deny support to other developmentally disabled people in his position. If the *Act* is amended to specify IQ among the criteria for support, then adults with FASD and IQs above 70 will not be eligible for support through CLBC.

The Alberta *Persons with Developmental Disabilities Services Act*, RSA 2000, c P-9.5⁷⁰ states defines developmental disability as "a state of functioning that began in childhood and is characterized by a significant limitation, described in the regulations, in both intellectual capacity and adaptive skills."⁷¹ The Developmental Disabilities Guidelines and *Developmental Disabilities Regulation*, Alta Reg 230/2013 states that to be eligible for Persons with Development Disabilities services/funding, an individual must have a significant limitation in six or more adaptive skills; and the individual has a significant limitation in intellectual capacity (must be significantly below average).⁷² Adaptive skills include communication, home living, community use, health and safety, leisure, self-care, social skills, self-direction, functional academics, and work.⁷³

Positive Characteristics

The positive characteristics that many people with FASD share are rarely highlighted. These positive characteristics include: generosity, natural ability with

⁶⁶ *Fahlman (Guardian ad litem of)*, at paras 9-12.

⁶⁷ *Fahlman (Guardian ad litem of)*, at paras 10, 13.

⁶⁸ *Fahlman (Guardian ad litem of)*, at para 41.

⁶⁹ *Fahlman (Guardian ad litem of)*, at para 58.

⁷⁰ *Persons with Developmental Disabilities Services Act*, RSA 2000, c P-9.5.

⁷¹ *Persons with Developmental Disabilities Services Act*, s 1(1)(c).

⁷² Alberta, Developmental Disabilities Guidelines, online: <http://www.humanservices.alberta.ca/disability-services/pdd-developmental-disabilities-guidelines.html>; *Developmental Disabilities Regulation*, Alta Reg 230/2013 ss 3, 4.

⁷³ *Developmental Disabilities Regulation*, Alta Reg 230/2013, s 4(2).

animals, strong nonverbal skills, ability to perform visual tasks, an affinity for art and music, outgoing, charming, fun-loving, spontaneous and affectionate. As noted by Bonnie Buxton:

The textbooks about fetal alcohol rarely mention the wonderful qualities that make many people with FASD endearing – even though we may occasionally feel like throttling them. Because they live in the present, they can be delightful leisure-time companions, and like Colette, many have a wry, offbeat sense of humor. Despite their learning difficulties, people with FASD may be extremely talented in other areas. Colette is one of many whose fearlessness makes them gifted and confident with animals of all sizes. Some are excellent athletes. Others with FASD have artistic ability as poets, painters, or musicians, although their attention problems or addictiveness generally get in the way of worldly success. And over and over, I've found them to possess something all too often lacking in so-called normal people – an enormous generosity of spirit.⁷⁴

Charter Arguments

There may be section 7, section 12 and section 15 arguments under the *Canadian Charter of Rights and Freedoms*⁷⁵ surrounding the way in which FASD prisoners are treated in the Criminal Justice System. If Correction Services fails to achieve their legislated mandate of providing care to prisoners with FASD, perhaps a violation of FASD prisoners' right to equality under section 15 of the *Charter* can be established. If FASD prisoners are being classified as higher security risks because corrections staff misinterpret their behaviour as willful lack of compliance, with the consequence that FASD prisoners suffer segregation, isolation and other demeaning treatment that does not accurately represent the risk they pose to the safety of other prisoners and staff, a violation of both section 7 right to liberty and section 15 right to equality may be established. If FASD prisoners suffer the destructive effects of segregation and isolation, along with victimization by fellow prisoners, and punitive treatments from staff, a violation of their section 12 right to be free from cruel and unusual punishment may be established. Finally, if courts are sending FASD offenders to prison to access treatment that is unavailable in the community, perhaps a violation of their section 7 right to liberty and security of the person can be established.

Charter arguments are discussed more fully in the chapters that follow.

⁷⁴ Bonnie Buxton, at 114.

⁷⁵ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

Chapter Two: Assessment of FASD in adults

Many adults with FASD remain undiagnosed, particularly if they are over 30. This is because FAS was first identified as late as 1973. Once these adults left the public school system (often by grade 8) without a diagnosis of FASD, their symptoms were unlikely to be noticed by any agency or institution until they came into contact with the criminal justice system. However, if physicians did not diagnose FASD early on and psychologists and teachers did not recognize it, lawyers and judges likely also did not recognize it. This series of events can occur even today. As noted by Conry and Fast, “[a] courtroom is not the place to discover that a person has special problems with memory, cognition, or communication. However, if the possibility of FAS/FAE is overlooked in court, there may be no more chances of diagnosis.”⁷⁶

Ann Streissguth identifies several benefits of FASD diagnosis. She finds that FASD diagnosis:

- promotes visibility;
- identifies a cause and better appreciation for inexplicable behaviours;
- alters unrealistic expectations;
- motivates the development of appropriate treatments and interventions;
- diagnostic records can aid in further research on needs-assessment, program evaluation, and recidivism; and
- allows for an understanding of the etiology of lifelong disability – relief⁷⁷

Streissguth also finds, though, that diagnosis of FASD can have negative repercussions as well:

- stigma of label;
- further stigmatize already stigmatized groups, such as Indigenous persons;
- removing blame, and overlooking other possible causes for behaviour;
- providing excuse for behaviours that may be explained by environmental factors; and
- emotional and social repercussions.⁷⁸

⁷⁶ Conry and Fast, at 30.

⁷⁷ Fred J Boland et al, “Fetal Alcohol Syndrome: Implications for Correctional Service” (28 July 1998), online: Correctional Service Canada, Research Branch <http://www.csc-sec.gc.ca/text/rsrch/reports/r71/r71_e.pdf> at 55 [Fred J Boland].

⁷⁸ Fred J Boland, at 67.

On the whole, it is valuable for FASD offenders to be diagnosed, because establishing a mental disorder is a necessary step for ensuring that governmental institutions, including the courts, probations and corrections, accommodate their deficits and limitations.

Courts can gather diagnostic information about accused in several ways. If an accused has already been assessed for FASD or other mental disorders, under subsection 721(1) of the *Criminal Code*,⁷⁹ the court can order a pre-sentence report outlining the assessment results:

721(1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether accused should be discharged under section 730.

If an accused appeals his or her sentence, the court can order a post-sentence report:

687(1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it sees fit to require or to receive,
(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
(b) dismiss the appeal.⁸⁰

Part XX.1 – Mental Disorder of the *Criminal Code* authorizes courts to order an assessment of the mental condition of an accused:

672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
(a) whether the accused is unfit to stand trial;
(b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
(c) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female

⁷⁹ *Criminal Code*, RSC 1985, c C-46 s 721(1) [*Criminal Code*].

⁸⁰ *Criminal Code*, s 687(1).

person charged with an offence arising out of the death of her newly-born child;

(d.1) whether a finding that the accused is a high-risk accused should be revoked under subsection 672.84(3); or

(e) whether an order should be made under section 672.851 for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.⁸¹

672.12 (1) The court may make an assessment order at any stage of the proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.⁸²

672.13 (1) An assessment order must specify

(a) the service that or the person who is to make the assessment, or the hospital where it is to be made;

(b) whether the accused is to be detained in custody while the order is in force; and

(c) the period that the order is to be in force, including the time required for the assessment and for the accused to travel to and from the place where the assessment is to be made.⁸³

Conry and Fast, writing in 2000, recommended that judges order assessment reports for accused who they suspect might suffer from FASD, and that the orders should specify the need for medical rather than psychiatric diagnosis:

Psychiatric remand is the channel most often used for assessment. Unfortunately, psychiatric remand centres often lack a physician experienced in taking the physical measurements and conducting the evaluation for FAS/FAE. Consequently, reports from these centres may not address the possibility that the person has FAS/FAE and the possible implications for defence, sentencing, and treatment. It is important, then, that the judge explicitly order an assessment for FAS/FAE and state that a physician who is experienced in making this diagnosis complete the assessment. A definite diagnosis of FAS/FAE can assist the judge and all others who are involved with that individual, whether victim, witness, or accused, while he or she navigates the legal process.⁸⁴

⁸¹ *Criminal Code*, s 672.11.

⁸² *Criminal Code*, s 672.12(1).

⁸³ *Criminal Code*, s 672.13(1).

⁸⁴ Conry and Fast, at 26.

A cluster of cases from BC in 2002 demonstrate the barriers inherent in the criminal justice system to assessment of FASD in adults. Even when a judge is very informed about FASD and very alert to the possibility of FASD in an accused, he or she cannot rely on provisions of the *Criminal Code* to order medical assessments for FASD. In *R v Gray*,⁸⁵ the accused pled guilty to trafficking in cocaine, breaching his probation order, and failing to attend court when required. He could give no reason for the breach of the probation order, or for his failure to attend court. Both defence counsel and Gray's probation officer speculated that the probation order was too complex for him to understand. Trueman J. became concerned that the accused might have developmental disabilities and adjourned to determine whether the accused could receive some form of assessment.⁸⁶ Because no assessment was available, the accused brought a *Charter* application alleging that the provincial government's failure to assess him for developmental disabilities constituted a breach of his right to equality under section 15 of the *Charter*. The defence sought as a remedy under *Charter* section 24 an order requiring the provincial government to pay for a medical assessment for FASD.⁸⁷

The court recognized that it must address *Charter* breaches that are foreseeable and reasonably probable, and that sentencing Gray without fundamentally important information about his circumstances could breach his *Charter* rights. The problem with establishing a foreseeable *Charter* breach is that Gray was not able to prove that he was mentally disabled. The Forensic Psychiatric Service (FPS) could not diagnose FASD, and the only health care facilities in BC with the expertise to diagnose FASD were Sunny Hill Health Centre for Children (Sunnyhill) in Vancouver and The Asante Centre for fetal alcohol syndrome (Asante) in Maple Ridge, both private centres.⁸⁸ Assessments for adults through the private centres were not covered by provincial health care, but adults could pay \$2500-3000 for an assessment, or pay qualified pediatricians \$1500-2000 for an assessment. Because Gray was receiving welfare, any request for referral to a secondary health care provider would have to be approved by the Ministry for Human Resources, and there was a \$500 annual limit on such medical requests.⁸⁹ The Legal Services Society of British Columbia, the Ministry of Health, and the First Nations and Inuit Health Branch of Health Canada each declined to fund Gray's assessment.⁹⁰ Trueman J. summarizes the paradoxical nature of the problem:

⁸⁵ *R v Gray*, 2002 BCPC 58, [2002] BCJ No 428 [*R v Gray*].

⁸⁶ *R v Gray*, at para 13.

⁸⁷ *R v Gray*, at paras 16, 17.

⁸⁸ *R v Gray*, at paras 71, 72, 75.

⁸⁹ *R v Gray*, at paras 77, 83.

⁹⁰ *R v Gray*, at para 85.

Nathan Gray puts forward the existence of a developmental disorder. To establish the accuracy of his claim, he needs a medical assessment. For all practical purposes, he cannot get a medical assessment in the Province of British Columbia because, for adults, that type of assessment has been privatized. To get an assessment as part of a *Charter* remedy, he must establish on the balance of probabilities that he has a Section 15 mental disability. He cannot establish that he has a mental disability because he cannot get a private assessment. He cannot get a private assessment because he has a mental disorder of some sort and no money.

If he does not get a medical diagnosis, no governmental agency will have to recognize his mental disability and accommodate it. This includes Probation and Corrections. If he is not accommodated, the secondary disabilities will get worse. The longer this goes on, the greater the damage, medically and legally. The criminal system has the greatest potential for harming this man. It also has the power to stop it.

This issue has come to a head in my courtroom. I cannot think of another medical condition where this impasse occurs.⁹¹

Despite Gray's lack of diagnosis, Trueman J. nevertheless found on the balance of probabilities that Gray suffered from a mental disorder.⁹² Gray was entitled to differential treatment in the form of a probation order simple enough for him to understand. His breach of the probation order was a direct result of the court's failure to accommodate his suspected mental disability, and convicting him for breach of the probation order would abridge his section 15 right to equality. Ultimately, the section 15 application failed, due to the possibility of unexplored methods of obtaining an assessment for Gray through some government agency.⁹³ Trueman J. found that the government could not be found to have infringed Gray's rights until the issue of funding was fully explored.

Trueman J. then turned to the options available to the court for procuring an FASD assessment for Gray. Pursuant to section 721, the court could order a probation officer to file a pre-sentence report after obtaining an FASD assessment for Gray,⁹⁴ but Trueman J. noted that in previous cases, probation officers had simply referred offenders to FPS, even when assessments by Asante were specifically requested by the court.⁹⁵ Under s. 723, the court could call witnesses with expertise in FASD diagnosis to

⁹¹ *R v Gray*, at paras 49-52.

⁹² *R v Gray*, at para 127.

⁹³ *R v Gray*, at para 144.

⁹⁴ *R v Gray*, at para 179.

⁹⁵ *R v Gray*, at para 182.

speak in a very superficial way to the possibility that Gray suffers from FASD, but the court would have no jurisdiction to secure payment for their services.⁹⁶ Therefore, Trueman J. ordered, pursuant to section 672.12, an assessment for developmental disorder to be undertaken by a medical doctor, preferably a developmental pediatrician, experienced in such assessments, to determine whether Gray is unfit to stand trial or is suffering from a mental disorder rendering him exempt from criminal responsibility. The assessment was to take place at Sunnyhill, Asante, or another location agreed on by Crown and defence.⁹⁷

On appeal, the British Columbia Supreme Court rejected Trueman J.'s assessment order, finding that Trueman J. lost jurisdiction. In *R v Gray*,⁹⁸ Wong J. enumerated several grounds for setting aside the assessment order:

1. The *Criminal Code* does not grant jurisdiction to a provincial court judge to order the province to expend funds to carry out an assessment. Trueman J.'s order did not specify the source of funding for the assessment, but presumably she anticipated that funds would come from the province's Consolidated Revenue Fund. The court finds that absent express legislative authority, no court can require the expenditure of government funds. The *Criminal Code* does not authorize funding for specialized assessments. Even if the court were to interpret section 672.11 as vesting a provincial court judge with jurisdiction to order the payment of money from the Consolidated Revenue Fund, such an interpretation would be unconstitutional. The *Criminal Code* is federal legislation, and the federal government cannot use its jurisdiction over criminal law to require provincial funding for developmental disorder assessments.⁹⁹
2. While courts can make an assessment orders to determine whether an accused is unfit to stand trial or not criminally responsible at any time during the proceedings, they cannot make the order for the purpose of determining sentence.¹⁰⁰
3. An order made pursuant to section 672.11 must be based upon reasonable grounds that the evidence is necessary. As section 672.11 was never put before the parties the issue of how the evidence called might relate to

⁹⁶ *R v Gray*, at paras 188-193.

⁹⁷ *R v Gray*, at paras 216, 219.

⁹⁸ *R v Gray*, [2002] BCSC 1192 [*R v Gray* BCSC].

⁹⁹ *R v Gray* BCSC, at paras 57-72.

¹⁰⁰ *R v Snow* (1992), 10 OR (3d) 109, 76 CCC (3d) 43 (Ont Gen Div).

reasonable grounds for an assessment order was never canvassed. The only evidence came from Gray's testimony. After reviewing the transcripts from the provincial court trial, the court concludes that Gray's testimony was "both coherent and responsive to topics discussed" and revealed no evidentiary basis for an order pursuant to section 672.11.¹⁰¹

4. Section 672.13 provides that the assessment order must specify the hospital where the assessment is to be conducted, and the Minister of Health designates certain institutions as hospitals for the purpose of conducting assessment orders. Neither Sunnyhill nor Asante is on the Minister's list of designated institutions.¹⁰²
5. The focus of an assessment pursuant to section 672.11 is not simply the existence of a mental disorder but rather the effect of any mental disorder with respect to the legal concepts of fitness to stand trial or criminal responsibility. The *Criminal Code* provides that the Province determines where such assessments are to be conducted and precludes assessment by medical doctors, such as developmental pediatricians, with no understanding of the criminal justice system. The *Code* requires that medical practitioners practicing in the area of forensic psychiatry conduct fitness or NCR assessments, which is why offenders requiring assessments are referred to FPS rather than private institutions such as Sunnyhill or Asante.¹⁰³
6. The kind of assessment the court can order is defined in section 672.11 as "an assessment by a medical practitioner of the mental condition of the accused." The provision clearly requires the medical practitioner to look at the general mental condition of the accused in the context of whether the accused is fit to stand trial or criminally responsible, and does not require the practitioner to provide a specific diagnosis of a specific disability. The court has no jurisdiction under section 672 to order a specific type of assessment.¹⁰⁴

The court recommended the incremental approach to assessment: first, an assessment of cognitive and functional disabilities by FPS may be sufficient for sentencing. If the FPS report suggests the possibility of FASD, referral to subspecialists,

¹⁰¹ *R v Gray* BCSC, at paras 30-33.

¹⁰² *R v Gray* BCSC, at paras 37, 38.

¹⁰³ *R v Gray* BCSC, at paras 47.

¹⁰⁴ *R v Gray* BCSC, at para 52.

such as developmental pediatricians, may be appropriate.¹⁰⁵ Wong J. also affirmed that until all funding options are explored, *Charter* section 15 does not come into play on the issue of funding, and recommended that Gray explore other government funding avenues, such as a special request to the Minister of Health or the Minister of Human Resources.¹⁰⁶ The decision is silent, however, on the subject of how Gray would explore the funding options, assuming that his lawyer's fees were covered by Legal Aid, which would not necessarily fund exceptional efforts such as exploring funding for a private FASD assessment.

Another accused, Cecil George Creighton, experienced similar circumstances and a similar outcome. In *R v Creighton*,¹⁰⁷ Creighton pleaded guilty to possession of stolen property in December 2000 and break and enter in January 2002.¹⁰⁸ He had a lengthy record of property offences, breaching court orders, escapes, and other offences. He pleaded guilty to every charge he faced and had never gone to trial. The court commented on the ineptitude of the break and enter and speculated that if he had conducted all his previous crimes as ineptly, he would likely have never had any defence on the facts.¹⁰⁹ Trueman J. suspected that Creighton might suffer from pFAS or ARND and ordered the production of information relating to his birth mother's use of alcohol, pursuant to section 723.¹¹⁰ The report revealed a high probability that his birth mother drank during pregnancy.¹¹¹ Noting the court's duty to inquire when it suspects that an offender might suffer from a mental disorder or mental disability, Trueman J. found that an FASD assessment was required. The reasonable grounds required by section 672.11 were satisfied by Creighton's behavioural problems, inability to control his impulsiveness or learn from his mistakes, developmental deficits as a child and adolescent, lack of employment history, and inability to function for most of his life.¹¹² Trueman J. ordered an assessment pursuant to section 672.11(b), limiting the scope of

¹⁰⁵ The incremental approach to assessment was followed in a later case, *R v Synnuck* 2005 BCCA 155, 210 BCAC 150. The court ordered a post-sentence report from FPS on the grounds that the accused might suffer from neurological damage, but found insufficient grounds to order an FASD assessment unless FASD was noted as a possibility in the post-sentence report. Because the accused had suffered several head injuries, the etiology of his neurological impairment was inconclusive (*R v Synnuck*, 2005 BCCA 632, 220 BCAC 210). In any case, the court found no link between his brain damage and his criminal behaviour, concluding that he was not "disabled", but rather a career criminal.

¹⁰⁶ *R v Gray* BCSC, at para 81, 82.

¹⁰⁷ *R v Creighton*, 2002 BCPC 182, (*sub nom R v CGC*) [2002] BCJ No 1151 [*R v Creighton*].

¹⁰⁸ *R v Creighton*, at paras 2-4.

¹⁰⁹ *R v Creighton*, at paras 5-8.

¹¹⁰ *R v Creighton*, at para 17.

¹¹¹ *R v Creighton*, at para 19.

¹¹² *R v Creighton*, at para 94.

the assessment to the issue of criminal responsibility,¹¹³ and specified that payment for the assessment should come from the public medical plan or from funds designated for the administration of justice by the Attorney General. The court stated that if there is no funding for doctors to perform the assessment under the ordinary course of events, that fact should be established.¹¹⁴

On appeal, the Supreme Court granted the Crown's application for an order of *certiorari* to set aside Trueman J.'s order of assessment.¹¹⁵ Wong J. found that the order was made without jurisdiction, because it failed to comply with a mandatory provision in the *Criminal Code*—section 672.13—which requires assessment orders to specify the service, person, or hospital where the assessment is to be performed, and whether the accused will remain in custody until the assessment is completed. By failing to comply with either of the requirements of the provision, Trueman J. lost the jurisdictional basis for her order.¹¹⁶ Wong J. also pointed out that Creighton's defence counsel was not seeking an assessment for neurodevelopment disorders and did not raise the issue of FASD, and that Trueman J. made the assessment order on her own motion.

In *R v Harris*,¹¹⁷ the accused breached his probation immediately after being released from a two-year custodial sentence. A few months later, he was arrested for break and enter; he spent four months in custody as he was denied bail, and then pleaded guilty. The defence requested a conditional sentence, and in order to prove that he could abide by a conditional sentence order, he was released on bail to a recovery house. He left within a week, would not return for fear of being arrested, and gradually relapsed into his drug addiction. Despite an outstanding warrant for his arrest, he was out of custody for seven months, until he was arrested for standing outside a house waiting for his companion to pass him stolen items through the window. He spent another month in custody before pleading guilty to the charge of break and enter.¹¹⁸

Trueman J. adjourned the sentencing hearing so that a probation officer could assist Harris to obtain and complete an intake form for the Asante Centre. She was aware that funding for an assessment by Asante would not likely be available, but she felt that filling out the intake form would be the best way to obtain information about

¹¹³ *R v Creighton*, at para 53.

¹¹⁴ *R v Creighton*, at paras 101, 102.

¹¹⁵ *R v Creighton*, 2002 BCSC 1190, 55 WCB (2d) 215 [*Creighton BCSC*].

¹¹⁶ In contrast, the *Youth Criminal Justice Act*, 2002, c 1, is less restrictive and allows courts to order assessments pursuant to s 34 without specifying particulars of where and by whom the assessment will occur (*R v TK*, 2006 Nu J No 15, 70 WCB (2d) 555).

¹¹⁷ *R v Harris*, 2002 BCPC 33, (*sub nom R v H(J)*, 1998 CarswellNWT 153 (WL Can) NWT SC) [2002] BCJ No 313 [*R v Harris*].

¹¹⁸ *R v Harris*, at paras 2-12.

his history that could point to the possibility that he suffers from FASD.¹¹⁹ Trueman J. inferred from the information on Harris' completed intake form that it was more probable than not that he had a brain injury arising from his mother's alcohol consumption during pregnancy.¹²⁰ She declined to order an assessment under section 672.11, because the defence wanted to proceed to sentencing to resolve the matter,¹²¹ and because there were no resources in BC for publicly funded FASD assessments for adults. Trueman J. noted that in previous cases, doctors had performed assessments *pro bono* or sent the bill directly to the court, and she was not sure how or even if they were paid.

Deciding that Harris likely suffered from FASD, Trueman J. considered rehabilitation to be a more pressing sentencing objective than denunciation or deterrence, and that separation from the public was unnecessary as Harris posed no danger to the public. She imposed a conditional sentence order of nine months and three years' probation. The conditions include explaining his limitations to his probation supervisor, requesting her help in setting up a daily schedule, obtaining diagnosis of FASD and medication, attending Narcotics Anonymous meetings, and attending court periodically to advise Trueman J. as to how the order is being implemented.¹²²

The Crown appealed the sentence, arguing that the conditional sentence order was unfit.¹²³ The Court of Appeal found that the sentence was ultimately fit, but that Trueman J. erred in principle by effectively diagnosing Harris with FASD. It is wrong for a sentence to be based on a conclusion about the mental capacity of an individual offender derived from assumptions and general knowledge.¹²⁴ Dr. Speth, a clinical and forensic psychologist from FPS, completed a post-sentence psychological evaluation of Harris and concluded that his presentation was unremarkable and consistent with similar offenders for whom maternal alcohol abuse was not an issue. He found that Harris presented a high risk for both general and violent re-offending. Of course, Dr. Speth conceded that he is not qualified to assess FASD. The court noted that it is almost

¹¹⁹ *R v Harris*, at paras 14, 15.

¹²⁰ *R v Harris*, at para 85.

¹²¹ *R v Harris*, at para 87.

¹²² *R v Harris*, at paras 146-149.

¹²³ *R v Harris*, 2002 BCCA 152, 55 WCB (2d) 133 [*R v Harris*, BCCA].

¹²⁴ In addition to refraining from diagnosing accused with FASD, judges should also refrain from taking judicial notice of terminology related to FASD. Although it was decided when FASD was significantly less well known than it is currently, *AJ v Yukon Territory (Family and Children Services, Director)*, [1986] YJ No 40 stands for the proposition that judicial notice cannot be taken of fetal alcohol syndrome when the term is undefined in legislation (in section 134(1) of the *Children's Act*, SYT 1984, c 2), because the term is not one of general knowledge.

impossible for an adult to be diagnosed with FASD in BC. Because a sentencing judge may only take FASD into account when an assessment is performed by a qualified physician, the condition and concomitant disabilities are irrelevant, in practical terms, to sentencing and to the criminal justice system in BC.¹²⁵

In *R v MacKenzie*, sentencing was adjourned so that FPS could prepare a pre-sentence report with a psychological component to address the possibility of FASD.¹²⁶ The psychologist from FPS advised that he could not diagnose FASD as he was not a medical doctor.¹²⁷ While FPS cannot diagnose FASD, it can assess intelligence, cognitive skills, neuro-cognitive disorders and deficits, psychiatric disorders, and traits such as impulsivity which are consistent with FASD.¹²⁸ MacKenzie applied for assessment by a different psychologist, Dr. Koopman, who was not employed with FPS.¹²⁹ Following *Gray* and *Creighton*, the court ruled that it had no jurisdiction to order an assessment by a psychologist outside of FPS.¹³⁰ The court ordered the general psychological assessment to be completed by another psychologist within FPS, but noted that the defence was welcome to submit Dr. Koopman's report if it could cover the cost of the assessment.¹³¹

MacKenzie did retain Dr. Koopman to assess him, but she was unable to diagnose him with FASD.¹³² McKenzie then argued that sentencing him in the absence of an FASD diagnosis would violate his *Charter* section 7 right to be deprived of liberty only in accordance with the fundamental principles of justice. He submitted that it is a fundamental principle of justice that offenders receive fair sentencing hearings.¹³³ The accused failed to prove that the diagnosis of FASD would affect his sentencing.¹³⁴ Dr. Koopman testified that managing and treating McKenzie would be the same regardless of whether his behaviour and cognitive deficiencies were the result of FASD or some other cause:

I think the most important aspects of diagnosis of Mr. MacKenzie is to understand how he thinks, how he learns, how he changes behaviour and the source of things that do not work in changing his behaviour and this will be true whether he is FASD or not. His situation is one of a management problem, not

¹²⁵ *R v Harris* BCCA, at paras 12, 14, 18.

¹²⁶ *R v MacKenzie*, 2005 BCPC 106, [2005] BCJ No 796 at para 2 [*R v MacKenzie*].

¹²⁷ *R v MacKenzie*, at para 4.

¹²⁸ *R v MacKenzie*, at para 5.

¹²⁹ *R v MacKenzie*, at para 1.

¹³⁰ *R v MacKenzie*, at para 4.

¹³¹ *R v MacKenzie*, at paras 3, 5.

¹³² *R v MacKenzie*, at para 7.

¹³³ *R v MacKenzie*, at para 10.

¹³⁴ *R v MacKenzie*, at para 51.

just by society or those working with him but a management problem of him by himself. And so the more we can know about all these factors, about his thinking, his reasoning, the way he learns, the things that are effective, the things that are not effective in helping him to do this, that is what is really important whether all of this is because he has FASD or not. In other words, if he has FASD, we would not do something differently with him in terms of management than we would if we found out he does not have FASD. But he has all these thinking, reasoning, consequential thinking problems. The management would be exactly the same. There are no drugs that we use. There is no specific protocol of treatment that is only for FASD.¹³⁵

The court concluded that the etiology of his functional disabilities was not as important as the understanding of how to manage his disabilities. In any case, the *Charter* section 7 right to a fair hearing is not as pressing in the context of sentencing, because the accused's guilt or innocence is not at issue.¹³⁶ Governmental refusal to fund an FASD assessment did not affect the accused's right to a fair sentencing hearing, hence the dismissal of his *Charter* application.¹³⁷

The Alberta Court of Queen's Bench subsequently recognized that the unavailability of independent assessment can affect an accused's right to a fair trial, at least in the context of a dangerous offender application. Charged with aggravated assault using a weapon and attempted murder, the accused in *Alberta (Attorney General) v RJH*¹³⁸ faced the possibility that the Crown would seek to have him declared a dangerous offender. He suffered from a variety of psychiatric disorders and cognitive limitations.¹³⁹ Reports by a family physician, a neuropsychologist, and a psychiatrist revealed a significant lack of consensus about the accused's mental condition. Drs. Massey and Botha indicated that there was a strong probability that the accused suffered from FASD.¹⁴⁰ Dr. Friend focused on post-traumatic stress disorder and dissociative identity disorder, concluding that the accused's mental illness symptoms were feigned and that he had no viable defence of not criminally responsible on account of mental disorder (NCR).¹⁴¹ Defence counsel had tried unsuccessfully to engage the services of 13 different forensic psychiatrists, and finally Dr. Semrau of British Columbia had agreed to travel to Alberta to assess the accused. Although the Legal Aid Society of

¹³⁵ *R v MacKenzie*, at 53.

¹³⁶ *R v MacKenzie*, at 46.

¹³⁷ *R v MacKenzie*, at 59.

¹³⁸ *R v RJH*, 2006 ABQB 656 (*sub nom Alberta (Attorney General) v RJH*) 64 Alta LR (4th) 255 at para 1 [*R v RJH*].

¹³⁹ *R v RJH*, at para 66, 67.

¹⁴⁰ *R v RJH*, at paras 74-90.

¹⁴¹ *R v RJH*, at paras 96-104.

Alberta was covering the costs of the accused's legal representation, they refused to fund the cost of Dr. Semrau's travel and services.¹⁴² The defence brought a notice of motion seeking an order for financial support for expert investigation and forensic services, on the basis that they were essential to the accused's ability to make full answer and defence and have a fair trial.¹⁴³ The Court found that it can remedy a prospective *Charter* breach if there is sufficiently serious risk that the breach could occur.¹⁴⁴ The issue turned on whether Dr. Semrau's services were necessary for the defence's right to have a fair trial. The Crown maintained that as much inquiry into the accused's mental state as could reasonably be expected had already been conducted and that further examination would not necessarily improve the accused's position.¹⁴⁵ The court noted that the accused faced the maximum sentence allowable by law, that he lacked financial means to independently explore his mental state, and that there was controversy over Dr. Friend's dismissal of dissociative identity disorder.¹⁴⁶ The court found that the appearance of justice would be injured if the accused were unable to have a qualified psychiatrist, independent of the state, inquire into his mental state and report back to his counsel. The possibility of the defence of NCR had enough of an air of reality to it that a miscarriage of justice could result if the accused could not engage a forensic psychiatrist to at least conduct the initial investigation. The court ruled that the Crown must make arrangements, either through the Legal Aid Society or otherwise, to cover Dr. Semrau's expenses, and that the prosecution against the accused would be stayed pending that step.¹⁴⁷

It is not explicit in the judgment why the defence chose Dr. Semrau for the psychiatric assessment, but given that he is a forensic psychiatrist and not a medical doctor, it is unlikely he had expertise in diagnosing FASD.¹⁴⁸ It would appear that the defence hoped to base a finding of NCR on the accused's other mental health diagnoses. While the defence may ultimately succeed, the criminal review board will be unaware of the accused's FASD-related limitations and requirements, assuming that the accused did suffer from FASD. Similarly, if the defence fails and the accused is incarcerated, he will not receive the appropriate accommodation he requires as an FASD offender from corrections or the parole board. Until his FASD is recognized and accommodated, he will

¹⁴² *R v RJH*, at paras 50, 69.

¹⁴³ *R v RJH*, at paras 6, 9.

¹⁴⁴ *R v RJH*, at para 30.

¹⁴⁵ *R v RJH*, at para 124.

¹⁴⁶ *R v RJH*, at paras 136-138.

¹⁴⁷ *R v RJH*, at para 143.

¹⁴⁸ *R v RJH*, at para 6.

remain at a high risk of re-offending and will likely never receive the structure and support he requires.

Often courts include assessment for FASD in probation or conditional sentence orders. In *R v Kruse*,¹⁴⁹ the accused was charged with attempting to choke, strangle or suffocate a prostitute with the intent to rob her of the \$100 he had paid her for sexual intercourse.¹⁵⁰ In a pre-sentence report, his probation officer speculated that Kruse probably suffered from FASD. Although two of his siblings had been diagnosed with FASD, Kruse refused to participate in an assessment.¹⁵¹ The pre-sentence report also indicated a long history of poor impulse control, anger management issues, particularly directed at the opposite sex, substance abuse, denial of his substance abuse, and failure to comply with the recommendations of his addictions counselor.¹⁵² A forensic report stated that Kruse was not suffering from any acute mental disturbance other than his substantial history of polysubstance abuse. The report catalogued his maladaptive pattern of functioning, including his failure to conform to social norms, disregard for his own and others' safety, consistent irresponsibility, and his relative lack of remorse for his actions.¹⁵³ Recommendations included obtaining counseling for substance abuse, anger management, and family of origin issues, developing effective coping and problem-solving skills, life skills, stress management and communication skills. The forensic report concluded that Kruse had a high risk of re-offending.¹⁵⁴ The court did not consider Kruse an appropriate candidate for a conditional sentence order, and considered the sentencing objectives of denunciation, deterrence and separation more relevant to the circumstances than rehabilitation.¹⁵⁵ The fact that the victim was a sex worker and therefore a vulnerable person was an aggravating factor, as was the fact that Kruse was on probation for a violent offence at the time of the assault.¹⁵⁶ Taking into account the seven and a half months Kruse served pre-trial, the court arrived at a sentence of 12 months' imprisonment and three years' probation.¹⁵⁷ Noting that Kruse seemed to require structure, the court imposed stringent reporting conditions, as well as drug testing, substance abuse, assessment by forensic psychiatric services, and

¹⁴⁹ *R v Kruse*, 2004 ABPC 194, 370 AR 87 [*R v Kruse*].

¹⁵⁰ *R v Kruse*, at paras 1, 2.

¹⁵¹ *R v Kruse*, at para 6.

¹⁵² *R v Kruse*, at paras 7-9.

¹⁵³ *R v Kruse*, at paras 11-15.

¹⁵⁴ *R v Kruse*, at paras 16 and 17.

¹⁵⁵ *R v Kruse*, at paras 34, 35.

¹⁵⁶ *R v Kruse*, at paras 27, 40.

¹⁵⁷ *R v Kruse*, at para 67.

assessment for FASD.¹⁵⁸ The probation order did not specify where or by whom the FASD assessment was to be conducted.

In *R v Head*,¹⁵⁹ the accused was convicted of sexual assault and pleaded guilty to breach of probation and assaulting his common-law partner. A psychological assessment, consisting of only one test designed to measure non-verbal intellectual ability, labeled him intellectually impaired. His probation officer prepared a pre-sentence report recommending that he serve a conditional sentence on his reserve. The report also indicated that he might suffer from FASD, but there was no proper diagnostic tool available. Taking into account his intellectual impairment, various *Gladue*¹⁶⁰ factors, and the relatively minor, non-violent nature of the sexual assault, the court determined that a conditional sentence order of 20 months along with a probation order of 12 months was appropriate. The conditions attached to both orders include residing with his grandmother on their reserve, abstaining from alcohol, attending counseling and a healing circle, and attending FASD assessment if directed by his supervisor. This sentence was overturned on appeal and was replaced with a two-and-a-half year prison term. The Court of Appeal held that sentence was demonstrably unfit because the trial judge erred in assessing the gravity of the offence and the degree of responsibility of the accused.¹⁶¹ In two cases, the possibility that the accused suffered from FASD was acknowledged, but the court made no effort to secure assessment. In *R v Beaulieu*,¹⁶² an accused who sexually assaulted a 13-year-old girl received a sentence of three years' imprisonment. The court took into account the aggravating factors that one of the assaults occurred in her own home and the other occurred after the accused lured her to his home. The accused's lack of sophistication and Aboriginal heritage were mitigating factors. He denied the testimony of the complainant and exhibits no remorse or any indication that he understood the purpose of the proceedings. Although aware of the possibility that he suffered from FASD, the court concluded that "without assessments by professionals, there is really nothing that I can do to tailor a sentence in a way that might address some of his problems."¹⁶³

¹⁵⁸ *R v Kruse*, at para 70.

¹⁵⁹ *R v Head*, 2004 SKPC 91, (*sub nom R v MJH*), 251 Sask R 240.

¹⁶⁰ *R v Gladue*, [1999] SCJ No 19, [1999] 1 SCR 688. This case provides that there are special cultural considerations that a sentencing judge must take into account when assessing a person's case if he or she is Aboriginal.

¹⁶¹ *R v MJH*, 2004 SKCA 171, 257 Sask R 1.

¹⁶² *R v Beaulieu*, 2007 NWTSC 18, [2007] NWTJ No 17 [*R v Beaulieu*].

¹⁶³ *R v Beaulieu*, at para 10.

In *R v McNeely*,¹⁶⁴ the accused was sentenced to two years' imprisonment and two years' probation for robbery and obstructing justice. Schuler J. found the accused to be "a puzzle"¹⁶⁵ due to his "unbelievably, to use the very basic word, stupid"¹⁶⁶ admissions to police and his tendency to brag about criminal behaviour. The court recognized that the accused needed structure and restrictions, but included no FASD-specific conditions in his probation order.¹⁶⁷ A pre-sentence report indicated that psychological assessments completed when the accused was a teenager found him to be mildly mentally challenged and recommended assessment for FASD.¹⁶⁸ The decision effectively ignored this recommendation. Without an official diagnosis, Courts are often unwilling to consider how FASD impacts the offence or the accused's moral blameworthiness. In *R v Cardinal*,¹⁶⁹ a convicted person appealed a four-year sentence, plus two years' probation regarding an aggravated assault for which he pled guilty. A *Gladue* report suggested that the accused suffered from FASD, but there was no formal diagnosis. Without conclusive proof, the Court of Appeal was skeptical about the FASD diagnosis, and unwilling to explore how it would impact sentencing:¹⁷⁰

[T]he reference to the appellant's suffering from FASD ... was not supported by expert opinion and largely emanated from statements of the appellant to the author of the *Gladue* Report. Despite that, the sentencing judge regarded a condition of FASD to be likely. We cannot detect palpable and overriding error in that finding, even if the record on the point is scant. That said, that disorder is on a spectrum and there is no evidence as to where the appellant might fit in that continuum, nor what effect, if any, it might have had on his conduct, or self-control. Nor is it plain what might be done about it.

Ideally, every accused whose history or behaviour points to potential fetal alcohol damage would receive proper assessment for FASD. Well over ten years ago, Boland et al recommended that Correctional Service Canada implement a screening process to identify suspected cases of FASD among offenders as early as possible in the incarceration process.¹⁷¹ They also recommended that the criminal justice system

¹⁶⁴ *R v McNeely*, 2006 NWTSC 63, [2006] NWTJ No 75 [*R v McNeely*].

¹⁶⁵ *R v McNeely*, at para 26, 27.

¹⁶⁶ *R v McNeely*, at para 26.

¹⁶⁷ *R v McNeely*, at para 26.

¹⁶⁸ *R v McNeely*, at para 12.

¹⁶⁹ *R v Cardinal*, 2017 ABCA 396 [*Cardinal*].

¹⁷⁰ *Cardinal* at para 40.

¹⁷¹ Fred J Boland, at 69.

initiate its own pre-sentence investigative screening to find out whether accused suspected of FASD had ever been diagnosed:

A positive identification would allow for the primary and secondary disabilities associated with FAS/FAE to impact on all aspects of the criminal justice process from prosecution to parole release. FAS/FAE individuals are definitely at increased risk for coming into contact with the criminal justice system and as medical personal [*sic*] become more aware of FAS/FAE the availability of an early diagnosis is more likely.¹⁷²

Accused with FASD are still falling through the cracks. It is not enough to include FASD assessment as optional conditions of probation orders, given the continued unavailability of affordable FASD assessment for adults. Sentencing judges must consider the potential for *Charter* violations identified in the case law when accused with FASD are sentenced without accounting for their neurological damage, cognitive deficiencies, and multiple limitations. Defence counsel must consider the mental disorder defences and *Charter* challenges that may be unavailable to accused whose FASD remains undiagnosed.¹⁷³

¹⁷² Fred J Boland, at 68.

¹⁷³ University of Washington, Department of Psychiatry and Behavioral Sciences Fetal Alcohol and Drug Unit School of Law, *Judicial Decisions Regarding FASD*, [unpublished, available online: University of Washington <<http://www.depts.washington.edu/fadu/legalissues/website.revised.09.29.pdf>>]. Many cases in the US deal with FASD offenders suing their counsel for ineffective assistance of counsel when counsel fail to raise the issue of FASD.

Chapter Three: False Confessions

Charter Rights

Anyone who is detained by the police has, among other things, the right to retain and instruct counsel without delay, the right to be informed of that right, and the right to remain silent. The *Charter* guarantees these rights in section 7 where it states “Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice”¹⁷⁴ which has been interpreted to include a right to silence, and section 10(b) which states “Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.”¹⁷⁵ These rights form part of the broader privilege against self-incrimination. Because statements made to the police will generally be admissible at trial, detainees can choose not to proffer any information to the police that might aid their prosecution. Because detainees may not understand the nuances of how information could be used against them, they can enlist the help of a counsel as early as possible after they are detained to advise them.

Choosing to exercise these rights requires a general understanding of the prosecutorial process and the roles police and defence counsel play within that process. The choice to exercise these rights must also be predicated on the ability to predict/anticipate the potential outcomes. When an individual with FASD is arrested, his or her ability to exercise these rights may be compromised. The most common deficit in all FASD individuals, regardless of whether they suffer from full FAS, pFAS or ARND and regardless of IQ level, is difficulty with abstract reasoning. Deficits in abstract reasoning result in the inability to conceptualize the future, to predict consequences, and to understand how present actions can affect future outcomes. Detainees with FASD may focus on the short-term goal of going home rather than the long-term goal of mounting an effective defence. They may say whatever it takes to leave the police station regardless of how incriminating their statements may end up being, and they may waive

¹⁷⁴ *Charter*, s 7.

¹⁷⁵ *Charter*, s 10(b).

the right to contact counsel for frivolous reasons because they cannot anticipate the potential detriment.

Individuals with FASD may also have difficulty understanding the concepts involved. For example, they may interpret the abstract concept “waiving rights” as the more concrete interpretation “waving rights”.¹⁷⁶ FASD detainees often indicate that they understand their rights even when they do not, due to a desire to please authorities, and to an unwillingness to admit their failings. Because many adults with FASD exhibit a facility with expressive language that outreaches their comprehension, the police officers interrogating them may not suspect that they do not fully comprehend their rights, or that their choices are not rational and informed. Even if an accused with FASD exercises his or her right to counsel, interrogation can result in a violation of his or her rights to silence. Accused with FASD are liable to make self-incriminating statements to police even after consulting with counsel; these statements are all the more likely to be admitted as evidence at trial even though they may be inaccurate.¹⁷⁷

Charter section 10(b) guarantees that every person who is arrested or detained has the right to retain and instruct counsel as well as to be informed of his or her right to counsel.¹⁷⁸ Consequently, police officers have a duty to provide detainees with the opportunity to contact counsel and to inform detainees about free legal services available, including legal aid and duty counsel. Inherent in this duty is an obligation to ensure that detainees understand the right to counsel and the consequences of waiving that right. In the case of detainees whose ability to understand may be limited by mental illness or intellectual impairment, police officers have a heightened duty to ensure comprehension.¹⁷⁹ An RCMP guidebook for police officers dealing with individuals who may suffer from FASD provides strategies for interrogators to ensure that accused understand their *Charter* rights:

¹⁷⁶ Conry and Fast, at 32.

¹⁷⁷ Conry and Fast, at 41.

¹⁷⁸ *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460; *R v Grant*, [2009] 2 SCR 353, 2009 SCC 32 (CanLII).

¹⁷⁹ *R v Henry*, [1996] YJ No 39 (QL) (Y SC) [*R v Henry*]; *R v Sawchuk*, 117 Man R (2d) 282, [1997] MJ No 186 [*R v Sawchuk*].

Consider the need to have a guardian or support person present to ensure the person understands their rights.

When reading people their rights, ensure that they understand them.

If they simply repeat what you said, ask questions that require reasoning and understanding. For example, you may want to ask an understanding question such as, “What does it mean to ‘waive your rights’?” Or you may want to ask them a reasoning question such as asking them to give an example of “rights”, or “what is a lawyer?” This is important because FASD affected individuals may be able to repeat something they did not necessarily understand.¹⁸⁰

When section 10(b) rights are violated, statements detainees make to the police may be excluded under section 24(2) of the *Charter* if their admission would bring the administration of justice into disrepute:

24 (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.¹⁸¹

If a violation of *Charter* rights is suspected, the trial judge will hold a *voir dire* (hearing within a hearing) to determine the admissibility of the accused’s statements. Defence counsel can argue that the accused was not properly informed of his or her right to counsel, or, if the accused waived his or her right to counsel, that the waiver was invalid. Each of these arguments turns on the accused’s comprehension. It is unlikely that the police would fail completely to inform a detainee of his or her section 10(b) rights; however, the way the information is delivered and the language used might prevent detainees from truly understanding the scope of their rights. Particularly in the case of accused with FASD, complex, abstract terms, such as “duty counsel,” “instruct,” “plea,”

¹⁸⁰ Terralyn McKee et al, *Fetal Alcohol Spectrum Disorder: FASD Guidebook for Police Officers* (Ottawa: Royal Canadian Mounted Police, 2002), online: Asante Centre <http://www.asantecentre.org/_Library/docs/latestfasguide.pdf> at 19 [RCMP Guidebook].

¹⁸¹ *Charter*, s 24.

and “prejudice” may not resonate and the accused may have difficulty relating the concepts to his or her circumstances. Although any detainee can choose to waive his or her right to counsel, waiver is not valid in the absence of an appreciation of the consequences.¹⁸² Courts impose a high standard for an effective waiver of the right to counsel: a waiver is only valid when the detainee fully understands his or her section 10(b) rights, fully understands the means by which the section 10(b) rights may be exercised, and adverts to those rights.¹⁸³

In *R v Henry*,¹⁸⁴ RCMP officers interviewed a murder suspect who suffered from FAS, had an IQ range of 55 to 65, and operated at the level of a 7.5 year old child. Although the officers made “a real effort”¹⁸⁵ to advise Henry of his right to remain silent and of his right to counsel, MacCallum J. found “something more needed to have been done to assure the accused’s understanding.”¹⁸⁶ The accused declined the officers’ invitation to call a lawyer, but he did not actually state that he did not want a lawyer. In addition, he made reference to an unsuccessful attempt to contact a court worker, and he mentioned the name of a lawyer who had acted for him previously. Both of these facts point to the conclusion that Henry wanted legal advice. Expert evidence from a forensic psychiatrist revealed that “[a]lthough he would likely understand in isolation that he had a right to talk to a lawyer and that he did not have to talk to police, he might have difficulty with assessing consequences of making a statement, and he would have difficulty in assimilating the information in its several parts.”¹⁸⁷ Like many individuals with FASD, Henry related to authority “in a child-like, passive manner”¹⁸⁸ and felt compelled to speak to the officers. The expert witness also noted that Henry was likely to say he understood what the officers told him, even when he did not understand.¹⁸⁹ Clearly the accused did not truly comprehend his right to contact counsel without delay

¹⁸² *R v Clarkson*, [1986] 1 SCR 383, 26 DLR (4th) 493.

¹⁸³ *R v Bartle*, [1994] 3 SCR 173, 118 DLR (4th) 83.

¹⁸⁴ *R v Henry*.

¹⁸⁵ *R v Henry*, at para 24.

¹⁸⁶ *R v Henry*, at para 41.

¹⁸⁷ *R v Henry*, at para 37.

¹⁸⁸ *R v Henry*.

¹⁸⁹ *R v Henry*, at para 39.

and to refrain from speaking to the police until he could seek legal advice. Any putative waiver of his right to counsel was clearly not premised on an understanding of the right and how it might be exercised, or on an appreciation for the consequences. MacCallum J. granted an exclusion of Henry's statements pursuant to *Charter* section 24(2), finding that his section 10(b) rights had been violated.

In *R v Sawchuk*,¹⁹⁰ a member of the Fire Department saw the accused, a known arsonist, leaving the vicinity of two separate fires. Police officers arrested him for arson. They read him the standard police caution and advised him of his right to retain and instruct counsel without delay. Sawchuk asked to phone a lawyer right away, but he had no phone in his room at the Winnipeg Hotel and the payphone in the hallway was occupied. The police officers told Sawchuk that he could call his lawyer from the police station and he agreed. When they arrived at the station, the officers turned the accused over to two other constables who were investigating the fires, without mentioning his request to contact his lawyer or their undertaking to allow him to contact his lawyer at the station. The constables advised Sawchuk of his right to counsel and asked if he would like to call duty counsel or any other lawyer, to which Sawchuk responded, "Not yet, Martin Glazer is my lawyer."¹⁹¹ He then declined their offer to let him phone his lawyer, likely because there was no phone in the interview room, and the offer would not make sense to him. He proceeded to make several inculpatory comments, accompanied police to the scene of the fires and pointed out where he had set not two but four fires that morning, and provided them with a formal statement recorded in writing. He also provided the police with keys to his room and allowed them to seize clothing as evidence.

Oliphant C.J. found several violations of Sawchuk's *Charter* rights: his section 7 right to silence, his section 8 right to be free from unreasonable search and seizure, his section 9 right not to be arbitrarily detained, and his section 10(b) right to counsel. Sawchuk suffered from FAS, and was intellectually impaired, with an IQ between 53 and 72 and the mental age of a seven to nine-year-old child. All the members of the police

¹⁹⁰ *R v Sawchuk*.

¹⁹¹ *R v Sawchuk* at para 34.

service who dealt with Sawchuk knew that he was mentally challenged, and “should have gone considerably further than they would have in dealing with a person who was not obviously mentally challenged.”¹⁹² Oliphant C.J. relied on *R v Prosper*¹⁹³ where the Supreme Court of Canada found an “obligation on the police to ‘hold off’ their investigation until a suspect wishing to speak to counsel had been given a reasonable opportunity to do so.”¹⁹⁴ In particular, the court found that “state agents must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel”¹⁹⁵ What amounts to a reasonable opportunity depends on the unique circumstances of each case. When the police are dealing with a detainee who is mentally challenged and who expresses a desire to speak to his lawyer, they should provide him with a telephone in a private space as soon as possible.¹⁹⁶ Their failure to do so resulted in a serious violation of his right to counsel, and the continued investigation resulted in a violation of his right to remain silent. Sawchuk’s waiver of his right to counsel was not effective, because his mental condition prevented him from understanding what he was giving up.¹⁹⁷ To remedy the *Charter* violations, Oliphant J. excluded from evidence Sawchuk’s comments to the police, his statement recorded in writing, and the clothing seized from his room.

Henry and Sawchuk are two examples of accused with FASD who incriminated themselves by speaking freely with the police even though they were properly informed of their right to consult with counsel and their right to remain silent. Fortunately, in each case the court found that the police officers who interrogated them failed to fulfill a heightened duty to ensure their comprehension of their rights. The heightened duty, however, seems to flow from the fact that Henry and Sawchuk’s limitations were readily apparent; in each case, the court found that the police were or should have been aware that the accused exhibited below average mental capacity. Both accused suffered from

¹⁹² *R v Sawchuk* at 60.

¹⁹³ *R v Prosper*, [1994] 3 SCR 236, 118 DLR (4th) 154.

¹⁹⁴ *R v Sawchuk*, at 48.

¹⁹⁵ *R v Sawchuk*, at 49, citing *R v Prosper* at 34.

¹⁹⁶ *R v Sawchuk*, at 62.

¹⁹⁷ *R v Sawchuk*, at 65.

intellectual impairments as well as FAS. Difficulty appreciating the consequences of waiving *Charter* rights or foreseeing the potential harm of making statements to the police, however, is not limited to accused with intellectual impairments. An accused with FASD of average intelligence may not give the interrogating officers any reason to suspect that he or she is incapable of effectively exercising or waiving *Charter* rights. A judge at a *voir dire* would not necessarily be convinced that such an individual's *Charter* rights had been violated even though he or she had been properly informed. Adults whose FASD-related limitations are invisible are the least likely to be diagnosed. If such individuals could provide evidence of a medical diagnosis of FAS, pFAS or ARND, the argument that they are incapable of comprehending the right to counsel and the right to silence might carry more weight. As long as many adults accused with FASD remain undiagnosed and unable to access assessment, measures to protect against self-incrimination are likely to fail them.

Voluntariness

Another aspect of the privilege against self-incrimination, and that potentially protects FASD accused against self-incrimination, is the common law confessions rule. The confessions rule, affirmed by the Supreme Court in *R v Oickle*,¹⁹⁸ “precludes the admission into evidence of an accused’s statement to a person in authority unless the Crown can establish beyond a reasonable doubt that the statement was made voluntarily.”¹⁹⁹ Whenever statements, admissions, or confessions made by the accused to police²⁰⁰ are entered into evidence at trial, a *voir dire* will be held to determine whether they were made voluntarily. The onus is on the Crown to prove voluntariness beyond a reasonable doubt, regardless of whether the admissions are self-incriminating or exculpatory. The court must look at all the circumstances surrounding the admission and ask whether there is a reasonable doubt as to voluntariness. As such, the test is necessarily contextual. Specific factors that might raise a reasonable doubt as to

¹⁹⁸ *R v Oickle*, [2000] 2 SCR 3 [*R v Oickle*].

¹⁹⁹ *R v Oickle*, at 24.

²⁰⁰ See Alberta Civil Liberties Research Centre, *Representing Mentally Disabled Persons in the Criminal Justice System: A Guide for Practitioners* (Calgary: Alberta Civil Liberties Research Centre, 1994) at 187 for a discussion of when other individuals to whom a mentally disordered accused might make admissions (such as psychiatrists, nurses, other mental health workers, etc.) will be considered a person in authority for the purposes of the confessions rule.

voluntariness focus on both the conduct of the person in authority and the mental state of the accused. The factors include whether the police used threats or promises to elicit a confession, whether the conduct of the police created oppressive conditions forcing the accused to confess to escape the conditions, whether the accused had an operating mind to know that what he was saying to police officers could be used to his detriment, and whether any form of police trickery induced the confession. In *Oickle*, the court determined that confronting the accused with adverse evidence is not sufficient to create an oppressive atmosphere that will render the accused's admission involuntary.²⁰¹ When police interrogate a mentally disabled accused, however, oppressive conditions can result from actions that would not be oppressive in the context of interrogating an accused person who is not mentally disabled.

In *R v Bohemier*,²⁰² the police suspected the accused of setting two fires, one in an empty lot next to his apartment building and the other in an apartment in the same building. Bohemier suffered from FAS and had an IQ below normal. He also suffered from schizophrenia and required medication to prevent gross disruptions of his thought process. He advised police that he had decided not to take his medication on the day of the second fire. Nevertheless, the police interrogated him without making any heightened effort to ensure that he understood his rights. The court found that Bohemier's mannerisms and speech patterns would make the police aware that he was not "an individual with a normal developmental state,"²⁰³ and in particular the fact that they requested psychiatric examination at some point after the interview shows that they must have suspected some deficiency in his mental capacity.

Bohemier consistently denied his involvement in the fires, until one constable advised him that the second fire was much more serious than the first because people had been injured. At that point, Bohemier became agitated and started to cry. He confessed to lighting both fires because he was angry and lonely.²⁰⁴ When he testified at the *voir dire* to determine the admissibility of his confession, he stated that the constable threatened to beat him if he did not admit to starting the fires. He recalled the constable making a fist and a threatening facial gesture.²⁰⁵ Monnin J. rejected the accused's suggestion that the constable threatened him in that manner, but found the conduct of the police oppressive "in relation to Mr. Bohemier," although "perhaps not

²⁰¹ *R v Oickle*, at 100.

²⁰² *R v Bohemier*, 2002 MBQB 198, 165 Man R (2d) 191.

²⁰³ *R v Bohemier*, at para 33.

²⁰⁴ *R v Bohemier*, at para 15.

²⁰⁵ *R v Bohemier*, at para 20.

oppressive in terms of an individual with a normal developmental state.”²⁰⁶ In the circumstances, the confession was not voluntary and was therefore inadmissible. The Crown conceded that there was no evidence other than the confession linking Bohemier to the fires, and the charges against him were dismissed.

In *R v Buffalo*,²⁰⁷ the accused was a prison inmate suspected of stabbing another inmate to death during a prison riot. He was placed in a segregated cell used for punishment. His parole officer visited him before he spoke to the investigating RCMP officers, and she discussed with him the possibility of requesting a transfer to another part of the prison or to another institution. During his interrogation, Buffalo attempted to elicit guarantees from the RCMP officers that he could be transferred if he made an inculpatory statement. The officers explicitly denied that they had any influence over his movement within the penitentiary system, but they did mention that they might make recommendations. Ultimately, Buffalo confessed his involvement in the murder. The court found that the officers’ promise to make recommendations was an inducement to Buffalo to make his confession. The inducement, however, was not significant enough to overbear his will, and therefore the confession was voluntary and admissible. The court concludes that Buffalo intended to make an exculpatory statement to the police to deflect suspicion away from himself and onto other inmates. When that failed and the officers pressed him to confess his involvement in the murder, he attempted to negotiate a favourable position. Their vague promise to make recommendations was the best result he could obtain before confessing, but did not in itself influence his decision to confess.

Marceau J. notes that Buffalo’s conduct is “hardly consistent with severe retardation,”²⁰⁸ after acknowledging his suspected FAS and other intellectual deficits, his grade 6 education, and his inability to read or write.²⁰⁹ Despite these limitations, Marceau J. states, “there is no question in my mind that his verbal skills are satisfactory and that he has picked up some law from his time in prison.”²¹⁰ In applying the contextual test for voluntariness, the court does not place much weight on Buffalo’s intellectual deficits. If he does suffer from FASD, he may not be able to appreciate the long-term consequences of his confession and may focus solely on his short-term goal of leaving his segregated cell. His verbal skills could mask his lack of comprehension about

²⁰⁶ *R v Bohemier*, at para 46.

²⁰⁷ *R v Buffalo*, 2006 ABQB 267, 399 AR 280.

²⁰⁸ *R v Buffalo*, at para 49.

²⁰⁹ *R v Buffalo*, at para 48.

²¹⁰ *R v Buffalo*, at para 49.

who would be able to authorize his transfer. Although the conclusion that Buffalo's statement was voluntary is not necessarily wrong, the decision emphasizes the accused's opportunistic attitude and minimizes his possible disabilities. The decision could set an unfortunate precedent in Alberta about the importance of FASD-related disabilities and deficits when the court examines the circumstances surrounding an accused's admission.

In the case of persons with FASD, any confession given may also be treated as coerced and involuntary. In *R v NRR*,²¹¹ 2013 ABQB 288, the police used a Mr. Big operation to obtain a confession regarding a double murder from a 16-year-old they had previously attempted to prosecute unsuccessfully. He had been diagnosed with many mental and social problems including suspected FASD.²¹² During the sting, NRR confessed to the murders.

During the *voir dire* to determine the admissibility of the confession, the Court noted the suspect's overwhelming vulnerability including his age, mental problems including FASD, unstable living situation, status as ward of the Province, lack of friends, and involvement in a sexually exploitive relationship with an authority figure. The sting was specifically tailored to appeal to NRR given these vulnerabilities and included giving him a close friendly relationship with role models, food, shelter, money, activities, alcohol, and a place he could meet with his (sexually exploitive) 34-year-old girlfriend²¹³ The judge held that NRR was so under the influence of the police officers that "his statements were made while he was functionally detained, subject to coercion by inducement, and in a circumstance where he believed that no harm and only good would come to him by confessing."²¹⁴ The confessions were excluded from the double murder trial.

In *R v Singh*,²¹⁵ the Supreme Court of Canada ruled that police can keep interrogating an accused even after he or she asserts a right to silence. The case did not deal with a mentally disordered accused, but could have detrimental implications if the same standard of police interrogation applies to mentally disordered accused. Singh was arrested for murder after a bystander was shot outside a nightclub. No forensic evidence linked Singh to the shooting, and therefore, identity was at issue. Singh spoke to legal counsel and then asserted his right to silence 18 times. Each time, the

²¹¹ *R v NRR*, 2013 ABQB 288 [*R v NRR*].

²¹² *R v NRR*, at paras 325-329, 342 385.

²¹³ *R v NRR*, at paras 385, 386.

²¹⁴ *R v NRR*, at para 415. Note that in a later SCC decision *R v Hart*, 2014 SCC 52, the court treated Mr. Big confessions as unreliable rather than involuntary.

²¹⁵ *R v Singh*, 2007 SCC 48, [2007] 3 SCJ No 405.

investigating officer either deflected the assertion or reiterated an intention to keep putting forward evidence and to keep asking for information. Eventually, the accused identified himself in photographs taken in the nightclub on the night of the murder and in another nightclub. Along with other evidence, admissions led to a conviction. Singh argued that his section 7 *Charter* right to silence meant that the police were under an obligation to stop interrogating a suspect when he or she asserts their right. The court held that that interpretation was too broad. Balancing the need to protect an accused's *Charter* rights and ensuring police can investigate crimes means that police can keep asking for information, as long as free will is not compromised. In this case, the police conduct did not affect Singh's operating mind or his freedom to choose whether or not to speak, and therefore no violation of Singh's section 7 *Charter* right was found.

False Confessions / Admissions / Accusations

Statements and admissions voluntarily made, in the absence of *Charter* violations, are not necessarily true or accurate. Individuals with FASD tend to be highly suggestible and acquiescent. They want to please authority figures; they have very bad memories; and they are likely to make something up when they do not remember. They may have difficulty linking one question to another and difficulty with abstract thought. Below average intelligence and poor memory have been linked to suggestibility, and impulsiveness has been linked to a tendency to give in to interrogative pressure.²¹⁶

Suggestible people are more likely to make false statements in real-life interrogations. In a study conducted by Gudjonsson in 1990, "false confessors scored substantially higher in all measures of suggestibility and compliance, and lower in IQ."²¹⁷ Conry and Fast suggest that a "person with FAS/FAE may misunderstand questions, be confused by the language used, or confabulate to fill in missing gaps in memory. Likewise, under questioning, an accused individual with FAS/FAE may feel pressured or simply be agreeable. What is then said may be taken as evidence and called a 'confession'".²¹⁸

The *RCMP Guidebook* highlights strategies police officers can use when interviewing accused, complainants or witnesses with FASD, including:²¹⁹

- Being patient and understanding when conducting an interview or taking a statement in order to get to the heart of what is being said;

²¹⁶ Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005), 30 *Queen's LJ* 601 at 648 [Christopher Sherrin].

²¹⁷ Christopher Sherrin, at 635.

²¹⁸ Conry and Fast, at 30.

²¹⁹ *RCMP Guidebook*, at 20; see also Conry and Fast, at 32, 38.

- Being cognizant of the limited capacities and special needs and make all necessary adjustments;
- Enlisting the support of a person familiar with FASD;
- Ensuring that all interviews/statements are videotaped or audio taped; FASD individuals may have severe memory impairments (i.e. a sexual assault victim may not remember details of the incident by the time this goes to trial);
- Ensuring the interview environment is free from distractions including visual and auditory stimulus;
- Being prepared to have to work with someone who cannot tell you what happened in a logical or chronological order;
- Encouraging a free narrative or asking open-ended questions;
- Not suggesting possible scenarios of what might have happened;
- Waiting while the interviewee formulates the answer. Silence may not mean refusal to answer but rather an inability to answer;
- When asking probing questions or specific questions, use only the terms the FASD person used;
- Validating and going over the disclosure; and
- Ensuring the Crown is aware that you suspect the person may be of diminished capacity.

There are a number of reasons why intellectually disabled individuals, including people with FASD, might give false statements or confess to crimes. For instance, these individuals may:²²⁰

- Want to please authority figures;
- Be unusually vulnerable to threats and coercion;
- Be particularly vulnerable to subtle non-aggressive influence;
- Have difficulty appreciating when a situation is adversarial;
- Inability to understand abstract concepts
- Learn to mistrust their own judgment and rely on clues from others;
- Be unable to distinguish culpable from non-culpable behaviour;
- Have poor impulse control and answer questions to relieve anxiety;
- Take blame so that they will be liked, or to get out of the situation;
- Confess to go home and think police will believe later retraction; and

²²⁰ Christopher Sherrin, at para 95; Conry and Fast, at 32-34.

- Answer when they don't know the answer, to enhance self-esteem and hide their disability.

It is important to note, however, that the concern surrounding false confessions extends outside police interrogations. Various courts have held that admissions or confessions given by persons with FASD to undercover police officers²²¹ and fellow inmates²²² are also unreliable. Since persons with FASD are impressionable and agreeable, the reliability of the confession depends on its specific context.

In *R v JIG*²²³ a confession made by the accused to a fellow inmate was excluded from evidence at trial. The accused had FASD and was very low-functioning in terms of his mental and social abilities. JIG had originally been deemed mentally unfit to stand trial because he was unable to understand the nature of a trial and what it related to. After spending three years in a youth psychiatric facility, his functioning improved somewhat and a trial was held. Before being deemed unfit to stand trial, but after being incarcerated, JIG had allegedly confessed to murdering his nephew. Details of the confession were, however, inconsistent with medical evidence and relevant timelines.

The judge was concerned that the confession was false, and since it was the primary evidence against the accused, he was acquitted.

There have also been significant problems with the overwhelming influence applied to mentally disabled persons subject to so called “Mr. Big” sting operations.²²⁴ In a “Mr. Big” sting, undercover officers lure suspects into fake criminal organizations and build a relationship with the suspect over time. In order to gain acceptance into the criminal organization, the suspect must prove their worth by confessing a crime to the “Mr. Big” boss (an under-cover police officer). These operations are now presumptively inadmissible because of fears that confessions are unreliable.²²⁵

Witnesses and Victims

As mentioned previously, the criminal courts are often unaware that an accused has FASD. This is also true of victims and witnesses and this lack of knowledge may negatively impact their experience and interaction with the criminal justice system.

²²¹ *R v NRR*

²²² *R v JIG*, 2015 BCSC 77.

²²³ *R v JIG*.

²²⁴ *R v Hart*, 2014 SCC 52 at para 103 “Special note should be taken of the mental health and age of the accused... [R]esearchers have found that those with mental illnesses or disabilities...present a much greater risk of falsely confessing...A confession arising from a Mr. Big operation that comes from ... someone suffering from a mental illness or disability will raise greater reliability concerns.

²²⁵ *R v Hart*, 2014 SCC 52.

Victims and witnesses with FASD may have difficulty explaining the details of a crime to police, and testifying in court or understanding abstract questions asked by counsel, as well as difficulty conveying their experiences into words when writing a Victim Impact Statement. This difficulty often leads to contradictions in testimony. This has led some judges to either discount or exclude their evidence entirely.²²⁶

Testimony can be misinterpreted when the court is not aware that victims or witnesses have cognitive limitations which may lead to victims of crime who have FASD being repeatedly victimized compared to the general population.²²⁷

Victims with FASD may be some of the most vulnerable victims of crime; it is incumbent upon criminal justice professionals to better understand how the Canadian criminal justice system may provide the best services possible for all victims of crime, particularly vulnerable victims of crime...Judges need to be alert to the issues that arise with a witness who has FASD. In doing so, they must be sensitive to striking a balance between protecting a vulnerable member of society and ensuring that the criminal burden of proof is met.²²⁸

There are some provisions in the *Criminal Code* that are intended to protect witnesses with physical and mental disabilities. These provisions are commonly known as “testimonial aids” and can be useful in situations where criminal justice professionals are aware that the victim or witness has FASD. As mentioned above, this pertinent information is often lacking. The provisions in the *Criminal Code* include:²²⁹

- Having a support person present while testifying to make the experience more comfortable;
- Allowing the witness to testify behind a screen or outside the courtroom via closed-circuit television, so that the witness does not have to see the accused;
- Ordering a publication ban to protect the identity of the witness; or
- Ordering members of the public to leave the courtroom during the proceedings

The judge has the final decision regarding whether or not a testimonial aid can be used and it appears as though they are not used very often.²³⁰

²²⁶ See, for example, *R v Switzer*, 2004 ABQB 360 (CanLII); *R v. JAR*, 2012 BCPC 241 (CanLII)

²²⁷ Charlotte Fraser & Susan McDonald, “Identifying the Issues: Victim Services’ Experiences working with Victims with Fetal Alcohol Spectrum Disorder”, online: Government of Canada, Canada Department of Justice <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2009/rr09_4/rr09_4.pdf> at 5 [Fraser and McDonald].

²²⁸ Fraser and McDonald, at 23, 25.

²²⁹ *Criminal Code*, at s 486.1, 486.2, and 486.5.

²³⁰ Fraser and McDonald, at 12.

In recognition of the fact that serious problems can also arise when taking statements from victims and witnesses who have FASD, strategies have been researched and developed to assist police officers and other professionals in the criminal justice system who are interviewing and examining FASD witnesses. For example, it may be necessary to:²³¹

- ensure a support person is present;
- audio or videotape the interview;
- assess the witness's ability to communicate;
- use interpreters or other assistance;
- call an expert witness to explain the witness's special communication needs;
- alert judges to confusion by witnesses;
- ensure that counsel is patient during examination and cross-examination;
- use a clear, calm voice in normal speaking tones; and
- make sure the individual feels safe.

Victim Service Workers use the following strategies when working with victims who have FASD:²³²

- hands-on activities;
- provide simple materials;
- use pictures;
- use visual cues;
- take several breaks;
- repeat information; and
- ask the victim to explain what they were just told.

The Nova Scotia Public Prosecution Service developed the *Investigation and Prosecution of Cases Involving Persons with Special Communication Needs Protocol* to assist officials in the criminal justice system in full and comprehensive investigation and prosecution of cases involving persons with special communication needs. It was recognized that, without assistance, such individuals are unable to fully access the criminal justice system or understand or be understood by officials.²³³ When a police

²³¹ Conry and Fast, at 35-36; *RCMP Guidebook*.

²³² Fraser and McDonald, at 20.

²³³ Nova Scotia, Public Prosecution Service, "Investigation and Prosecution of Cases Involving Persons with Special Communication Needs" (1991; Revised 2002), [unpublished, available online: Government of Nova Scotia

officer responds to a complaint where either the victim or a witness has special communication needs, he or she is supposed to conduct a prompt, detailed, and thorough investigation. In situations where the special communication needs of an individual impedes a police officer's ability to obtain a statement, the police officer must arrange for a suitable time to conduct an interview, with the proper support present. Whenever possible, the interview should be recorded by audio or videotape. The police must keep the person with special communication needs and his or her support person informed about the progress of the case. If the investigation is discontinued, this fact must be communicated promptly as well. When a police officer commences an investigation where a person with special communication needs is involved, that officer must remain on the case through to its conclusion unless the circumstances make it impossible. Finally, where a person suspected of committing an offence has special communication needs, the police officer must if appropriate, allow a support person to be present during the interview; take all reasonable steps to ensure that the suspect understands his/her rights and has full opportunity to exercise those rights; and take all reasonable steps to ensure that the suspect and the investigator are able to communicate and understand each other and if not that they arrange for an interpreter to be present. The *Protocol* highlights the importance of recognizing that all victims and witnesses are entitled to full, fair, and equal access and participation in the criminal justice system. Therefore, the greater the needs of victims and witnesses, the greater should be the effort to assist them.

One case demonstrates the special needs of witnesses with FASD. In *R v R(A)*²³⁴, the witness, K, who had FASD, changed her testimony regarding the circumstances of the sexual abuse she was subjected to by her father during the course of the trial. Taliano J. found the accused not guilty, stating:

I am not unmindful of the fact that K. is one of the weakest members of society and as such should be given the expansive protection of the criminal law. Given her limitations, her evidence cannot be expected to be perfectly symmetrical and although some allowances must be made for her mental functioning, the standard of criminal proof remains the same, that is, that the guilt of the accused must be proven beyond a reasonable doubt. It is not sufficient, given the numerous contradictions in K.'s testimony to simply say that other aspects of her

<http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/SpecCommNeeds.pdf> at 1 [*Protocol*].

²³⁴ *R v R(A)*, 2003 CarswellOnt 1401, 2003 OJ No 1320 (QL) (Ont SC J) [*R v R(A)*].

evidence are compelling and therefore her evidence should be believed and accepted.²³⁵

One of the main issues raised was whether K's testimony was tainted by the numerous interviews she went through prior to the trial. This case highlights the importance of ensuring that such interviews are either taped or recorded so that no doubt can be cast on whether the evidence from a victim or witness with FASD has been tainted.²³⁶

In *R v Carroll*,²³⁷ the court allowed FM's evidence from the preliminary hearing to be read in at trial. Carroll was accused of hiring out young girls as prostitutes, including FM who was a 13-year-old with FASD at the time. FM had difficulty remembering certain events at trial, and psychiatric evidence showed that FM's cognitive skills, including her memory, were affected by FASD. The defence's argument that the preliminary evidence was unreliable and should not have been admitted as a principled exception to the rule against hearsay was not accepted by the court.

Accommodation was also made for the FASD-affected complainant in *R v CMS*.²³⁸ An FASD-affected woman alleged that she was sexually assaulted by CMS and allowed her social worker to prepare her Victim Impact Statement (VIS) for her. The defence argued that the VIS was not admissible but Veale J. admitted the statements pursuant to section 722(4) of the *Criminal Code*, finding that the social worker was a person responsible for the victim's care and support and that the victim herself was "unable to articulate the entire impact of the sexual assault."²³⁹

It is important to note that victims and witnesses who do not themselves have FASD may also have a negative experience with the criminal court proceedings where they are the victim of a crime or a witness of a crime committed by a person with FASD

²³⁵ *R v R(A)*, at para 27. This approach can be contrasted with that given in *R v EHS*, 2012 BCPC 450 (CanLII). EHS also dealt with a complainant's (LS's) evidence of sexual abuse by her father. There were some significant weaknesses and inconsistencies in LS's testimony. However, given her serious mental limitations, the trial judge did not believe that LS had the "guile or the wit to fabricate a story of sexual abuse at the hands of her father and to remain fixed in such a mode of deceit over the long period of time which has elapsed here since her first disclosure." (at para 51). This led strength to her testimony and EHS was ultimately found guilty.

²³⁶ *R v R(A)*, at para 35.

²³⁷ *R v Carroll*, 1999 BCCA 65. See also, *R v Land*, 2012 ONSC 3989 (CanLII), where the Court permitted a witness's prior testimony from a police interview and preliminary inquiry be admitted by the Crown. Since the evidence was central to the Crown's case, however, defence counsel was permitted to cross-examine the witness in person. The witness was allowed to have a support person present for the cross-examination.

²³⁸ *R v CMS*, 2005 YKSC 2, [2005] YJ No 6 (QL) [*R v CMS*].

²³⁹ *R v CMS*, at para 11.

and there is a lack of appropriate awareness about FASD. Victims and witnesses in these circumstances might not understand the behaviour of the perpetrator, including why it appears that the perpetrator does not show remorse. Victims and witnesses also might not understand the judgment made by the court (e.g., if FASD was considered as a mitigating factor at sentencing).²⁴⁰

²⁴⁰ Fraser and McDonald, at 6.

Chapter Four: Unfit to Stand Trial

An integral aspect of the right of every accused to make full answer and defence to criminal charges is the right to be present in the courtroom when the prosecution makes its case. The right to be present extends beyond physical presence to a concept of mental awareness of the proceedings. Every accused who stands trial must be fit to stand trial. Fitness is presumed unless an accused is found unfit to stand trial on the balance of probabilities.²⁴¹ The *Criminal Code* defines “unfit to stand trial” as:

2. “unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
 - (a) understand the nature or object of the proceedings, or
 - (b) understand the possible consequences of the proceedings, or
 - (c) to communicate with counsel²⁴²

The accused’s inability to conduct a defence, and in particular, to understand the nature or object and possible consequences of the proceedings or to communicate with counsel, must result from mental disorder. Mental disorder in the *Code* means “a disease of the mind.”²⁴³ While not strictly a disease, FASD has been interpreted as a mental disorder for the purposes of Part XX.1, the Mental Disorder section of the *Code*.²⁴⁴ Accused with FASD can raise the issue of fitness at any stage during the proceedings prior a verdict in rendered. Many individuals with FASD will not be found unfit to stand trial on the balance of probabilities, however, because their mental deficits are not severe enough to prevent them from meeting the requirements of fitness.²⁴⁵ Fitness becomes an issue when an accused with FASD is also mentally challenged or has an IQ significantly below average.²⁴⁶

²⁴¹ *Criminal Code*, s 672.22.

²⁴² *Criminal Code*, s 2.

²⁴³ *Criminal Code*, s 2.

²⁴⁴ See *R v RF*, 2002 SKPC 137, 228 Sask R 111 [*R v RF*]; *R v Ford*, 2006 NLCA 70, (*sub nom R v CPF*) 262 Nfld & PEIR 165 [*R v Ford*]; and *R v Faulkner*, 2007 CanLII 3092 (NL Prov Ct) [*R v Faulkner*].

²⁴⁵ See *R v Jobb*, 2008 SKCA 156.

²⁴⁶ See *Bushman (Re)*, [2001] BCRBD No 283 (QL); *CHS (Re)*, [2001] BCRBD No 23 (QL); *Cardinal (Re)*, [2006] BCRBD No 51 (QL); *Isaac (Re)*, [2001] BCRBD No 182 (QL); *Isaac (Re)*, [2001] BCRBD No 254 (QL); *Isaac (Re)*, [2003] BCRBD No 143 (QL); *Isaac (Re)*, [2005] BCRBD No 126 (QL); *JI (Re)*, [2000] BCRBD No 255 (QL); *JWT (Re)*, [2005] BCRBD No 69 (QL); *Johnny (Re)*, [2001] BCRBD No 127 (QL); *WT (Re)*, [2000] BCRBD No 272 (QL); *Williams (Re)*, [2000] BCRBD No 139 (QL); *Williams (Re)*, [2000] BCRBD No 52 (QL); *Wolfe (Re)*, [2001] BCRBD No 223 (QL). British Columbia is the only province that publishes the findings of its Criminal Review Board. All nine of the adults accused under the

An accused found unfit to stand trial will come under the jurisdiction of the Criminal Review Board, a five member board established by the lieutenant governor in each province.²⁴⁷ At least one member of the review board must be entitled under the laws of the province to practice psychiatry and, when only one psychiatrist serves on the board, at least one other member must be entitled to practice medicine or psychology.²⁴⁸ The review board must hold a hearing within 45 days after the determination that the accused is unfit.²⁴⁹ These hearings must be held at least once every 12 months as long as the accused remains under its jurisdiction.²⁵⁰ At any hearing, the review may decide that the accused is fit to stand trial and send the accused back to court.²⁵¹ If the review board determines that the accused is unfit, they must make one of two dispositions: conditional discharge, or detention in a hospital. Section 672.54 stipulates the available dispositions:

672.54 Where a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3), or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
- (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate;
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.²⁵²

recent jurisdiction of the BC Review Board who were found UST and who were diagnosed with or suspected of having FASD were also mentally challenged or experienced significant intellectual impairments.

²⁴⁷ *Criminal Code*, s 672.38(1).

²⁴⁸ *Criminal Code*, s 672.39.

²⁴⁹ *Criminal Code*, s 672.47(1).

²⁵⁰ *Criminal Code*, s 672.81(1).

²⁵¹ *Criminal Code*, s 672.48.

²⁵² *Criminal Code*, s 672.54.

Because the power to grant an absolute discharge in subsection 672.54(a) applies only to accused found not criminally responsible on account of mental disorder (NCR), a review board cannot grant an absolute discharge to a UST accused. The rationale for this distinction lies in the differential legal status of the two determinations. An NCR accused has been found beyond a reasonable doubt to have committed the act or omission forming the offence, but due to mental disorder cannot be held criminally responsible.²⁵³ As long as the NCR accused does not pose a threat to public safety, and his or her mental condition and other needs do not require detention or conditions, there is no basis for the review board's continued jurisdiction. In making its disposition, the review board must consider how to reintegrate the accused into society, and an absolute discharge may be the best method for achieving reintegration for an NCR accused. A UST accused, on the other hand, has not yet been tried for the offence, and could still be acquitted or convicted. Until the Crown has an opportunity to prosecute the accused, the review board has no power under section 672.54 to grant an absolute discharge. The accused may receive an acquittal, if there is no longer sufficient evidence to put the accused on trial. The Crown must hold an inquiry to decide whether it still has a *prima facie* (at first glance) case at least every two years after the accused is found UST,²⁵⁴ or at any time that the accused raises a reasonable doubt that there is a *prima facie* case against him or her.²⁵⁵ If the inquiry reveals that the Crown cannot make a *prima facie* case against the accused, he or she must be acquitted.²⁵⁶

As long as sufficient evidence remains to try the accused, and as long as the accused remains unfit to stand trial, he or she must remain under the jurisdiction of the review board and subject to a hospital detention order or a conditional discharge, even though the accused poses no threat to the safety of the public. Many accused who are found UST because they suffer from a mental illness but have not received appropriate medication can receive treatment and become fit to stand trial in a relatively short time. Those accused whose mental disorder results from a permanent condition, such as brain damage that admits no cure, may never become fit to stand trial. Accused with FASD will generally fall into this category, because they are generally found UST due to intellectual impairments resulting from the permanent brain damage they suffered from *in utero* alcohol consumption. Although co-occurring conditions, such as mental

²⁵³ *Criminal Code*, s 16.

²⁵⁴ *Criminal Code*, s 672.33(1). This two-year period can be extended where it is satisfied that the extension is necessary for the proper administration of justice (*Criminal Code*, s 672.33(1.1)).

²⁵⁵ *Criminal Code*, s 672.33(2).

²⁵⁶ *Criminal Code*, s 672.33(6).

illnesses, ADHD, and learning disabilities, may be treated, the underlying brain damage is permanent and cannot be reversed.

There are examples, however, of accused persons with FASD being found fit to stand trial after several years of being found UST. The accused in *R v JIG*, discussed above, was originally deemed UST, but after spending three years in a psychiatric facility he possessed the competence to stand trial. However, inculpatory statements made by JIG were not reliable evidence and he was ultimately found not guilty.²⁵⁷

The *Criminal Code* previously made no provisions for permanent UST who posed no threat to public safety. This oversight prompted several accused to argue that the Mental Disorder section infringed their right to liberty under section 7 of the *Charter*. Two young offenders with FASD, in particular, challenged the legislation. In *R v TJ*,²⁵⁸ the accused was charged with sexual assault when he was 15 years old. The complainant lived in the same group home as TJ, and she alleged that he lay on top of her while she was in bed. She was wearing night clothes and may have been under the covers, but he wore no pants. When she confronted him, he quickly left the room, and there was no suggestion that he had attempted to fondle her or use force. The incident occurred in 1992 and TJ was found UST. At numerous hearings between May 1993 and September 1998, the review board continued to find him unfit and to discharge him subject to conditions, which included living in an approved residence with 24-hour-per-day supervision. As a result of the conditions, TJ spent an extended period of time in residential placements far from his family and experienced deterioration in his behaviour and his ability to care for himself. TJ suffered from FAS and had an intelligence level at the “higher end of moderate mental retardation.”²⁵⁹ A report prepared just prior to his first review board hearing declared that his intellectual deficit rendering him incapable of understanding the court process was “not amenable to treatment and should be considered a permanent state.”²⁶⁰ The court noted that if TJ had been tried and convicted of sexual assault, the maximum sentence he would have received under the *Young Offenders Act* would have been two years.²⁶¹ By the time TJ brought the *Charter* challenge, he had been under the jurisdiction of the review board for six and a half years, and had spent part of that time in residential placements similar

²⁵⁷ *R v JIG*, at para 71.

²⁵⁸ *R v TJ*, (1999) YJ no 57 (available on WL Can) (YT Terr CT).

²⁵⁹ *R v TJ*, at para. 1.

²⁶⁰ *R v TJ*, at para. 2.

²⁶¹ *R v TJ*, at para. 4.

to open custody. TJ alleged violations of his section 7 right to liberty and his section 11(b) right to be tried within a reasonable time.²⁶²

Any actual or potential deprivation of life, liberty or security of the person that is not in accordance with the principles of fundamental justice infringes section 7. It is a principle of fundamental justice that the state cannot limit individual rights arbitrarily. If the state, pursuing a legitimate objective, limits an individual's rights by using means that are broader than necessary to achieve the objective, the result is a violation of the principles of fundamental justice. The objective of section 672 is to restrict the liberty of NCR and UST accused only to the extent that is necessary for the safety of the public. Unlike NCR accused, UST accused who no longer present a threat to public safety can be held within the criminal justice system indefinitely. Lilles Terr. Ct. J. found that the provision was overbroad in its application to permanent UST accused, and that the limits imposed on them cannot be demonstrably justified in a free and democratic society.²⁶³ It is ironic that "s. 672 can treat a UST accused who has never been found to have committed a criminal act more severely and for a longer time than an NCR accused who has been adjudicated guilty."²⁶⁴

Section 11(b) of the *Charter* illustrates a specific deprivation of the rights guaranteed under section 7, and it provides that "any person charged with an offence has the right to be tried within a reasonable time."²⁶⁵ The purposes behind the right to trial within a reasonable time are minimizing the time the accused spends in pre-trial custody or under restrictive release conditions, the trepidation experienced by the accused while awaiting trial, and the deterioration of evidence.²⁶⁶ The time TJ spent under restrictive release conditions was longer than the sentence he would have received had he been convicted of the offence. There was no reason to assume that the stress on a UST accused is less significant than the stress experienced by an accused with capacity waiting to stand trial.²⁶⁷ As for the deterioration of evidence, Territorial Court Judge Lilles noted, "I do not know the status of the complainant and her memory, or whether TJ has any significant recollection of the events that make up the subject

²⁶² *Charter*.

²⁶³ *R v TJ*, at paras 39-42; See also *R v W(C)*, 2001 ABPC 148, 296 AR 311. Two years later, an Alberta court upheld the constitutionality of the UST provisions, while speculating that the regime could become unconstitutional if a permanent UST accused was subject to CRB jurisdiction for several years and inordinate delay became an issue.

²⁶⁴ *R v TJ*, at para 38.

²⁶⁵ *Charter*.

²⁶⁶ *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355, cited *R v TJ* at para 45.

²⁶⁷ *R v TJ*, at para 47.

matter of the charge.”²⁶⁸ The length of the delay affects its reasonableness: Judge Lilles noted that the Supreme Court found a 19 month delay *prima facie* unreasonable.²⁶⁹ In TJ’s case, the delay of six and a half years with no foreseeable trial date was unreasonable, and the delay was inherent in the legislation. The legislative scheme:

[m]akes no allowance for the person who will never become fit to stand trial nor does it contemplate the individual who may become fit many years into the future. While the objective of the Code regime is to retain jurisdiction to try persons accused of crimes, its scope is far beyond that which would minimally impair an accused’s right to be tried within a reasonable time.²⁷⁰

The overbreadth of section 672.54 was found to be disproportionate to its objective of protecting the public interest. As provincial and territorial mental health legislation provide an alternative method of meeting the objective of protecting both mentally ill accused and the public interest, there was no pressing reason for the overbroad jurisdiction of section 672. The Court held that section 672.54(a) should be read down to cure the *Charter* violations and declared the words “a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused” of no force and effect.²⁷¹ The reading down ensured that both NCR and permanent UST accused could receive absolute discharges once they posed no threat to the safety of the public. Rather than order that the court or review board conduct another disposition to decide whether T.J. was eligible for an absolute discharge, Judge Lilles found that his was an exceptional case warranting a stay of proceedings.²⁷²

In *R v DB*,²⁷³ the accused was a mentally handicapped 17-year-old boy with pFAS charged with sexual assault for touching a four-year-old girl’s vagina. The complainant was the daughter of DB’s neighbours, and the incident occurred while her brother and DB’s siblings were present. It is possible that one of the other children proposed the touching to the highly suggestible accused. DB had an IQ of 51 and functioned like an illiterate six-year-old child. He lived with his foster parents in a highly structured environment that the court found could not be replicated in any program available to youth with FAS.²⁷⁴ He was found UST, and received conditional discharges over a period

²⁶⁸ *R v TJ*, at para 47.

²⁶⁹ *R v TJ*, at para 65.

²⁷⁰ *R v TJ*, at para 52.

²⁷¹ *R v TJ*, at para 95.

²⁷² *R v TJ*, at 100.

²⁷³ *R v DB*, 2004 SKPC 43, 252 Sask R 1.

²⁷⁴ *R v DB*, at para 22.

of three years. The conditions imposed by the Review Board included a prohibition on DB being alone with other children, which necessitated major disruptions to his family's routine. Because DB lacked capacity to comply with any order, it fell to his foster parents to ensure compliance with the board's conditional discharge disposition. The court speculated that if DB had been fit to stand trial, his sentence would likely have consisted of a short period of probation reporting, and he would have long since been out of the criminal justice system.²⁷⁵ DB argued that section 672.54 violated his *Charter* section 7 rights to liberty and security of the person by not affording him an absolute discharge. As in *TJ*, it was found that the conditional discharge infringed DB's right to liberty and security of the person. Overbroad and vague provisions in criminal law offend principles of fundamental justice, because they may result in restriction on the liberty of an accused person even in the absence of public safety concerns.²⁷⁶ As DB posed no threat to public safety, and as the permanence of his FAS-related disabilities meant that the charges against him would never be adjudicated, continued restrictions on his liberty violated section 7 of the *Charter*.

DB also argued that section 672.54 infringed section 15(1) of the *Charter* by discriminating against accused persons whose permanent disabilities prevent them from ever standing trial. Section 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.²⁷⁷

In order to offend section 15(1), legislation must draw a formal distinction between the affected person and others on the basis of personal characteristics, or fail to take into account the affected person's already disadvantaged position within Canadian society. The distinction must result in differential treatment based on the enumerated or analogous grounds, and the differential treatment must discriminate substantively against the affected person. Section 672.54 draws a distinction between NCR and UST accused that results in differential treatment, because the provision fails to provide for permanently unfit accused. Unlike NCR accused who pose no risk to public safety, permanent UST accused who pose no risk to public safety remain under

²⁷⁵ *R v DB*, at para 24

²⁷⁶ *R v DB*, at para 53.

²⁷⁷ *Charter*.

the jurisdiction of the review board for an indefinite period of time. The differential impact is discriminatory, because it is based on the stereotype that mentally disordered persons are dangerous to society. The mental disorder provisions in the *Code* are intended to affect a balance between the concern for danger to society and the liberty interests of the NCR or UST accused. While the provisions have been found constitutionally sound with regards to NCR accused,²⁷⁸ the provisions fail to protect the liberty interests of UST accused with permanent neurological disabilities who will never become fit to stand trial and who pose no risk to public safety. Section 672.54 is discriminatory and therefore infringes section 15(1).

Turpel-Lafond J. noted that *TJ* was a review of a disposition, while in *DB* the court was making an originating disposition. While a judicial stay was an appropriate remedy in *TJ*, she found that a judicial stay was not a sufficient remedy for originating dispositions that offend the *Charter*, because review boards do not have the same power as courts to issue stays. She preferred to address the provisions of the *Code* directly by reading into section 672.54 the option of an absolute discharge for UST accused, and then granting an absolute discharge to DB.

Shortly after *DB* was decided, the Supreme Court, in *R v Demers*,²⁷⁹ also found the mental disorder provisions unconstitutional. Demers had Down syndrome and was charged with sexual assault. After being found UST in 1997, he received several conditional discharge dispositions requiring him to live with his family and establish a consensual treatment regime with his parents and medical professionals.²⁸⁰ Demers argued that the interplay of sections 672.54, 672.33, and 672.81(1) of the *Code* infringed his section 7 right to liberty by breaching two principles of fundamental justice: the presumption of innocence, and the principle that criminal legislation must not be overbroad. The Supreme Court found that the review board proceedings did not determine guilt or innocence, but merely impose the least onerous disposition on the basis of the *prima facie* case against the accused. The provisions did not therefore offend the principle of presumption of innocence. The provisions were overbroad, however, because “the means chosen are not the least restrictive of the unfit person’s liberty and are not necessary to achieve the State’s objective.”²⁸¹ The Supreme Court rejected reading in and reading down as remedies, because either remedy would involve “detailed and complicated consequential amendments to the existing

²⁷⁸ *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 175 DLR (4th) 193.

²⁷⁹ *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489.

²⁸⁰ *R v Demers*, at para 3.

²⁸¹ *R v Demers*, at para 43.

legislation.”²⁸² Their remedy of choice was to declare the three sections of the *Code* invalid pursuant to section 52 of the *Constitution*,²⁸³ and to suspend the declaration of invalidity for twelve months, in order to give Parliament time to amend the offending legislation. The Court also provided that if Parliament did not cure the unconstitutionality of the mental disorder provisions, affected accused could ask for a stay of proceedings. Because the rule in *Schachter*²⁸⁴ prevents courts from awarding retroactive remedies under section 24 of the *Charter* in conjunction with section 52 remedies, stays of proceedings would not be available to permanently unfit accused until a year after the *Demers* decision. And even then, qualified accused would not necessarily receive a stay; the Court notes that the remedy is drastic and reserved for the clearest of cases. *Demers* himself was not necessarily eligible for a stay, as his dangerousness had not been evaluated since his original disposition, and it was not clear that he posed no threat to the safety of the public.

The Court in *Demers* was confident that Parliament would amend the impugned provisions, because the federal government had already begun to deal with the problem facing permanently unfit accused by proposing amendments to the *Criminal Code*.²⁸⁵ In a 2002 report,²⁸⁶ the Standing Committee on Justice and Human Rights recommended, *inter alia*,

- adding requirements to the s. 2 definition of “unfit to stand trial” to effectively determine fitness, including a test of real or effective ability to communicate and to provide reasonable instructions to counsel,
- amending section 672.54 to allow the courts, on their own volition or following the recommendation of a review board, to absolutely discharge permanently unfit accused,
- repealing unproclaimed Code provisions (672.65, 672.66, 672.79, and 672.8 [the capping provisions]) that would have provided for limits on the length of time unfit or mentally disordered persons could be detained, and

²⁸² *R v Demers*, at para 58.

²⁸³ *Constitution Act, 1982*, s 52(1), being Schedule B of the *Canada Act 1982* (UK), 1982 c 11. The *Constitution Act* is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

²⁸⁴ *Schachter v Canada*, [1992] SCR 679, 93 DLR (4th) 1, cited *R v Demers* at para 63.

²⁸⁵ *R v Demers*, at para 59.

²⁸⁶ Canada, House of Commons, Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code* (June 2002) (Chair: Honourable Andy Scott, M.P.) at 27 & 29, online: <<http://www.parl.gc.ca/content/hoc/Committee/371/JUST/Reports/RP1032130/justrp14/justrp14-e.pdf>>. See Recommendations at 3, 5, 13 & 14.

- repealing the unproclaimed Dangerous Mentally Disordered Accused provisions (672.65, 672.66, 672.79 and 672.8) that would have extended the cap in the case of mentally disordered persons accused of serious personal injury offences.

As long as the courts could grant absolute discharges to unfit accused who would never regain the capacity to stand trial and who posed no threat to public safety, it would no longer be necessary to cap the length of time UST accused could be detained, or to override the caps in the case of dangerous UST accused. Any mentally disordered accused who presented a threat to public safety would be ineligible for an absolute discharge under the amended section 672.54. By effectively ensuring that no UST accused would remain subject to release on conditions for an unreasonable length of time, the Committee's recommended changes would cure the unconstitutionality of the *Code's* mental disorder regime.

Crucial recommendations were ignored, however, when Bill C-10, *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, received royal assent in May 2005. The capping provisions and the DMDA provisions were repealed, but section 672.54 was not amended to allow the court to grant absolute discharges to UST accused. Instead, the Bill introduced section 672.851, a complex regime that allows boards of review to recommend that a court conduct an inquiry into whether a permanently unfit accused can receive a stay of proceedings. Before it can recommend that the court conduct an inquiry the review board must have held at least one hearing under section 672.81 or 672.82²⁸⁷ and must be of the opinion that the accused is likely permanently unfit and does not pose a significant threat to the safety of the public.²⁸⁸ As soon as practicable after receiving the review board's recommendation, the court may hold the inquiry, or it may decide not to hold an inquiry.²⁸⁹ If the court holds an inquiry, it shall order an assessment of the accused.²⁹⁰ Once the court completes its inquiry, it may order a stay of proceedings if it is satisfied

- (a) on the basis of clear information, that the accused remains unfit to stand trial and is not likely to ever become fit to stand trial;
 - (b) that the accused does not pose a significant threat to the safety of the public;
- and

²⁸⁷ *Criminal Code*, s 672.851(1)(a).

²⁸⁸ *Criminal Code*, s 672.851(1)(b).

²⁸⁹ *Criminal Code*, s 672.851(3).

²⁹⁰ *Criminal Code*, s 672.851(5).

(c) that a stay is in the interests of the proper administration of justice.²⁹¹

The court must consider submissions from the accused, the prosecutor, and all other parties when determining whether a stay is in the interests of the proper administration of justice, as well as the following factors:

- (a) the nature and seriousness of the alleged offence;
- (b) the salutary and deleterious effects of the order for a stay of proceedings, including any effect on public confidence in the administration of justice;
- (c) the time that has elapsed since the commission of the alleged offence and whether an inquiry has been held under section 672.33 to decide whether sufficient evidence can be adduced to put the accused on trial; and
- (d) any other factor that the court considers relevant.²⁹²

If the court decides to order a stay of proceedings, any disposition made by the court or by the review board in respect of the accused ceases to have any effect,²⁹³ and the accused is released from the jurisdiction of the criminal justice system.

While section 672.851 ensures that permanently unfit accused will not necessarily languish under conditional release orders indefinitely, it does not remedy the discriminatory distinction identified in *DB*. Section 672.54(a) provides for mandatory absolute discharges for NCR accused who pose no threat to public safety. In contrast, permanent UST accused who pose no threat to public safety must meet the additional requirement of showing that a stay of proceedings is in the interests of the proper administration of justice. They must engage a much more onerous procedure in order to obtain the same practical result. It is ironic that mentally disordered persons who have been found guilty of an offence (but not criminally responsible) have recourse to a simpler and more convenient exit from the criminal justice system than those whose continued presence in the criminal justice system depends solely on an allegation and sufficient evidence to hold a trial.

Also of significance is the requirement that the Review Board hold at least one hearing under section 672.81 or 672.82 before making its recommendation. Section 672.81 requires the Review Board to hold a hearing every 12 months (although the time between hearings can be extended to 24 months), while section 672.82 provides that the review board may hold a hearing at any time on its own motion or at the request of

²⁹¹ *Criminal Code*, s 672.851(7).

²⁹² *Criminal Code*, s 672.851(8).

²⁹³ *Criminal Code*, s 672.851(9).

the accused or any other party. These hearings are in addition to the initial disposition hearing conducted either by the court under s. 672.45 or by the review board under section 672.47, either of which must take place within 90 days after the verdict of UST is rendered by the court. The accused must endure a minimum of two disposition hearings before the review board can recommend to the court that it should inquire into whether a stay of proceedings is appropriate. In practical terms, a permanently unfit accused will necessarily spend several months, at minimum, under the jurisdiction of the review board before obtaining a stay of proceedings. In contrast, an accused found NCR can obtain an absolute discharge at his or her first disposition hearing, possibly at the same time the finding of NCR is made. A permanently unfit accused still faces potentially indefinite detention or subjection to conditions. Even when a Board recommends that the court inquire into whether it should order a stay of proceedings, the court's inquiry is discretionary, as is its order for a stay of proceedings. The permanently unfit accused who does not present a significant threat to the safety of the public will not necessarily obtain a stay of proceedings and could still remain under the jurisdiction of the Review Board forever. In contrast, the absolute discharge for NCR accused who pose no threat to public safety is mandatory under section 672.54(a).

The addition of section 672.851 to the *Code* does not significantly change the situation with regards to permanently UST accused. Despite the review board's recommendation that the court conduct an inquiry, the court can exercise its discretion *not* to conduct an inquiry. Section 672.851 does not include criteria for determining when it would be appropriate to hold an inquiry, nor does it state whether the defence or the Crown can present arguments about the issue. The section contains no provision for the accused or his or her counsel to request that the court conduct an inquiry, or to request that the review board make recommend that the court conduct an inquiry.²⁹⁴ In fact, the accused might have better luck obtaining a stay of proceedings simply by making an application to the court. Of course, the review board recommendation may be more convenient, particularly for an accused without adequate legal representation. The procedure contemplated by section 672.851 is complex and uncertain. Ironically, the "most involved and complicated of the legal proceedings found in Part XX.1 of the *Code*" relates to "an individual who has no appreciation for the process."²⁹⁵

²⁹⁴ See *R v Kearly*, 2006 CarswellOnt 5182 (WL Can) (Ont Ct J) and *R v Kearly*, [2005] OJ No 5394 (QL) (Ont Ct J). One of the first cases adjudicated under s 672.851 held that because a court can conduct an inquiry on its own motion or at the recommendation of review board, a necessary inference must be drawn that the court can conduct an inquiry upon the application of the party.

²⁹⁵ Canada, House of Commons, Standing Senate Committee on Legal and Constitutional Affairs, *Issue 9: Evidence for April 14, 2005, Mr. Malcolm Jeffcock, Lawyer, Nova Scotia Legal Aid Commission* (April 14,

In the case of DB, the conditions imposed by the review board were disruptive to him and his entire family, and the longer they remained the more they threatened to jeopardize the stability of his daily life. For individuals with FASD, stability, structure and routine are the best way to prevent impulsive behaviours which could result in criminal acts. The court recognized that DB was one of the lucky individuals with FASD who lived in a supportive environment with an informed and dedicated family. His situation offered an ideal example of how to care for and manage an individual suffering from the effects of extreme fetal alcohol damage. The only factor in his life that might exacerbate his risk of re-offending was the onerous conditional discharge imposed by the review board. Clearly, removing the conditions as quickly as possible was imperative, which is why the court granted him an absolute discharge. It is difficult to understand what objective is addressed by prolonging the time permanently UST accused must remain under the jurisdiction of the criminal justice system before obtaining a stay of proceedings that is clearly justified. In addition, the inclusion of “the time that has elapsed since the commission of the alleged offence” as a criterion for determining whether a stay is in the interest of the administration of justice suggests that a stay will become more appropriate as time passes, with the inverse implication that a stay will be less appropriate the less time has passed since the initial determination of unfitness. This creates undue burdens on persons with FASD and related conditions. Damage to the brain caused by in utero alcohol exposure is permanent. Accused persons found unfit to stand trial due to brain damage from fetal alcohol exposure are unlikely to see their condition improve to gain fitness to stand trial.²⁹⁶ Presented with a UST accused who is unlikely to become fit to stand trial, and who does not pose a significant threat to the safety of the public, the court should order a stay of proceedings, regardless of how much time has transpired since the alleged offence. The underlying premise of the unfitness provisions is the idea that an unfit accused can become fit through assessment, treatment, medication, or time. The unfit accused remains under the

2005) (Chair: Senator Lise Bacon), online:
<http://www.parl.gc.ca/Content/SEN/Committee/381/lega/09evb-e.htm?Language=E&Parl=38&Ses=1&comm_id=11>.

²⁹⁶ *R v JJG*, 2015 BCSC 77.

jurisdiction of the Review Board until he or she can be returned to the court to stand trial for the offence of which he or she has been accused. This underlying premise is unduly burdensome and often inapplicable to FASD accused who suffer from permanent brain damage, because assessment, treatment, medication, or time cannot alter the condition that renders them unfit. Section 672.851 is not an adequate response to the Supreme Court of Canada's finding in *R v Demers* that indefinite detention breaches the permanently unfit accused's section 7 *Charter* right to liberty.

Section 672.851 Concerns

In sum, the following points set out briefly concerns with this section, especially with respect to FASD accused:

- 1) A Review Board Recommendation should not always be required in order for a court to order an assessment of a person who is UST;
- 2) The section contains no provision for the accused to apply directly to court for an assessment or to request such a recommendation from a Review Board;
- 3) The requirement that a granting a stay is in the interest of the proper administration of justice is not in place for NCR accused, who only have to show they do not represent a safety risk for the public;
- 4) Factors for determining whether the stay is in the interest of the proper administration of justice are unclear and inordinately broad;
- 5) Using the time that has elapsed since the offence as a factor suggests that brevity will not satisfy the public interest—the concept of punishment should not apply to an unfit accused who has not been convicted of any crime;
- 6) The holding of an inquiry and the granting a stay are both discretionary and not mandatory;
- 7) This procedure is the most involved and complicated legal proceeding in *Criminal Code* Part XX.1, and ironically, it applies to individuals who often have no appreciation for the most basic legal proceedings;

- 8) Most UST, if they became fit will receive a verdict of NCR and be eligible for an absolute discharge; there is no policy reason for denying a person an absolute discharge based solely on his or her legal status (e.g., UST);
- 9) The Review Board has expertise in psychiatric matters, which the court lacks, it should have the jurisdiction to make the decision to stay charges;
- 10) This section does not provide criteria for court to determine whether it should hold an inquiry, or provide information on whether the Crown and defence can make legal arguments; and finally,
- 11) It would be easier to amend 672.54 to comply with the *Demers* case than to add a new, complicated process.²⁹⁷

Summary

FASD accused are not always found UST, because their mental deficits are not always severe enough to prevent them from meeting the requirements of fitness. A person determined to be UST can receive either a conditional discharge or detention in a hospital. He or she cannot receive an absolute discharge, though, because such a determination requires that the accused was tried for the offense. This is obviously not the case for someone who is UST because he or she has not yet gone to trial and has therefore not been tried. FASD accused determined to be UST cannot therefore receive an absolute discharge. FASD people generally remain UST because the intellectual impairments that make them UST generally result from permanent brain damage. This means that FASD accused are unlikely to become “fit to stand trial” and thus not have the opportunity to be tried for an offense, nor possibly gain an absolute discharge. UST accused can remain within the criminal justice system indefinitely, even if they do not present a threat to public safety. This is also an infringement on a UST accused’s section 7 *Charter* rights to liberty and security of the person because it does not represent the least restrictive mode of infringement of the person’s rights. The *Criminal Code* only allows for UST accused to receive a stay of proceedings. This in itself is difficult for FASD accused to receive, though, because the Court can use its discretion in determining whether to conduct an inquiry into whether a stay is merited.

²⁹⁷ Canadian Bar Association, National Criminal Justice Section, *Bill C-10 Criminal Code Amendments (Mental Disorder)* November 2004, at 2 to 5.

Chapter Five: Not Criminally Responsible on account of Mental Disorder

An accused who is found to have committed the act or made the omission that formed the basis of the offense charged can submit that he or she is not criminally responsible on account of mental disorder (NCR).²⁹⁸ The verdict of NCR is rendered in lieu of a verdict of guilty when the accused successfully raises the NCR defence. Section 16 of the *Criminal Code (Code)* provides that the burden of proof rests with the party that raises the issue²⁹⁹ to show on the balance of probabilities³⁰⁰ that the accused:

1. committed an act or made an omission while suffering from a mental disorder, and
2. the mental disorder rendered the accused incapable of
 - a) appreciating the nature and quality of the act or omission, or
 - b) knowing that it was wrong.³⁰¹

The verdict is available to an accused who meets either branch of the test for NCR, either being unable to appreciate the nature and quality of the act or being unable to know that the act was wrong. The analysis of whether an accused can appreciate the nature and quality of an act focuses on the physical nature and quality of the act. Appreciating differs from knowing, because it involves being aware of the consequences that flow from the act. The Supreme Court in *R v Cooper* describes the difference between appreciating and knowing: “An accused may be aware of the physical character of his action (i.e., in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being.”³⁰² The first branch of the NCR defence requires an accused to show that he or she is unable to understand the impact of the act or omission and to perceive the potential consequences resulting from the act or omission. The second branch requires the accused to show that he or she is incapable of knowing that the act is legally and morally wrong according to the standard of the reasonable person.

Theoretically, the NCR defence should operate to relieve accused with FASD from criminal responsibility. As discussed in Chapter One, the most common deficit in individuals with FASD is the inability to appreciate the consequences of their actions. Neurological damage inflicted on the brain by fetal alcohol consumption impairs the

²⁹⁸ *Criminal Code*, s 672.34.

²⁹⁹ *Criminal Code*, s 16(3).

³⁰⁰ *Criminal Code*, s 16(2).

³⁰¹ *Criminal Code*, s 16(1).

³⁰² *Cooper v R*, [1980] 1 SCR 146 at para 1163, 13 CR (3d) 97 [*Cooper*].

ability for abstract reasoning, which involves the ability to perceive that present actions lead to future results. Regardless of their level of intelligence, individuals with FASD may not be able to know when an act or omission is wrong, particularly in the moral sense. Individuals with FASD often lack the ability to understand how their actions affect others. Criminal behaviour rarely results from an intention to break the law or to cause pain, loss or inconvenience to others. Rather, individuals with FASD have difficulty controlling their impulses and act to indulge needs or desires without engaging in any form of analysis about the impact of their actions on others or about the legal and moral propriety of the actions. These common characteristics should ensure that accused with FASD fall within one of the two branches of the NCR defence. In practice, however, very few FASD accused are found not criminally responsible on account of mental disorder.³⁰³

The *Code* defines “mental disorder” as “a disease of the mind.”³⁰⁴ Disease of the mind has been interpreted to include “any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.”³⁰⁵ Whether or not an accused suffers from a disease of the mind is a legal determination, based on both medical and legal principles. Courts in Saskatchewan and Newfoundland have ruled that FASD is a disease of the mind, and that accused with FASD therefore suffer from a mental disorder as contemplated in section 16.³⁰⁶ In each case, however, the accused failed to show that mental disorder rendered him or her unable to appreciate the nature and quality of the act or to know that the act was wrong.

In *R v RF*,³⁰⁷ the accused was a young offender with pFAS and an IQ of 72, and she was charged with 18 offences including carrying a concealed weapon, obstructing police, riding in a stolen car, and numerous breaches of undertakings. Dr. Jo Nanson, a specialist in FAS, gave expert testimony that RF was unable to anticipate the consequences of her choices at the time she made them,³⁰⁸ and that, although she knew some of the things she did were against the rules, she lacked the capacity to understand

³⁰³ For an example of this restricted approach, see comments made by the Crown’s expert doctor to the Ontario Court of Appeal in *R v Manitowabi*, 2014 ONCA 301: “Dr. Wright indicated that FASD did not provide a basis for a finding that a person was not criminally responsible on account of a mental disorder, but could in some circumstances impact on the issue of an accused’s intention” (at para 49).

³⁰⁴ *Criminal Code*, s 2.

³⁰⁵ *Cooper*, at 1160.

³⁰⁶ *R v RF*, *R v Ford*, and *R v Faulkner*.

³⁰⁷ *R v RF*.

³⁰⁸ *R v RF*, at para 64.

the long term consequences of breaking the rules.³⁰⁹ Dr. Nanson also speculated that if RF knew that consequences would accrue immediately, she might be able to control her impulses, but results that were far removed from her actions (such as criminal sanction) held very little meaning for her.³¹⁰ Whelan J. found that an accused's appreciation of the nature and quality of his or her acts need not be very sophisticated, and all that is required for criminal responsibility is an appreciation of the immediate consequences rather than the remote or long-term consequences.³¹¹ RF did not meet the first branch of the NCR defence, because she did exhibit a limited appreciation of the consequences, impact, and results of the physical acts for which she was charged. Dr. Nanson testified that R.F. knew that doing illegal things would get her in trouble, but that "she doesn't understand ... the sense of social contract imbedded in that, that she's violating the rights of others by the activities that she's doing."³¹² For example, R.F. could not understand "why someone else would be upset if their car were stolen."³¹³ Whelan J. recognized that R.F.'s limited moral development prevented her from applying society's standards or reflecting on the "rightness or wrongness"³¹⁴ of her actions, but found that there was insufficient evidence to conclude that R.F. was incapable of knowing that her actions were wrong. The s. 16 analysis must focus on what the accused knew at the time of the offence, not at some later date.³¹⁵ Whelan J. found that the discussion about whether R.F. knew her actions were wrong at the time she committed them "simply did not take place or was not possible."³¹⁶ The balance of probabilities did not favour a finding of NCR.

In *R v Ford*,³¹⁷ the Crown appealed the trial judge's finding that the accused was unable due to FAS to form the specific intent required for aggravated sexual assault. The Court of Appeal ruled that the trial judge erred in assuming aggravated sexual assault was a specific intent offence. The accused's capacity to form the requisite general intent could be presumed, because the trial judge rejected the accused's NCR defence. The trial judge found that FASD was a disease of the mind and that the accused did suffer from a mental disorder, but that the accused failed to show on the balance of probabilities that he could not appreciate the nature and quality of his acts.

³⁰⁹ *R v RF*, at para 55.

³¹⁰ *R v RF*, at para 60.

³¹¹ *R v RF*, at para 77.

³¹² *R v RF*, at para 56.

³¹³ *R v RF*, at para 56.

³¹⁴ *R v RF*, at para 83.

³¹⁵ *R v RF*, at para 80.

³¹⁶ *R v RF*, at para 86.

³¹⁷ *R v Ford*.

In *R v Faulkner*,³¹⁸ the accused forced his way into the bed-sitting room of another occupant of his boarding house. He assaulted and stabbed the man, stole items from his room, and forced him to reveal the PIN number for his ATM card. Faulkner testified that he committed the offences under threat of death from Mr. Ayles, another occupant of the boarding house. Faulkner and Mr. Ayles had a brief conversation on the night of the assault; Mr. Ayles stated that he could barely remember the exchange because he had been drinking and denied making any threats to Faulkner. The court rejected Faulkner's defence of NCR, finding that his "activities were goal directed throughout the evening and during his attack," that "he knew what he would do before he did it," and that he knew "the reason for the assault."³¹⁹ He told the police that he did not want to steal the items, but that he had to do whatever Mr. Ayles asked in order to protect himself. In the court's opinion, this suggested that Faulkner "was in touch with reality in the sense that he perceived and understood the threat by Mr. Ayles and responded to it."³²⁰ His mental impairments and the threats lessened his degree of criminal responsibility,³²¹ but he failed to establish that he was incapable of appreciating the nature and quality of his acts or knowing that they were wrong.

FASD alone is rarely sufficient for a verdict of NCR, but it is not impossible. In *R v Charlie*,³²² the accused was charged with sexual assault. He was "profoundly affected" by FAS.³²³ He functioned at the level of a 4 to 6-year-old, could not read and was deemed unable to provide informed consent even with simplified language and processes. During assessments while incarcerated, he demonstrated no understanding of his length of incarceration or the nature of the offence he committed. He demonstrated no memory of the alleged sexual assault. When meeting with community support workers while incarcerated he had "no understanding of what was going on. And he misunderstands things every step of the way"³²⁴. He became easily distressed, and in those cases, his limited functioning deteriorated rapidly.³²⁵ The judge found that FAS constituted a mental disorder, and that he was unable to appreciate the nature and quality of his acts. The accused was found not criminally responsible.

³¹⁸ *R v Faulkner*.

³¹⁹ *R v Faulkner*, at para 21.

³²⁰ *R v Faulkner*, at para 21.

³²¹ *R v Faulkner*, at para 30.

³²² *R v Charlie*, 2016 YKTC 68 (CanLII) [*R v Charlie*].

³²³ *R v Charlie*, at para 13.

³²⁴ *R v Charlie*, at para 13.

³²⁵ *R v Charlie*, at at para 18.

An FASD diagnosis, in conjunction with intellectual impairments or mental illness can fulfill the requirements of the section 16 NCR defence. A review of disposition hearings of the British Columbia Criminal Review Board (CRB) reveals that 15 adult offenders diagnosed with or suspected of having FASD have come under its jurisdiction in the past few years after being found NCR.³²⁶ Ten of the fourteen offenders are mentally challenged or suffer from significant intellectual impairments. Eleven of the offenders suffer from mental illnesses, including personality disorder, schizophrenia, and schizoaffective disorder. Five of the NCR offenders are both mentally challenged and mentally ill. Although individuals with FASD suffer from a disease of the mind and are therefore mentally disordered persons for the purposes of the NCR defence, it would appear that individuals with FASD must also suffer from intellectual impairments or severe mental illnesses in order to take advantage of the NCR defence. It is perhaps significant to note that FAS, pFAS, and ARND do not appear in the DSM-V,³²⁷ the handbook that lists categories of mental disorders and criteria for their diagnosis. However, it does list Neurobehavioural Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) as a condition for further study and possible inclusion in subsequent editions.³²⁸ Courts and review boards refer accused for assessment to forensic psychiatrists, who cannot diagnose FASD and are not necessarily trained to recognize FASD characteristics. Individuals with FASD who also suffer from intellectual impairments or mental illnesses are categorizable within the forensic psychiatric system, while individuals who suffer only from FASD are not.

Least Onerous and Least Restrictive Disposition

After a finding of NCR, either the court or the criminal review board must make a disposition pursuant to s. 672.54 of the *Code*. The available dispositions are detention in

³²⁶ See *AFT (Re)*, [2000] BCRBD No 123 (QL); *DMV (Re)*, [1997] BCRBD No 7 (QL); *DRS (Re)*, [2000] BCRBD No 174 (QL); *Dolan (Re)*, [2005] BCRBD No 23 (QL); *Gosnell (Re)*, [2003] BCRBD No 77 (QL); *Gosnell (Re)*, [2004] BCRBD No 21 (QL); *Hutchinson (Re)*, [2000] BCRBD No 195 (QL); *Hutchinson (Re)*, [2000] BCRBD No 24 (QL); *Hutchinson (Re)*, [2001] BCRBD No 13 (QL); *Hutchinson (Re)*, [2004] BCRBD No 204 (QL); *Ignace (Re)*, [1999] BCRBD No 11 (QL); *Ignace (Re)*, [2000] BCRBD No 215 (QL); *Isaac (Re)*, [2003] BCRBD No 142 (QL); *Isaac (Re)*, [2006] BCRBD No 21 (QL); *JWT (Re)*, [2005] BCRBD No 69 (QL); *Loeppky (Re)*, [2000] BCRBD No 163 (QL); *Loeppky (Re)*, [2003] BCRBD No 239 (QL); *Loeppky (Re)*, [2004] BCRBD No 242 (QL); *Nome (Re)*, [2000] BCRBD No 308 (QL); *Nome (Re)*, [2001] BCRBD No 79 (QL); *Nome (Re)*, [2002] BCRBD No 127 (QL); *RAS (Re)*, [2001] BCRBD No 155 (QL); *RAS (Re)*, [2004] BCRBD No 253 (QL); *Tsakoza (Re)*, [2004] BCRBD No 221 (QL); *Weiss (Re)*, [2005] BCRBD No 285 (QL); *Weiss (Re)*, [2006] BCRBC No 208 (QL); *JWT (Re)*, [2005] BCRBD No 69 (QL), and *Shore (Re)* BCRBC June 16, 2016 [Note: Can't get on QL and citation system is different on BC CRB website].

³²⁷ American Psychiatric Association, "Diagnostic and Statistical manual of Mental Disorders (5th ed)" [DSM-V].

³²⁸ DSM-V at 798-801.

custody or in a hospital, conditional discharge, or absolute discharge. The court or review board must take into account public safety as its paramount consideration, as well as the accused's mental condition, and the reintegration of the accused into society along with the other needs of the accused. In addition, the disposition must be the least onerous and the least restrictive to the accused. The Supreme Court in *Winko*³²⁹ affirmed that the purpose of the NCR verdict is not to punish the accused, but rather to provide opportunities for treatment: "[t]hroughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused."³³⁰ The Court upheld the constitutionality of the scheme, but according to Veale J. in *DJ v Yukon (Review Board)*,³³¹ their ruling did not "preclude the finding of a section 7 violation where governmental actions operate to thwart that scheme's 'emphasis on providing opportunities to receive appropriate treatment'."³³²

In *DJ*, the accused was charged with sexual assault while he was a youth. He was found NCR and placed in a home for young offenders under a conditional discharge order, but once he turned 18, he was no longer eligible to be placed in the same facilities. In June 1999, the CRB, noting his significant risk to reoffend, made a short-term disposition placing the accused in the Whitehorse Correctional Centre (WCC) in its capacity as a designated hospital pursuant to section 672.1 of the *Criminal Code*, with the suggestion that he be segregated from other inmates for his own protection. The CRB reconvened in August, November, March, and April, each time continuing the disposition. Although the CRB recognized that the WCC was not the best place to keep the accused,³³³ they could not identify another facility that could offer the supervision

³²⁹ *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 [*Winko v British Columbia*].

³³⁰ *Winko v British Columbia*, at para 43.

³³¹ *DJ v Yukon (Review Board)*, 2000 YTSC 513 [*DJ v Yukon*].

³³² *DJ v Yukon*, at para 39.

³³³ Two years later, the Whitehorse Correctional Centre's designation as a hospital again came under judicial review in *R v Rathburn*, 2004 YKTC 24, 67 WCB (2d) 842. The accused was found NCR after attacking his common law partner during a psychotic episode. He had been held in a segregated cell at the WCC in a cell designated as a hospital room. The cell was 6 by 10 feet, made entirely of concrete, with a steel bunk and thin mattress, no natural lighting, a toilet but no sink, and was accessed by a sliding barred gate. The accused was held there 24 hours a day, with the exception of one hour of exercise or fresh air when it was possible. The court found that his continued detention under the circumstances was detrimental to the accused's mental health. It would also violate his section 7 right to liberty and his section 12 right to be free from cruel and unusual punishment. The court pronounced the designation of the WCC as a hospital inoperative for the purpose of the case, and ordered that the accused be detained in either the Whitehorse General Hospital, the Forensic Psychiatric Hospital in Port Coquitlam, BC or the Alberta Hospital in Edmonton. The court criticized the government's failure to respond to the judgment in *DJ v Yukon*, at para 39.

required. At one point, the Criminal Review Board (CRB) noted that there was no appropriate facility in Western Canada to deal with the accused's FAS and ADHD. The Adult Resource Centre (ARC) in Whitehorse was eventually targeted as an appropriate facility, but long-term funding was not forthcoming. An upcoming election was disrupting the Legislative Assembly's meeting schedule, and so permanent funding could not be approved. The accused applied for an order of *habeas corpus*, alleging an infringement of his section 7 *Charter* right to liberty. The CRB decided that a placement at the Adult Resource Centre (ARC) would be the least restrictive and onerous, but lack of funding prevented the CRB from making that disposition. Having determined the least restrictive and onerous disposition, the CRB committed an error by making a contrary disposition. The order for segregated custody at the WCC infringed *Charter* section 7 by depriving D.J. of the residual liberty he would have enjoyed under a less restrictive disposition such as placement at the ARC. The violation could not be saved by section 1 of the *Charter*, because administrative convenience could not justify an infringement of *Charter* rights. The court ordered the accused into the care and custody of the ARC.

Mentally disordered offenders with FASD present a unique challenge to the duty of CRBs to impose the least onerous and least restrictive dispositions on UST and NCR accused. Generally speaking, mentally ill offenders come under the jurisdiction of forensic psychiatric institutions and mentally challenged offenders qualify for support from community living organizations. Some, but not all, offenders with FASD suffer from severe mental illnesses. Many individuals with FASD do not fall within the definitions of mentally challenged set by community living organizations. In order to be considered mentally challenged, an individual must have an IQ of 70 or lower.³³⁴ Most individuals with FASD have an IQ higher than 70, although (as discussed in the first chapter) most individuals with FASD have an AQ (adaptive quotient) of less than 70. Often, accused who have been found NCR or UST are held in custody unnecessarily. The CRB may decide that they present no danger to the public and could be released on a conditional discharge if a residential placement were available. When institutions available for the mentally ill and the mentally challenged disclaim responsibility for individuals who suffer from fetal alcohol damage, there is often nowhere else to find the structured and supported environment needed to manage an offender with FASD.

In *Ignace (Re)*, the British Columbia Review Board (BCRB) granted a conditional discharge to the accused who was charged with mischief and found to be NCRMD

³³⁴ Robert J Williams, at 50.

despite psychiatric opinions which opposed that finding. The Provincial Court Judge apparently made the NCRMD so that the accused could get the care he required. However, the accused spent 32 months in the Forensic Psychiatric Institute (FPA), an institution that was not intended to meet his needs, but the various agencies potentially responsible for him were not willing to provide funding to support him.³³⁵ They stated that:

despite the controversial court finding that Mr. Ignace was NCRMD, the threat he poses to public safety may prevent him from ever receiving an absolute discharge. Furthermore Mr. Ignace is not unable to extricate himself from the custodial setting of FPI as a result of the absence of resources available to him. That the absence of resources was the very reason that he was apparently found NCRMD is truly ironical.³³⁶

As noted in Chapter One, often people with FASD do not receive the support they need to function in society, because they do not qualify for community living supports. This can lead to the unfortunate “revolving door” syndrome, whereby people with FASD circulate between the community and the criminal justice system, without receiving the support they need to function effectively in either place.

Diminished Capacity

Although the NCR defence may not always be available to persons with FASD, the impairment of cognitive functions through brain injury or FASD, may be relevant to the sentence that they receive if they are guilty of a criminal offence. This is discussed below in Chapter Six: Sentencing.

Summary

This Chapter discussed the conditions necessary for someone to be determined (not criminally responsible) NCR on account of mental disorder. These conditions include that a person has committed an act while suffering from a mental disorder and that the mental disorder has rendered the person incapable of appreciating the nature and quality of the act or omission or has rendered the accused incapable of knowing that the act was wrong. An FASD accused satisfies these conditions because of his or her low level of intelligence and lack of understanding of when an act or omission is wrong,

³³⁵ *Ignace (Re)*, [2000] BCRBD No 215 (QL), at para 24 [*Re Ignace*, (2000)].

³³⁶ *Re Ignace* (2000), at para 27.

particularly from a moral point of view. This chapter shows, through analyzing a handful of cases, that FASD alone is rarely sufficient for a verdict of NCR. However, FASD in conjunction with intellectual impairments or mental illness can fulfill the requirements of the *Criminal Code* section 16 NCR defence. Courts and Criminal Review Boards (CRB) refer accused for assessment to forensic psychiatrists, who cannot diagnose FASD and are not necessarily trained to recognize FASD characteristics. People with FASD who also suffer from intellectual impairments or mental illnesses are categorizable within the forensic psychiatric system, whereas people who suffer only from FASD are not always categorizable in this way. This means that people with FASD do not come under the jurisdiction of forensic psychiatric institutions and do not qualify for support from community living organizations. People with FASD can thus receive sentencing that is not the least restrictive on them, given that they may not be eligible for support from community living organizations. This is a violation of their section 7 *Charter* right to liberty and security of the person.

Chapter Six: Sentencing

For the adult accused with FASD, the sentencing stage of the criminal process is a crucial juncture. An appropriate sentence can provide an informed and practical plan for rehabilitation and avoidance of further involvement with the criminal justice system, while a sentence that fails to take the offender's FASD into account can contribute to the cycle of recidivism. Judges have many options to choose from when fashioning appropriate sentences, and little guidance beyond general sentencing principles and minimum sentences for particular offences. The *Criminal Code* codifies common law principles and purposes of sentencing. Section 718.1 sets out the fundamental principle of sentencing:

718.1. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.³³⁷

Judges must consider not only the offence but also the person who committed the offence when deciding on a just punishment. Because the offender has been convicted of the offence, or has pleaded guilty, he or she must have had the requisite *mens rea* to commit the offence, so it is not possible to argue at the sentencing stage that an accused is not responsible for the offence. However, the principle acknowledges that there are degrees of responsibility, and an accused with cognitive deficiencies may be less responsible than a normal accused and therefore less deserving of punishment. Section 718.2 sets out further sentencing principles, such as:

718.2(a). a sentence should be increased or reduced to account for any relevant aggravating and mitigating circumstances relating to the offence or the offender...³³⁸

The section lists specific aggravating factors, which include offences motivated by bias or hate, spousal or child abuse, abuse of trust or authority, association with a criminal organization or terrorism, and offences that have had a significant impact on the victim.³³⁹ The *Code*, however, is silent about what should be considered mitigating circumstances. Courts have recognized mental illness and intellectual impairment as mitigating factors that can affect the nature and duration of sentences.

³³⁷ *Criminal Code*, s 718.1

³³⁸ *Criminal Code*, s 718.2(a).

³³⁹ *Criminal Code*, s 718.2(a).

Judges who understand the characteristics and deficits of FASD offenders consider FASD to reduce moral blameworthiness where there is a connection between the condition and the offence for which he or she is charged.³⁴⁰ In these cases, an FASD diagnosis acts as a mitigating factor along with other factors such as history of abuse, lack of education, and systemic poverty.³⁴¹ Care must be taken, however, to establish this connection. In *R v Manitowabi*³⁴² 2014 ONCA 301, the Ontario Court of Appeal rejected fresh evidence demonstrating that the accused suffered from FASD as a factor mitigating moral blameworthiness in sentencing. The evidence established the accused had FASD, and that FASD has the potential to impact moral blameworthiness. However, the evidence but did not specifically explain how the accused's FASD impacted his ability to understand the probable consequences of his actions.³⁴³ The accused's sentence was not reduced.

The mere recognition of FASD as a mitigating circumstance and the resulting reduction in the length of a sentence is not enough to prevent offenders with FASD from committing more offences. Compared to regular offenders, those with FASD are generally unable to learn from the experience of conviction and sentencing. They do not make the necessary link between their actions and the sentence imposed upon them by the court, and the experience does not lead them to alter their behaviour to avoid further involvement with the criminal justice system. Preventing FASD offenders from reoffending requires not just shorter sentences, but a different approach to sentencing. The purpose of sentencing is set out in section 718 of the *Criminal Code*:

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

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.³⁴⁴

³⁴⁰ *R v Friesen*, 2016 MBCA 50 [*Friesen*] at para 26. See also *R v Powderface*, 2014 ABPC 193 (CanLII) at paras 13, 15.

³⁴¹ *R v Ramsay*, 2012 ABCA 257 [*R v Ramsay*]; *R v Quash*, 2009 YKTC 54 (CanLII) [*Quash*] at para 70.

³⁴² *R v Manitowabi*, 2014 ONCA 301

³⁴³ *R v Manitowabi* at para 6.

³⁴⁴ *Criminal Code*, s 718.

Judges must impose just sanctions, but they have considerable leeway in deciding which objective or objectives to emphasize in each case. Denunciation, specific deterrence, and general deterrence are often primary objectives in sentencing, based on the idea that an awareness of the consequences will prevent offenders from reoffending and others from offending. But deterrence is lost on offenders and others who cannot understand the relationship between the offence and the sentence. As explained by the Alberta Court of Appeal in *R v Ramsay*:

Where the cognitive deficits experienced by the offender significantly undermine the capacity to restrain urges and impulses, to appreciate that his acts were morally wrong, and to comprehend the causal link between the punishment imposed by the court and the crime for which he has been convicted, the imperative for both general deterrence and denunciation will be greatly mitigated.³⁴⁵

In other words, for adults with FASD, “[t]he traditional principles of sentencing emphasizing punishment and deterrence have little or no effect on such individuals because the organic nature of FAS/ARND impedes the individual’s ability to adapt their behaviour.”³⁴⁶

A more useful approach to sentencing would emphasize objectives such as rehabilitating the offender, promoting a sense of responsibility in the offender, and acknowledging the harm done to victims and to the community. Even these objectives are not necessarily realizable in the case of an offender with FASD. The permanence of the brain damage caused by *in utero* alcohol consumption does not easily admit rehabilitation. Treatment of an FASD offender must be aimed at providing structure, support, and supervision to avoid opportunities to indulge in impulsive behaviour, rather than attempting to modify behaviour. Promoting a sense of responsibility in an FASD offender is also a difficult objective to meet, due to the impulsivity, difficulty with abstract thought, and problems with memory exhibited by individuals with FASD.

Over the last several years, many judges have displayed a more “sophisticated... understanding of the linkages between FASD, impulsivity, lack of control” and the

³⁴⁵ *R v Ramsay* at para 24.

³⁴⁶ Larry N Chartrand & Ella M Forbes-Chilibeck, “The Sentencing of Offenders with Fetal Alcohol Syndrome” (2003) 11 Health LJ 35 at para 26 [Larry N Chartrand and Ella M Forbes-Chilibeck].

problems with applying deterrence to FASD accused.³⁴⁷ As judges have become more aware of the spectrum of fetal alcohol related conditions, they are attempting to fashion sentences that emphasize rehabilitation over denunciation and deterrence. One of the earliest judgments dealing with an FASD-accused recognized that the court could not assess the offence against the standards of a normal person.³⁴⁸ Moreover, in *R v FJN*,³⁴⁹ a March 2012 case from the Provincial Court of Alberta, the judge did reduce the sentencing period of the accused in part due to the accused's FASD status. The judge also acknowledged that given the FASD status of the accused, the sentencing principles of deterrence and denunciation should be less important than that of rehabilitation.³⁵⁰

However, "because of the paucity of appellate court decisions, it is not yet clear whether there is now a general principle of law that deterrence and/or denunciation is/are no longer appropriate principles to apply in the sentencing of FAS/ARND offenders."³⁵¹ Many judges still treat FASD as a neutral factor,³⁵² a mitigating circumstance,³⁵³ or even an aggravating circumstance,³⁵⁴ without recognizing that traditional sentences, even when they are more lenient than those imposed for similar offences on regular offenders, do not prevent FASD offenders from reoffending. Moore and Green note that FASD challenges the fundamental assumptions of the criminal justice system:

³⁴⁷ David Milward "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47 UBC L Rev 1025 [*Milward*] at 1044. In support of this position, *Milward* cites *R v Soosay*, 2012 ABPC 220 (CanLII); *R v Harper*, 2009 YKTC 18 (CanLII); *Quash*.

³⁴⁸ *R v Sam*, [1993] YJ No 112 (QL) (Y Terr Ct).

³⁴⁹ *R v R/JN*, 2012 ABPC 81.

³⁵⁰ *R v R/JN* at paras 30, 35, and 36.

³⁵¹ Larry N Chartrand & Ella M Forbes-Chilibeck, at para 28. See also: Canadian Research Institute for Law and the Family, *Access to Justice for Individuals with FASD*, Whitehorse, Yukon, September, 2008 online: http://people.ucalgary.ca/~crilf/publications/FASD_Final_Report_February2008.pdf; *R v Harper*, 2009 YKYC 18; *R v Soosay*, 2012 ABPC 220, at para 26; In *R v Charlie*, 2012 YKTC 5, the judge acknowledged the shortcomings of prison in deterring or rehabilitating FASD offenders, as well as the need for FASD offenders to be in a structured, supervised, and programmed environment. However, the judge did not alter the sentencing to reflect these considerations.

³⁵² In *R v DC*, 2005 YKSC 30 (CanLII), Gower J sentenced the accused to two years less a day and three years probation for assaulting his common law wife: "I view the offender's FASD diagnosis as a neutral factor for the most part. While it helps to explain his impulsivity and cognitive defects, it is not an excuse for his behaviour any more than his voluntary intoxication can be taken as an excuse."

³⁵³ In *R v Farr*, 2005 YKTC 81, Ruddy Terr Ct J accepted a joint submission of three years imprisonment for sexual offences even though the usual range for similar offences was four to six years, in part due to the accused's suspected FASD, his ADHD and his cognitive impairments.

³⁵⁴ In *R v J*, 1996 CarswellBC 2717 (WL Can) (BC Youth Ct), a young offender was sentenced to closed custody for one year and two years' probation for motor vehicle theft. De Villiers Youth Ct. J. rejected the argument that J's impulsivity diminished his responsibility, drawing an analogy between the impulsivity of paedophiles and offenders with FASD: "An intelligent offender with FAS is just as much aware of the difference between right and wrong as an intelligent paedophile. If he commits a crime against another person he must suffer the consequences."

Persons with FASD, as a group, challenge the underlying premise that defendants understand the relationship between actions, outcomes, intentions, and punishment. The treatment of FASD defendants raises fundamental questions about how we assess individual responsibility, both at the guilt-determining and sentencing stages of the adjudicative process.³⁵⁵

Sentencing offenders with FASD requires innovative approaches. David Milward has argued persuasively for adopting a “needs based” approach to sentencing persons with FASD.³⁵⁶ This approach focuses on rehabilitation and intensive supports over deterrence (which is largely ineffective on persons with FASD) and retribution.³⁵⁷ This requires a willingness on the part of defence counsel, Crown prosecutors, and judges to look past offenders’ criminal history, their demeanor, and their apparent lack of remorse to question the true causes of the behaviour that brings them into continual conflict with the criminal justice system.

An example of this innovative approach was used in *R v Drysdale*³⁵⁸. The accused was found guilty of assault and threatening to use a weapon after he violently reacted to provocation and threatening comments³⁵⁹ by a security guard while intoxicated and homeless. He was diagnosed with FASD among other things, had severe learning and cognitive disabilities, and was addicted to alcohol and drugs. A *Gladue* report was prepared detailing his abuse and neglect, his subsequent adoption after multiple foster home placements, and the tragic history of his family including residential school placements (for his grandparents) and life in an ostracized tent city on the outskirts of a Manitoba town (for his parents). The Court also reviewed his lengthy criminal history which included a six-year federal sentence and multiple breaches of probation.

The Crown sought a two-year sentence in a federal penitentiary with prolonged probation, while the accused sought a shorter provincial sentence. After reviewing the accused’s circumstances, limitations and personal and inter-generational history, the judge concluded that the a “‘needs based’ as opposed to a retributive sentence was appropriate.³⁶⁰

³⁵⁵ Timothy Moore and Melvyn Green, “FASD: A Need for Closer Examination by the Criminal Justice System” (2004) 19(1) CR (6th) 99 at 101.

³⁵⁶ David Milward “The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways” (2014) 47 UBC L Rev 1025 [*Milward*]

³⁵⁷³⁵⁷ *Milward* at 1057

³⁵⁸ *R v Drysdale*, 2016 SKQB 312 (CanLII) [*Drysdale*].

³⁵⁹ *Drysdale*, at para 64.

³⁶⁰ *Drysdale*, at para 62.

This needs-based approach emphasized utilizing community resources to engage in the life-long management of his condition and risk to the community. This offered the “best chance of reducing [the accused’s] risk of reoffending”, while recognizing that this risk may “never be completely eliminated” (para 69).

The accused was sentenced to time-served plus 45 days, to be followed by a lengthy probation period. The probation order took in account the accused’s cognitive abilities and difficulties stemming from FASD. It was worded in simple, plain language with important information bolded. Simple and clear directions were given to the accused’s probation officer and the court house.

This needs-based approach is innovative and pragmatic. It seeks to work within the reality of the accused’s limitations to maximize their chance of success.

Certain judges, notably Carly Trueman, of the British Columbia Provincial Court and Mary Ellen Turpel-Lafond, formerly of the Saskatchewan Provincial Court, recognize the necessity of informing themselves about FASD and crafting responsive, sympathetic sentences aimed at protecting FASD offenders from the damage caused by treating FASD offenders as though they have the same capacity as regular offenders. Trueman J. writes:

The cognitively challenged are before our courts in unknown numbers. We prosecute them again and again and again. We sentence them again and again and again. We imprison them again and again and again. They commit crimes again and again and again. We wonder why they do not change. The wonder of it all is that we do not change.³⁶¹

It is frustrating to note that despite a significant body of case law dealing with FASD offenders and their limitations, some courts refuse to make the connection between imprisonment, unstructured release, and inevitable recidivism.

In *R v Synnuck*,³⁶² the accused appealed sentence of four years’ imprisonment for two charges of break and enter. The BC Court of Appeal ordered a post-sentence report to explore the possibility of FAS, which concluded that the accused’s condition could result from a series of concussions and head injuries he suffered, but was not a result of

³⁶¹ *R v Harris*, 2002 BCPC 33, (*sub nom R v H(J)*), 1998 CarswellNWT 153 (WL Can) NWT SC), [2002] BCJ No 313, at para 167.

³⁶² *R v Synnuck*, 2005 BCCA 632, 220 BCAC 210 [*R v Synnuck*].

fetal alcohol exposure. The accused and his father both indicated that his mother drank during pregnancy, but his mother denied it. The accused introduced a report from another psychologist criticizing the methodology and conclusions of the first psychologist. A parole board report indicated that the accused was often ostracized or victimized while incarcerated, but quickly committed crimes once he was released, because he felt more comfortable in prison due to his lack of life skills. The court found that the accused could not be characterized as disabled and that there was no link between any brain injury he may have suffered and his criminal activity. Rather he was a “career criminal,”³⁶³ and therefore the sentence was not unfit:

Generally speaking, he functions at a below average intellectual level, displays some degree of paranoia and anxiety, has poor interpersonal skills and requires a highly-structured environment to minimize his risk of re-offending; but these traits are not exceptional in the criminal population and do not make him ‘disabled’.³⁶⁴

If the sentencing judge in *Synnuck* had been willing to explore alternative sentencing options, such as probation or a conditional sentence order, the accused might have had an opportunity to acquire the necessary life skills to survive outside of prison. Because adults with FASD generally cannot live independently, any probation or conditional sentencing order would necessarily have to make provisions for supervised residence and other supports. To conclude that a neurologically impaired offender prefers prison is to deny him of any chance for rehabilitation.

R v Cardinal,³⁶⁵ was an appeal from a sentence of four years’ imprisonment, plus two years’ probation for an aggravated assault. The appellant had suspected, but undiagnosed FASD.³⁶⁶ The probation order banished the accused from his reserve, and contained no follow up in terms of supervision or counselling. The appellant argued the sentence was excessive and that the probationary terms were punitive.

The Court of Appeal upheld the four-year sentence, but amended the probationary order. According to the Court of Appeal, the appellant’s criminal history demonstrated that the lighter sentences were not acting as a deterrent. Therefore, it was appropriate to impose a significantly longer prison sentence.³⁶⁷ It was also

³⁶³ *R v Synnuck*, at para 15.

³⁶⁴ *R v Synnuck*, at para 15.

³⁶⁵ *R v Cardinal*, 2017 ABCA 396.

³⁶⁶ *Cardinal* at para 40.

³⁶⁷ *Cardinal* at paras 28, 37

incumbent on the Court to protect the community from this individual, because RCMP coverage was limited in that area.

The probationary order was amended to remove the banishment order, and order basic supervision from a probation officer. The probation officer was given the option to impose counselling or rehabilitation in the future.

Cardinal demonstrates the persistent refusal of some courts to engage with the difficulties in obtaining an FASD diagnosis, and the inability of prison terms to act as a deterrent or rehabilitative force for a person with permanent brain damage. The sentencing judge imposed a lengthy prison sentence to teach the accused a lesson, while providing no support on release. The Court of Appeal only slightly amended this ruling to impose standard probationary terms. This hard-lined approach does not safeguard the community or provide a framework to reduce the risk of reoffending for a person with FASD. A needs-based approach would emphasize supports, while balancing the necessity of a prison sentence with its limitations.

Fitness to be Sentenced

The 2002 Standing Committee on Justice and Human Rights recommended that the definition of “unfit to stand trial” in section 2 of the *Criminal Code* be amended by adding the words “and to be sentenced” to the title and the words “or sentence imposed” after the words “verdict is rendered” in the definition itself. The Standing Committee also recommended that subsection 672.11(a) of the *Criminal Code* be amended to allow the court to order an assessment in such cases, and that subsection 672.38(1) of the *Criminal Code* be amended to give Criminal Review Boards jurisdiction in such cases. As of December 2017, these recommendations have not been implemented.³⁶⁸

A finding of guilt is not the only relevant consideration at sentencing. The penalty inflicted on a person should take into consideration the gravity of the offence, blameworthiness, degree of participation and relevant mitigating and aggravating factors. Further, the offender’s background and character is relevant when considering the prospect of successful rehabilitation, the efficacy of community sanctions, the need for individual deterrence, and the level of future risk. Allan Manson argues that: “[i]t is unfair to proceed to impose a sentence on someone who cannot, by reason of mental

³⁶⁸ *Standing Committee on Justice and Human Rights* at 10-12. As of this writing, these amendments have not been made.

disorder” address those factors.³⁶⁹ He goes on to argue, “[s]urely, the principles of fundamental justice would prevent sentencing from proceeding without affording the offender a fair opportunity to appear to present mitigating evidence, challenge aggravating factors, and make a submission as to the appropriate sanction.”³⁷⁰

In *Creighton*,³⁷¹ Trueman J. suggested that there might be a fiduciary duty on the Crown to identify those in the criminal justice system who, due to mental disability, deserve help rather than punishment. She noted that the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society. Trueman J. observed that no federal or provincial government initiative had ever contributed to preventing crime with regards to Creighton or accused like him. Trueman J. raised doubt as to whether sentencing Creighton would generate respect for the law or contribute to the maintenance of a just, peaceful, and safe society. In absence of evidence concerning Creighton’s ability to instruct counsel or be held criminally liable, Trueman J. held that it was fundamentally wrong to sentence him. Given that Creighton had already been sentenced forty-six times for similar offences, deterrence was unlikely. In *Creighton*,³⁷² the BC Supreme Court made an order of *certiorari* requiring Trueman J. to sentence Creighton. Trueman J. was very reluctant to sentence the accused because she suspected that he was not fit due to FASD. While the Supreme Court ordered sentencing for Creighton, the Court of Appeal ruled, in *R v Harris*,³⁷³ that a provincial judge cannot diagnose mental disability. Trueman J. wrote “I feel caught between two courts.”³⁷⁴ Unable to resolve the dilemma, and unwilling to impose a conditional sentence that Creighton would likely find too difficult to follow and would inevitably breach, she sentenced him to time served, in order to avoid the dilemma of imposing punishment on an accused who probably suffered from an undiagnosed cognitive impairment, and also to avoid violating his section 7 and section 15 *Charter* rights.

Often FASD offender will not meet the requirements of UST or NCR because they have sufficient intelligence to understand the court process and to appreciate the difference between right and wrong. Nevertheless, they suffer from adaptive deficiencies that may render them incapable of connecting the sentence imposed with

³⁶⁹ Allan Manson, “Fitness to be sentenced: A historical, comparative and practical review” (2006) 29:4 Int’l J L & psychiatry 262 at 269 [Allan Manson].

³⁷⁰ Allan Manson, at 271.

³⁷¹ *R v Creighton*, [2002] BCPC 564 [*Creighton* #3].

³⁷² *R v Creighton*, 2002 BCSC 1190, 55 WCB (2d) 215.

³⁷³ *R v Harris*, 2002 BCCA 152, 55 WCB (2d) 133.

³⁷⁴ *Creighton* #3.

the crime they have committed. Traditional sentences (incarceration, probationary conditions, etc.) fail to meet the sentencing objectives of deterrence, denunciation, and rehabilitation in the case of FASD offenders, who cannot learn from the experience. Courts must have a wide variety of tools at their disposal to craft sentences that will have a meaningful effect on the behaviour of FASD offenders. In many cases, not imposing a sentence may be the most appropriate action for the court to take. If the offender's family undertakes to provide an appropriate level of supervision and structure to prevent the offender from finding him or herself in a situation where criminal activity could result, a sentence may not be necessary. Particularly if assessment is available at the sentencing stage, the family members may be newly aware of the offender's condition and willing to change their approach to managing the offender's difficulties once they know that he/she suffers from FASD. In other cases, the offender may require and be eligible to access the support of community living or residential placement, and the imposition of conditions (through conditional sentence order or probation) will not necessarily add to his or her rehabilitation. The jurisdiction of the Criminal Review Board may be more suited to ensuring the FASD offender receives appropriate structure and support than either the corrections or probation services.

Conditional Sentence Orders

The principles of sentencing provide that offenders should not be deprived of liberty when less restrictive sanctions are available,³⁷⁵ and that all reasonable sanctions other than imprisonment should be considered for all offenders.³⁷⁶ The *Criminal Code* provides an alternative to imprisonment, the conditional sentence order, for offenders who pose no risk to the safety of the public. Sections 742 through 742.7 outline the conditional sentencing scheme. When the court imposes a sentence of imprisonment for two years or less for any offence the court can order the offender to serve the sentence in the community if:

- The court is satisfied that the offender can serve the sentence in the community without endangering the community and that the sentence is consistent with the fundamental purposes and principles of sentencing under sections 718 and 718.2;
- The offence does not have a mandatory minimum term of imprisonment;

³⁷⁵ *Criminal Code*, s 718.2(d).

³⁷⁶ *Criminal Code*, s 718.2(e).

- The offence is not one that is indictable and carrying a maximum term of 14 years or life;
- The offence is not one that is indictable, carrying a maximum term of 10 years, and resulted in bodily harm, involved trafficking in drugs, or involved the use of a weapon;
- The offence is not one relating to terrorism, criminal organizations, prison breach, criminal harassment, sexual assault, kidnapping, trafficking in persons, abduction of a person under fourteen, motor vehicle theft, theft over \$5000, breaking and entering a place other than a dwelling-house; and arson for a fraudulent purpose.

³⁷⁷

The compulsory conditions imposed by the court are as follows:

- Keep the peace and be of good behaviour;
- Appear before the court when required to do so by the court;
- Report to a supervisor as required by the supervisor;
- Remain within the jurisdiction of the court unless granted written permission to leave; and
- Notify the court or supervisor of any change in address or employment.³⁷⁸

When the court makes the order, it can also prescribe any number of optional conditions, including

- Abstaining from drugs or alcohol;
- Abstaining from owning, possessing, or carrying a weapon;
- Providing for the care and support of dependants;
- Performing community service;
- Attending an approved treatment program; and
- Other reasonable conditions the court considers desirable to secure the good conduct of the offender and to prevent to commission of more offences.³⁷⁹

There is an obligation on courts to ensure that offenders understand the conditions imposed:

742.3(3) A court that makes an order under this section shall

³⁷⁷ *Criminal Code*, s 742.1.

³⁷⁸ *Criminal Code*, s 742.3(1).

³⁷⁹ *Criminal Code*, s 742.3(2).

(a) cause a copy of the order to be given to the offender...

(b) explain the substance of subsection (1) and sections 742.4 and 742.6 to the offender;

(c) cause an explanation to be given to the offender of the procedure for applying under 742.4 for a change of the optional conditions; and

(d) take reasonable measures to ensure that the offender understands the order and the explanations.

The legislation allows courts considerable flexibility when making conditional sentence orders, and courts can fashion creative orders designed to meet the specific needs of each offender, ranging from residential requirements to a wide variety of treatment programs. Unlike probation orders, which require the offender to consent to treatment, conditional sentence orders allow courts to make treatment mandatory as part of the optional conditions. Conditional sentence orders also streamline the process of sanctioning breaches of conditions. An alleged breach of a probation order must be prosecuted as a separate offence. In contrast, an allegation of breach of a conditional sentence order requires the offender to prove on the balance of probabilities that he or she complied with the condition or had a reasonable excuse for failing to comply:

742.6(9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

(a) take no action;

(b) change the optional conditions;

(c) suspend the conditional sentence order and direct

(i) that the offender serve in custody a portion of the expired sentence, and

(ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.³⁸⁰

Because the conditional sentence order is a custodial sentence served in the community, any breach of conditions can result in suspension of the conditional sentence order and reinstatement of the custodial requirement. The threat of

³⁸⁰ *Criminal Code*, s 742.6(9).

incarceration supplies a powerful incentive to ensure that offenders comply with the conditions.

While courts can make conditional sentence orders for any accused who meets the requirements of a sentence of less than two years and no danger to the community, the orders are particularly useful when the courts must sentence mentally disordered accused. Unlike other jurisdictions where courts have the power to impose hospital orders, courts in Canada cannot sentence offenders to serve time in mental health institutions rather than penitentiaries.³⁸¹ As a result, large numbers of mentally disordered offenders are incarcerated in correctional facilities that cannot provide the mental health care they require.³⁸² Conditional sentence orders allow the courts to ensure that mentally disordered offenders access appropriate treatment while remaining under the jurisdiction of the correctional system. Offenders with FASD can benefit from conditional sentence orders, because treatment, therapy and training programs available in correctional facilities are rarely designed to accommodate the needs of adults with FASD.³⁸³ Many offenders with FASD are victimized or exploited in correctional facilities, due to their vulnerability and suggestibility. Often individuals with FASD appear to thrive in correctional facilities, because they respond well to structure and routine, and because continual supervision ensures that they cannot engage in impulsive behaviours. Once they are released to the community, without structure, supervision, or routine, they present a high risk of reverting to criminal activities. Except for the small minority of FASD offenders who pose a safety risk, most FASD offenders are better served by conditional sentence orders, which give courts control over where offenders live and how they spend their time, while allowing offenders to establish structures and routines within the community that can continue beyond the length of the order. Courts will often impose probation orders with similar conditions on top of

³⁸¹Julian V Roberts and Simon Verdun-Jones, “Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*” (2002), 39 *Alta L Rev* 788 at para 8 [Julian V Roberts and Simon Verdun-Jones].

³⁸² Julian V Roberts and Simon Verdun-Jones at para 3: “It is striking that when all forms of mental disorder (including personality disorders and substance abuse disorders) were included, the lifetime prevalence rate for inmates was 91.7 percent rather than 43.7 percent for the population at large. ... Society bears the cost but derives little benefit; the individuals fail to benefit from the experience [of incarceration], and there is little evidence that the experience serves to modify subsequent behavior.”

³⁸³ Fred J. Boland. The content of many treatment programs developed by the Correctional Service of Canada are relevant to FASD offenders, but the format of the programming is generally inappropriate. “A special institutional program for this population that takes into consideration their specific cognitive deficits and behavioral patterns” is recommended.

conditional sentence orders to ensure that their jurisdiction over the offender's treatment and other activities persists for as long as possible.³⁸⁴

Courts can be reluctant to impose conditional sentence orders if the necessary level of structure and supervision are not available in the community. Family involvement can be instrumental in convincing the court to impose a conditional sentence order. Often the court's concern is that the offender, if released into the community, will present a danger to the community due to lack of supervision and structure. This concern is particularly acute in communities where there are no residential placements that can provide the level of supervision required, or when FASD offenders are not eligible for such placements (for example, when they do not qualify for resources because they do not fall within the definition of developmentally disabled). A commitment from the offender's family to provide the level and intensity of supervision required to ensure that the FASD offender complies with the conditions of the order can help the court to overcome its concerns. The conditional sentence orders in *Steeves*³⁸⁵ contained conditions requiring the offenders to reside with their families once the court was convinced that family supervision would reduce the likelihood that the offenders would re-offend.

In *R v Ramalho*,³⁸⁶ the Court of Appeal changed a custodial sentence of two years less ten days to a conditional sentence order for the accused, who pleaded guilty to robbery.³⁸⁷ Once the sentencing judge imposed a sentence of less than two years, he erred in principle by failing to give serious consideration to the accused's adoptive parents' suggestion of a conditional sentence.³⁸⁸ The accused had a history of progress in limiting the adverse effects of her FASD while she resided with her adoptive parents, who were willing to take responsibility for her.³⁸⁹ The court found that restrictive

³⁸⁴ See *R v Jack*, 2001 YKSC 55, (*sub nom R v SRJ*) [2001] YJ No 123; *R v Martin*, 2001 CanLII 201, (*sub nom R v LEM*) 49 WCB (2d) 233, [2001] MJ No 62 (Man Prov Ct); *R v Steeves*, [1998] BCJ 3135 (QL) (BC Prov Ct); and *R v Makela*, 2000 BCPC 199, (*sub nom R v CJM*) [2000] BCJ No 2714.

³⁸⁵ *R v Steeves*. Accused was diagnosis of FAS and subsequently went to an FAS specialist, obtained employment, and lived a highly structured, supervised life with his step-parents. Conditions included residing with his step-parents, not leaving his residence unless in the company of one of his step-parents or attending his employment, continuing FAS treatment, attending any counseling recommended, and community service. Incarceration would have had a detrimental effect on him, including victimization, and there were no FASD suitable programs available in the provincial corrections system. See also *R v Dayfoot*, 2007 ONCJ 332, 74 WCB (2d) 298.

³⁸⁶ *R v Ramalho*, 2004 BCCA 617, (*sub nom R v JMR*) 206 BCAC 213 [*R v Ramlho*].

³⁸⁷ *R v Ramalho*, at para 12.

³⁸⁸ *R v Ramalho*, at paras 7, 9, 12.

³⁸⁹ *R v Ramalho*, at paras 7, 9.

conditions were more likely to protect the public in the long term than a short period of incarceration.³⁹⁰

When the offender’s family is not available to support the offender, the court will often impose a residential condition requiring the offender to live in a community placement. Depending on the level of supervision available, residential placements do not necessarily ensure that the offender will comply with the conditions. *R v Makela*³⁹¹ is one example of a conditional sentence order that failed to help rehabilitate the offender or to reintegrate him into the community. The accused was charged with robbing a sporting goods store. He threatened employees and customers in the store with violence, but did not actually cause any harm to anyone. He was chased from the store, dropped most of the money, and sat down with his hands behind his back once he saw the police approaching.³⁹² He had a fairly long criminal record, and this was his fifth robbery.³⁹³ His history included extreme physical, emotional, and sexual abuse,³⁹⁴ leaving home at the age of ten,³⁹⁵ addiction to cocaine and heroin,³⁹⁶ and no evidence of intervention by any social service agency. After a friend advised him that he might suffer from FASD, Makela requested assessment through his counsel. It was determined that he likely suffered from pFAS, but an absolute diagnosis was not possible without confirmation of *in utero* alcohol consumption.³⁹⁷ The court recognized the necessity of changing the accused’s environment, given his inability to change his behaviour on his own, and his willingness to deal with his substance abuse issues and to reconnect with his aboriginal heritage.³⁹⁸ He was accepted into a recovery house, and services through the Asante Centre³⁹⁹ were recommended.⁴⁰⁰ The court noted that FAS-specific resources were all provided by community organizations rather than government services, and that while programs were available for dealing with substance abuse, they were not tailored to FASD or administered by professionals with FASD experience.⁴⁰¹ The court

³⁹⁰ *R v Ramalho*, at para 12.

³⁹¹ *R v Makela*, 2000 BCPC 199, (*sub nom R v CJM*) [2000] BCJ No 2714 [*R v Makela*, 2000].

³⁹² *R v Makela*, 2000 at paras 2, 3.

³⁹³ *R v Makela*, 2000 at paras 18, 22.

³⁹⁴ *R v Makela*, 2000 at para 40.

³⁹⁵ *R v Makela*, 2000 at para 10.

³⁹⁶ *R v Makela*, 2000 at para 16.

³⁹⁷ *R v Makela*, 2000 at para 54.

³⁹⁸ *R v Makela*, 2000 at para 83.

³⁹⁹ The Asante Centre, “Key Service” online: <<http://www.asantecentre.org/services.html>>. The Asante Centre for fetal alcohol syndrome in Maple Ridge, BC provides assessment and diagnosis of FASD, as well as counseling, outreach programs, care plans, and a variety of other services.

⁴⁰⁰ *R v Makela*, 2000 at paras 85, 86.

⁴⁰¹ *R v Makela*, 2000 at paras 87, 89.

determined that the accused would not present a danger to the community if he was properly supervised and provided with the opportunity to deal effectively with his substance abuse, sexual abuse, physical and emotional abuse, depression, and anger.⁴⁰² In considering the possibility of endangerment of the community, the court must also consider the likelihood of endangerment to the offender and the justness of the sentence. Sentencing him to a term of imprisonment would likely only increase his propensity towards violence and ultimately endanger the community more than a conditional sentence.⁴⁰³ The court found that incarceration would not fulfill the objectives of specific or general deterrence,⁴⁰⁴ and that the objective of denunciation could not be achieved by sentencing a mentally disabled individual to an institution incapable of treating him appropriately.⁴⁰⁵ The court imposed a conditional sentence of two years less a day and three years probation.⁴⁰⁶

Five years later, Makela was again charged with robbery.⁴⁰⁷ It turned out that he had left the recovery house within three weeks of receiving the conditional sentence order. He then went to Edmonton where he committed several robberies and was sentenced to four years imprisonment.⁴⁰⁸ Once his penitentiary term in Alberta was completed, he returned to British Columbia, where he committed six robberies on convenience stores in various communities within two weeks.⁴⁰⁹ The court noted that he had no identification and that despite frequent efforts at obtaining identification, he lacked the appropriate information, having left his adoptive family at the age of ten. Without identification, he could not receive social assistance or rent an apartment, and it was “no wonder” that he saw no alternative to robbing stores.⁴¹⁰ He used a handgun in each of the robberies,⁴¹¹ although it was shown at the last robbery that the gun was not loaded, and the offences involved no violence beyond that threat.⁴¹² The court noted that the “enormous break” in the form of the conditional sentence order of 2000 – which was six years prior to this time – was an absolute failure, possibly due to his lack of identification.⁴¹³ Noting that prison is a difficult place for mentally disordered

⁴⁰² *R v Makela*, 2000 at paras 67, 112.

⁴⁰³ *R v Makela*, 2000 at para 66.

⁴⁰⁴ *R v Makela*, 2000 at paras 101, 110.

⁴⁰⁵ *R v Makela*, 2000 at paras 105, 106.

⁴⁰⁶ *R v Makela*, 2000 at paras 112, 114.

⁴⁰⁷ *R v Makela*, 2006 BCPC 320, (*sub nom R v CJM*) [2006] BCJ No 1536.

⁴⁰⁸ *R v Makela*, 2006 at para 6.

⁴⁰⁹ *R v Makela*, 2006 at para 2.

⁴¹⁰ *R v Makela*, 2006 at para 17.

⁴¹¹ *R v Makela*, 2006 at para 2.

⁴¹² *R v Makela*, 2006 at para 24.

⁴¹³ *R v Makela*, 2006 at para 29.

offenders, the court nevertheless considered a sentence of eight years imprisonment appropriate.⁴¹⁴ The court strongly recommended (with the hope that its recommendations would get through to the assessment people) that he receive psychiatric treatment, medication, one-on-one FAS counseling, and overall life skills counseling.⁴¹⁵

Makela reveals that despite the growing awareness within the criminal justice system that incarceration and other traditional sentencing tools fail to fulfill the sentencing objectives of deterring and rehabilitating mentally disordered offenders, innovative sentencing mechanisms such as conditional sentence orders are not necessarily any better. The success of conditional sentence orders in meeting sentencing objectives such as rehabilitation depends on adequate management of the offender within the restrictions set out by the order. Residential conditions must be strictly monitored to avoid situations where the offender leaves the residence and immediately reverts to criminal behaviour. *Makela's* conditional sentence failed to meet its stated goal of rehabilitation, mainly because he lacked identification, and whatever attempt was made to locate him after he left the recovery house to which he was assigned necessarily failed. *Trueman J.'s* judgment discusses at length the injustice of holding *Makela* to standards of accountability and responsibility that his pFAS precluded him from attaining. Yet he was held accountable for the multiple robberies he committed subsequent to leaving the recovery house, serving terms of imprisonment of several years in Edmonton and in Vancouver. Those offences and the resulting jail terms could arguably have been prevented by a more diligent and restrictive approach to the residential condition imposed by *Trueman J.'s* conditional sentence order.

Lack of resources within the correctional system can contribute to the failure of conditional sentence orders. *R v Quash*,⁴¹⁶ dealt with a sexual assault committed by an individual with FASD while serving a prior conditional sentence. The judge demonstrated a thorough understanding of the issues faced by FASD accused and the problems of a deterrence based approach to incarceration.⁴¹⁷ The judge also, however, also understood that there were inadequate community resources to meet the accused's needs via a conditional sentence.

[75] The frank reality is that there are insufficient residential facilities in the Yukon of the type required to meet the needs of these FASD

⁴¹⁴ *R v Makela*, 2006 at para 31.

⁴¹⁵ *R v Makela*, 2006 at para 33, 39.

⁴¹⁶ *R v Quash*, 2009 YKTC 54 (CanLII).

⁴¹⁷ *Milward* at pp 1044, 1068.

offenders. If there were, fewer of these offenders would be incarcerated in jail; those who were incarcerated would not be incarcerated for as long, and, in the end, there is a very real likelihood that the revolving door of offending, often with increasing severity, would slow or be closed altogether for the individual FASD offender. In the end, society would be better protected and would also benefit from the knowledge that its youngest victims were now being assisted to find a meaningful life, despite the crime visited upon them in the womb.

[76] The problem of providing appropriate supportive residential care facilities for FASD victims is one that will require collaborative effort of all governments, from federal to territorial and/or provincial and municipal, as well as an understanding by us as Yukon and Canadian residents that this is a societal problem and a societal responsibility. If we would choose to put our collective efforts into addressing this immediate need, in the end all parties would benefit.

The accused was sentenced to 26 months' incarceration, reduced by 14 months as a credit for his pre-trial custody.

Lack of community resources has also created a hesitancy among judges to invoke conditional sentence orders. In *R v Kendi*⁴¹⁸, Justice Reddy sentenced a man found guilty of spousal abuse. She understood that jail was not capable of changing the accused's behavior, and noted that all stakeholders would be best served through a structured and supervised placement within the community. Such placements did not, however, exist.⁴¹⁹ The accused was ultimately sentenced to six months' imprisonment plus two years' probation.

The first survey of probation officers in Canada⁴²⁰ reports a disturbing strain on the resources of probation services in Ontario. High case loads, lack of resources, lack of training, and restricted business hours result in probation officers being largely unable to monitor compliance with the conditions of conditional sentence orders, in particular house arrests and curfews.⁴²¹ Since *R v Proulx*⁴²² was decided in 2000, more courts have employed conditional sentence orders and the optional conditions attached to the orders have become more complex. In Ontario at least, there has been no increase in

⁴¹⁸ *R v Kendi*, 2011 YKTC 37 (CanLII).

⁴¹⁹ *R v Kendi* at para 14.

⁴²⁰ Julian V Roberts, "Supervising Conditional Sentence Orders: the Perceptions and Experiences of Probation Officers in Ontario" (2005) 29 CR 6th 107, at 7 [Julian V Roberts, "Supervising Conditional Sentence Orders"].

⁴²¹ Julian V Roberts, "Supervising Conditional Sentence Orders" at 6, 7.

⁴²² In *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61, the Supreme Court affirmed that a conditional sentence order is available for any offence as long as the statutory criteria are met.

resources for probation officers who serve as conditional sentence supervisors. Lack of resources can undermine the careful planning that often goes into constructing a conditional sentence order:

All the guidance of appellate courts and inventiveness of trial judges in devising offender-specific conditions will fail if the professionals charged with administering the sanctions are inadequately trained or resourced.⁴²³

Probation officers also report finding it difficult to ensure compliance with treatment and counseling.⁴²⁴ For regular offenders, who likely understand the consequences of breach of conditions and are likely motivated to comply with their order, less than optimal supervision will not necessarily prevent compliance. FASD offenders, however, are very unlikely to be able to comply with conditions without intensive supervision. Most conditional sentence orders relating to FASD offenders will place responsibility for the supervision of the offender on someone other than a probation officer (i.e., family members, residential placement staff, other social services professionals), but these people are not bound to comply with the order and their continued involvement in helping the offender comply with the conditions is not guaranteed.

Probation officers play a crucial role in monitoring the offender's compliance and in reporting breaches of conditions. If they cannot enforce the conditions, the FASD offender cannot be expected to comply, and breaches will inevitably result. Specific training in the deficiencies and special needs associated with FASD may ensure that probation officers provide an appropriate level of supervision to FASD offenders serving sentences in the community. An even better solution would be assigning certain probation officers to a small number of FASD offenders, in order to ensure the appropriate level and intensity of supervision. The higher cost associated with such specialized services would not likely exceed the cost of prosecuting and incarcerating the FASD offenders for their inevitable breaches.

Successful conditional sentence orders require judges to adequately assess the specific needs and limitation of the accused, and to understand what resources are available in the accused's community. The administration of conditional sentence orders requires a greater level of involvement from judges, compared to traditional sentencing tools. Because of the administrative complexity of conditional sentence orders, judges would be more likely to impose conditional sentence orders if they were assured that

⁴²³ Julian V Roberts "Supervising Conditional Sentence Orders" at 8.

⁴²⁴ Julian V Roberts "Supervising Conditional Sentence Orders" at 4.

the appropriate supervisory and treatment programs were available in their jurisdictions.⁴²⁵ For offenders with FASD, serving their sentence in the community can provide a valuable opportunity to access the structure, supervision, and support their condition requires and to avoid opportunities to reoffend.

In *R v Jack*,⁴²⁶ a woman was granted a one year conditional sentence after being found guilty of sexually assaulting a nine-year old while babysitting. The accused was diagnosed with FASD and received support from Options for Independent Living and she was employed with the Challenge Program. An aggravating factor in her sentence was the fact that she was at a medium-to-high risk to re-offend. A mitigating factor was that she was intellectually impaired. The conditions of her sentence included participation in a sexual offender risk management program and a probation order which ensured lengthy treatment.

In *R v LEM*,⁴²⁷ the accused was given a conditional sentence of two years and three years of probation for manslaughter, in addition to a concurrent sentence for break and enter and theft. The court took into account aggravating factors including multiple offences, intoxication, a lengthy record, the vicious nature of the assault, and the accused's risk to re-offend. The mitigating factors include the accused's disadvantaged background, his young age, FASD, amenability to treatment, and his remorse. The court held that given the accused's cognitive impairment, specific deterrence would have no effect, but the objectives of denunciation and retribution could be met by the conditional sentence.

In *R v Walsh*,⁴²⁸ Sinclair Prov J held that although the accused may have had some symptoms of FAE, his criminal behaviour could be attributed to habitual cannabis use and general laziness. After finding the accused guilty of arson causing \$150,000.00 in damage, he was sentenced to one year in jail and a three year probation order with complicated conditions. The court noted that the accused was at a high risk to re-offend and was unlikely to access counseling and vocational training. In *R v Dayfoot*,⁴²⁹ sentencing was adjourned for five months for an FASD assessment and testing after the Dayfoot pled guilty to robbery and uttering threats. The court stated that punishing behaviour that results from a disability is counter to the sentencing principle in the Criminal Code. Dayfoot's adoptive mother supported him through the lengthy

⁴²⁵ Julian V Roberts and Simon Verdun-Jones.

⁴²⁶ *R v Jack*, 2001 YKSC 55, (*sub nom R v SRJ*) [2001] YJ No 123.

⁴²⁷ *R v LEM*, [2001] MJ No 62 (MB Prov Ct).

⁴²⁸ *R v Walsh*, 2002 BCPC 644, [2002] BCJ No 3109.

⁴²⁹ *R v Dayfoot*, 2007 ONCJ 332.

assessment process. Dayfoot's history of failing to comply with court orders was notionally a stumbling block to a conditional sentence, but the robbery was his first violent offence and therefore, the court found that he was not likely to endanger the community. Dayfoot was given an 18 month conditional sentence with conditions that included residing at his mother's house, abiding by a curfew, and seeking appropriate employment.

In *R v MacKenzie*,⁴³⁰ the Crown recommended incarceration to provide structure for the accused and suggested that a sentence of five to six years was appropriate.⁴³¹ The accused, who had a lengthy record of non-violent property offences, as well as several counts of breach of probation, being unlawfully at large and escaping custody, was found guilty of break-and-enter.⁴³² The accused was serving a federal sentence at the time and was initially transferred to Genesis House, which was a community-related facility for federal offenders that focused on adult male offenders with a diagnosis of FASD or behavioural and functional limitations consistent with FASD.⁴³³ The Genesis House was under construction and MacKenzie was residing at Dick Bell-Irving House where he had one hour of supervised activity each day.⁴³⁴ Prior to that, MacKenzie was residing at Kwi'Kwe'Xwe'hp with 24-hour structure and supervision.⁴³⁵ While residing there, he participated in voluntary urinalysis, drug counseling, sweat lodges and aboriginal cultural learning, and he discovered his talent for woodworking.⁴³⁶ He demonstrated an awareness of his need for continual structure and support and motivation to address his needs. He also exhibited remorse and insight into the causes of his criminal behaviour, including his drug use.⁴³⁷ Taking into account MacKenzie's aboriginal background, his organic impairment, disabilities and deficits consistent with FASD, low risk to re-offend violently, low risk of recidivism, remorsefulness, and insight into his substance abuse and criminal activity, the court sentenced him to two years less a day to be served by way of conditional sentence order in the community.⁴³⁸ The conditions included: drug counseling, residential treatment program, residing at John Howard on completion of the residential treatment program, and a daily curfew. The

⁴³⁰ *R v MacKenzie*, 2007 BCPC 57, [2007] BCJ No 508 [*R v MacKenzie*].

⁴³¹ *R v MacKenzie* at para 7.

⁴³² *R v MacKenzie* at para 4.

⁴³³ *R v MacKenzie* at para 3, 16.

⁴³⁴ *R v MacKenzie* at para 3.

⁴³⁵ *R v MacKenzie* at paras 3, 11.

⁴³⁶ *R v MacKenzie* at para 10.

⁴³⁷ *R v MacKenzie* at para 13.

⁴³⁸ *R v MacKenzie* at paras 24, 25.

sentence was to be followed by one year probation, the conditions of which included residing as directed by the probation officer.⁴³⁹

In *R v Harris*,⁴⁴⁰ the Court of Appeal reviewed a conditional sentence order of nine months for a charge of break and enter.⁴⁴¹ The court found that the sentencing judge erred in principle by focusing exclusively on rehabilitation and by imposing a conditional sentence when there were no reasonable grounds for finding that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental principles of sentencing.⁴⁴² The court ultimately concluded that the conditional sentence order was not unfit.⁴⁴³ The Court of Appeal stated the importance of granting an order that conformed with the principle under section 742.1 of the *Criminal Code* of not sending offenders to jail when a less restrictive option is available. Harris had served eight months in pre-trial custody. The Court of Appeal ordered a sentence of 40 months, giving 16 months credit for pre-trial custody, which resulted in two years less a day.⁴⁴⁴ The Court also stated that this sentence “allowed Harris to function in the community with supervision while pursuing a diagnosis of [FASD], which [would not be] available in the provincial or federal corrections system”.⁴⁴⁵ In addition, Harris had been reasonably successful at complying with the conditions in the seven months since sentencing.⁴⁴⁶ Despite finding that the conditional sentence order was appropriate in this case, the court reiterated that conditional sentences are not necessarily warranted in every case of confirmed or suspected FASD.⁴⁴⁷ Finally, the court amended the order to remove the phrase “to the best of your ability” from certain conditions and to require Harris to submit to drug testing as directed by his supervisor.⁴⁴⁸

Summary

Essentially, FASD is a mitigating (partly excusing) factor for sentencing, but only to judges who understand the characteristics and deficits of FASD offenders. Traditional principles of sentencing do not apply to people with FASD. Some cases, which were

⁴³⁹ *R v MacKenzie* at paras 27, 39.

⁴⁴⁰ *R v Harris*, 2002 BCCA 152, 55 WBC (2d) 133 [*R v Harris*, 2002].

⁴⁴¹ *R v Harris*, 2002 at para 1.

⁴⁴² *R v Harris*, 2002 at para 11.

⁴⁴³ *R v Harris*, 2002 at para 26.

⁴⁴⁴ *R v Harris*, 2002 at para 22.

⁴⁴⁵ *R v Harris*, 2002 at para 24.

⁴⁴⁶ *R v Harris*, 2002 at para 25.

⁴⁴⁷ *R v Harris*, 2002 at para 26.

⁴⁴⁸ *R v Harris*, 2002 at para 28.

examined in this chapter, point towards the Crown having a duty to help people with FASD by not recommending punishment and thus not violating the accused's section 7 and 15 *Charter* rights. The Court can order conditional sentencing. Breaches of conditional sentences can result in the offender being sent to prison. Offenders cannot be forced by Canadian courts to go to a mental health institution. As a result, large numbers of mentally disordered offenders are incarcerated in correctional facilities that cannot provide the mental health care they require. However, conditional sentences can involve going to mental health institutions, but people with FASD rarely benefit from these institutions because they are rarely designed to accommodate the needs of adults with FASD. The success of conditional sentence orders for people with FASD depends on management of the offender within the restrictions set out by the order. In making the determination of whether to order a conditional sentence, courts look at the likelihood of the offender re-offending, the level of remorse by the offender, and other factors. They do not, however, always consider the effectiveness of the management system for the offenders.

Chapter Seven: Incarceration and Treatment

FAS/FAE is clearly present in our criminal justice system. According to Judge Barnett:

A Canadian forensic psychiatrist has estimated that 30% of our prison population may have FAS/FAE. It is safe to say that judges encounter such person frequently, recognize them seldom, and find that discouragingly few resources are available in any event.⁴⁴⁹

There is a common perception that FASD offenders are well-suited to incarceration, because jails and prison provide the structure, supervision, and routine that adults with FASD require. While many inmates with FASD may respond positively to these aspects of imprisonment, the incarceration of FASD offenders cannot fulfill the sentencing objectives of denunciation, deterrence or rehabilitation for a number of reasons. For instance, as noted in Chapter One and later in this chapter, people with FASD:

- Do not connect punishment with crime and therefore do not learn that committing crimes leads to incarceration;
- Are victimized in prison because they have poor judgment, are overly trusting, are eager to please and are suggestible;
- Are vulnerable to physical and sexual abuse and vulnerable to criminal influence;
- Are liable to join gangs and to be treated as scapegoats;
- May have a harder time getting parole because of an apparent lack of remorse; and
- Are misunderstood by untrained and unaware staff who are aware of the inmates' pattern of behaviour, but not aware that the behaviour is a symptom of a disability, that the inmate has permanent brain damage and that the inmate does not break the rules on purpose.

One way to address some of these issues is to develop and provide an awareness manual for Correctional Services staff. This manual would help these staff deal with FAS inmates more effectively. As noted by Fred Boland:

⁴⁴⁹ The Honourable Judge C Cunliffe Barnett, "A Judicial Perspective on FASD: Memoirs in the Making of Nanook of the North" in Ann Streissguth and Jonathan Kanter, eds, *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997) 134 and 135.

An awareness that individuals afflicted with FAS/FAE have damage to the brain that causes behavioral and developmental disturbances would likely lead to more realistic performance expectations for these individuals. It might also change the attributions given to their maladaptive behaviors and the ways that these behaviors are managed. Thus, rather than inferring that these individuals are unmotivated, manipulative, or self-defeating, staff may be able to see that their maladaptive behaviors are the result of neurological impairments caused by fetal alcohol-associated brain damage.⁴⁵⁰

Between May 2000 and the end of 2002, virtually all front-line corrections workers and managers in Alberta received FAS awareness training through workshops.⁴⁵¹ The Government of Alberta acknowledged the importance of managing people with FAS who are involved in the criminal justice system in a manner that takes into account their unique needs and circumstances, especially when they are in custody. One example of a management program that appears to have some success with FAS offenders is the interdisciplinary program at the Peace River Correctional Centre (PRCC).⁴⁵² The interdisciplinary team at PRCC includes a psychologist, the programs manager, the security manager, nurses, caseworkers, and corrections staff. Staff may refer offenders with behavioural concerns to the team for review and if appropriate, a behaviour management plan is devised outlining appropriate supervisory strategies staff may use with the offender on the unit, at work or in the classroom, and the offender is advised of the plan after it is formulated. The plan appears to assist staff in providing consistent and effective supervision or offenders who may have FAS or other similar challenges and often help the offenders avoid further disciplinary action. The plans often involve matching the offender with another inmate who acts as a positive role model and is there to encourage the offender. The Government MLA Review of Correction Service's recommendation to expand behaviour management plans for FAS-affected offenders in all adult centres in Alberta was accepted, but there is no indication whether this strategy has been implemented in any meaningful way.⁴⁵³

⁴⁵⁰ Fred J Boland et al, at 70.

⁴⁵¹ Fred J Boland et al, at 52.

⁴⁵² Alberta, Legislative Assembly, *Government MLA Review of Correctional Services: The Changing Landscape of Corrections* (2002) at 53, online: Government of Alberta <http://www.solgps.alberta.ca/programs_and_services/correctional_services/Publications/Report%20of%20the%20MLA%20Review%20of%20Correctional%20Services.pdf>.

⁴⁵³ Alberta, Legislative Assembly, *Government MLA Corrections Review Report: Response and Status* (no date) at 5, online: Government of Alberta <<http://www.assembly.ab.ca/lao/library/egovdocs/alsg/2004/143934.pdf>>.

Training corrections personnel to recognize and understand FASD will go a long way towards alleviating the victimization and abuse FASD offenders suffer in jails and prisons. A better solution is to avoid incarceration whenever possible. Some case law dealing with FASD accused indicates that sentences should emphasize the objective of rehabilitation over denunciation or deterrence. Because the rehabilitation of FASD offenders requires the creation of long-term, stable lifestyles where the offender can be supervised and opportunities for impulsive behaviours limited, whether through a commitment from family members or through some form of residential placement, probation and conditional sentence orders are much more likely to achieve the goal of rehabilitation than custodial sentences. Too often, however, judges sentence FASD offenders to incarceration as a result of alternate resources being unavailable.⁴⁵⁴

Courts sometimes sentence offenders who have, or are suspected of having, FASD to federal penitentiaries in the expectation that they will receive treatment that will contribute to their rehabilitation and ultimately their safe reintegration into the community. In *R v Luther*, the majority of the court held that “it is not the function of the Criminal Court to order confinement solely for the purpose of treatment of a physical or mental disorder.”⁴⁵⁵ Because sentencing judges now have to consider not only the gravity of the offence but also the circumstances of the offender (as part of the proportionality principle, in section 718 of the *Criminal Code*), even a sentence that is not disproportionate to the gravity of the offence may nevertheless be disproportionate when the circumstances of the offender are taken into account. Even a custodial sentence that is shorter than the sentence a normal offender would receive for the same offence may offend the principle in *R v Luther*, if the judge sentenced the FASD offender to incarceration for the sole purpose of accessing treatment.

In *R v DRB*,⁴⁵⁶ NN Phillips J. stated: “I have come to the conclusion that the most appropriate sentence for [the accused] is one that places him within the federal corrections’ system (because of the enhanced resources which appear to be available there) and allows for the transition back into his community to be extensively monitored.”⁴⁵⁷ It seems that as long as FASD offenders are sentenced to imprisonment

⁴⁵⁴ For example, see *R v Quash*.

⁴⁵⁵ *R v Luther*, [1972] 1 OR 634, 5 CCC (2d) 354. See also Richard D Schneider, “Sentencing mentally Ill Offenders” in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) at 168.

⁴⁵⁶ *R v DRB*, 2004 BCPC 47, [2004] BCJ No 480 [*R v DRB*].

⁴⁵⁷ *R v DRB* at para 66. See also *R v Charlette* (1993), 88 Man R (2d) 13, 51 WAC 13 (Man CA); *R v H(J)*, 1998 CarswellNWT 153 (WL Can) NWT SC, [1998] NWTJ No 163 (NWT SC), 1998 CarswellNWT 153 (not available on CanLII); *R v Suarak* (2001), 199 Nfld & PEIR 119 (available on CanLII) NL SCTD); *R v Bisson*, 2004 CarswellOnt 12844 (On SC); *R v Payne*, 2005 NWTSC 42 [2006] AWLD 920; *R v Barnes*,

in order to access rehabilitative programs and treatments, corrections personnel should adjust the available programs so that they are appropriate for FASD. A number of recommendations for rehabilitative treatment were offered in the Correctional Services Canada's *Fetal Alcohol Syndrome: Implications for Correctional Service Report* (by Fred Boland et al). Psychological intervention can reduce maladaptive behaviours and decrease secondary disabilities and help some people with FASD attain higher level of functioning.⁴⁵⁸ Psychiatric intervention has been found to help with depression and suicidal tendencies. Moreover, substance abuse programs with counselors who understand behaviour patterns are important so that certain behaviours are not misinterpreted as manipulation or denial. FASD offenders may also benefit from anger management, and social, life, communication, organizational, and cognitive skills programs. The Report highlights the importance of Correctional Services Canada programs being delivered in a suitable format that takes into consideration the cognitive deficits (likely to forget material from earlier session, have trouble applying abstract concepts to real life, difficulty reasoning by analogy and problem solving) of people with FASD. Repetition, concrete delivery, practical directives, shorter daily session, memory enhancement techniques, and small groups or one-on-one sessions may be useful. Extensive social and life skills training should be offered close to the offender's release date.

Once an offender with FASD is released, after care should be provided for as long as possible, including close monitoring and ongoing social and life skills training through supervision of parole or probation at least until they are established in a living situation with sufficient structure, supervision, and support from family, community organizations or government programs.⁴⁵⁹ Job skills training through community social services agencies should also be made available and relapse prevention and maintenance programs designed to suit FASD with substance abuse issues should be available. Successful reintegration into community depends on careful post-release planning. The Report suggests that although it is not possible to reverse brain damage, treatment can alleviate effects of secondary disabilities and change behaviour by controlling the offender's environment.⁴⁶⁰ Finally, parole and probation services should be aware of

2005 BCCA 432, 67 WCB (2d) 13; *R v Burnard*, 2005 ONCJ 518, 68 WCB (2d) 541; *R v Obed*, 2006 NLTD 155, 260 Nfld & PEIR 286; *R v CO*, 2006 NWTCA 3, 213 CCC (3d) 276; *R v Rae*, 2006 BCCA 125, (*sub nom R v DJR*) 223 BCAC 115; *R v Mariash*, 2005 CarswellBC 3301 (WL Can) BCPC); and *R v Martin*, 2001 CanLII 201, (*sub nom R v LEM*) 49 WCB (2d) 233, [2001] MJ No 62 (Man Prov Ct).

⁴⁵⁸ Fred J Boland et al.

⁴⁵⁹ Fred J Boland et al.

⁴⁶⁰ Fred J Boland et al.

FASD deficiencies related to time, organization, taking responsibility, and using transit. These services should not treat every breach of conditions as actionable and should tailor management of FASD probationers/parolees to take deficiencies into account. Ideally, probation/parole officers should carry much smaller caseloads and provide intensive supervision to FASD.⁴⁶¹

Summary

This chapter examined the effectiveness of incarceration and treatment for FASD accused. It may be thought that incarceration of FASD offenders is effective, but in reality, it is not. This is due to the fact that incarceration does not fulfill the objectives of denunciation, deterrence or rehabilitation, which are necessary for an FASD offender. Also, correctional services personnel have not received consistent and widespread training on how to monitor people with FASD. Furthermore, correctional services establishments do not provide people with FASD with the rehabilitative programs and treatment necessary for their growth and personal development. Programs and treatment that FASD offenders should receive include anger management treatment, and social, life, communication, organizational, and cognitive skills programs. After leaving correctional services, people with FASD should be monitored and have ongoing social and life skills training.

⁴⁶¹ Fred J Boland et al at 73-82.

Chapter Eight: Conclusion

People with alcohol-related brain damage do not belong in the criminal justice system, unless they are dangerous to the public. If every person with FASD were adequately supported by their families and communities, the number who would pose a risk to the safety of the public would be very small. Because most adults with FASD do not receive the support they need to cope with their disability, they often get into trouble with the law. When they are held to the same standards as offenders who are not brain-damaged, their legal troubles are compounded. If the courts decide to “give them a break” by imposing probation, conditional discharge, or a conditional sentence order rather than a more severe sentence, odds are they will breach one of the conditions, often not deliberately, but just because compliance with conditions is too onerous for them. When this happens, they must return to court to face new charges for the breach, or serve the remainder of their sentence in jail. With enough breaches of conditions, in addition to new offences committed during probation or conditional release, they quickly accumulate lengthy criminal records. Once FASD offenders are viewed as recidivists, the courts are more likely to impose longer and more restrictive sentences, increasing the probability that more breaches will occur and further entrenching their recidivism.⁴⁶²

These cycles of offending and re-offending could be broken if adequate support and supervision were available in the community, either through mental health agencies, community living agencies, health care services, cultural organizations, or FASD-specific organizations. They could also be broken if the criminal justice system was flexible enough to take accused persons’ FASD-specific deficiencies into account. Currently, however, FASD offenders tend to lack community support, and they are held to the same standard as non-brain-damaged offenders. Both of these factors contribute to the high likelihood that people with FASD will end up incarcerated. Prisons and penitentiaries are not appropriate places for people who suffer from alcohol-related brain damage (nor for that matter, for people who suffer from any neurological deficiencies or other mental health problems). The requirements of adults with FASD vary with the degree of neurological damage and the level of adaptive functioning: they can require treatment/medication (for mental health issues, ADHD, depression, physical deficiencies, etc.), education (to reach their full potential, usually disrupted by the

⁴⁶² See for example, *R v CPS*, 2006 SKCA 78.

inability of the education system to accommodate their disability), skills training (to improve their communication, organization, cognition, and social and adaptive functioning), substance abuse programming (to control their high likelihood of addiction to alcohol and other drugs), therapy (to address the effects of physical, sexual, and emotional abuse, discrimination, low self-worth, alienation from family, etc.), and supported living environments where their activities can be structured, their interactions with other people monitored, their financial transactions supervised, and their daily needs (food, hygiene, transportation) met.

The criminal justice system has no ability to provide these requirements except with the blunt and limited tools of incarceration, conditional sentencing orders, and probation. Corrections services are under-resourced and cannot meet the needs of FASD prisoners, probationers, and parolees. Adults with FASD are not truly accommodated by a criminal justice system that attempts to change their behaviour rather than their circumstances.

BIBLIOGRAPHY

LEGISLATION

- *Children's Act*, SYT 1984, c 2.
- *Children's Act*, RSY 2002, c 31.
- *Community Living Authority Act*, SBC 2004, c 60.
- *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act (UK)*, 1982, c 11.
- *Constitution Act*, 1982, s 52(1), being Schedule B of the *Canada Act (UK)*, 1982 c 11.
- *Criminal Code of Canada*, RSC 1985, c C-46.
- *Developmental Disabilities Regulation*, Alta Reg 230/2013.
- *Persons with Developmental Disabilities Services Act*, RSA 2000, c P-9.5.
- *Youth Criminal Justice Act*, 2002, c 1.

JURISPRUDENCE

AFT (Re), [2000] BCRBD No 123 (QL).

AJ v Yukon Territory (Family and Children Services, Director), [1986] YJ No 40, (*sub nom Joe v Yukon Territory (Director of Family & Children's Services)*) (1986), 1 YR 169.

Bushman (Re), [2001] BCRBD No 283 (QL).

CHS (Re), [2001] BCRBD No 23 (QL).

Cardinal (Re), [2006] BCRBD No 51 (QL).

DMV (Re), [1997] BCRBD No 7 (QL).

DRS (Re), [2000] BCRBD No 174 (QL).

Dolan (Re), [2005] BCRBD No 23 (QL).

Fahlman (Guardian ad litem of) v Community Living British Columbia, 2006 BCSC 900, (*sub nom NF (Guardian Ad Litem of) v Community Living BC*) 49 Admin LR (4th) 187.

Gosnell (Re), [2003] BCRBD No 77 (QL).

Gosnell (Re), [2004] BCRBD No 21 (QL).

- Hutchinson (Re)*, [2000] BCRBD No 195 (QL).
- Hutchinson (Re)*, [2000] BCRBD No 24 (QL).
- Hutchinson (Re)*, [2001] BCRBD No 13 (QL).
- Hutchinson (Re)*, [2004] BCRBD No 204 (QL).
- Ignace (Re)*, [1999] BCRBD No 11 (QL).
- Ignace (Re)*, [2000] BCRBD No 215 (QL).
- Ignace (Re)*, [2001] BCRBD No 182 (QL).
- Ignace (Re)*, [2001] BCRBD No 254 (QL).
- Ignace (Re)*, [2003] BCRBD No 142 (QL).
- Ignace (Re)*, [2003] BCRBD No 143 (QL).
- Ignace (Re)*, [2005] BCRBD No 126 (QL).
- Ignace (Re)*, [2006] BCRBD No 21 (QL).
- Jl (Re)*, [2000] BCRBD No 255 (QL).
- Johnny (Re)*, [2001] BCRBD No 127 (QL).
- JWT (Re)*, [2005] BCRBD No 69 (QL).
- Loeppky (Re)*, [2000] BCRBD No 163 (QL).
- Loeppky (Re)*, [2003] BCRBD No 239 (QL).
- Loeppky (Re)*, [2004] BCRBD No 242 (QL).
- Nome (Re)*, [2000] BCRBD No 308 (QL).
- Nome (Re)*, [2001] BCRBD No 79 (QL).
- Nome (Re)*, [2002] BCRBD No 127 (QL).
- R v Askov*, [1990] BCRBD 2 SCR 1199, 74 DLR (4th) 355.

- R v Barnes*, 2005 BCCA 432, 67 WCB (2d) 13.
- R v Bartle*, [1994] 3 SCR 173, 118 DLR (4th) 83.
- R v Beaulieu*, 2007 NWTSC 18, [2007] NWTJ No 17.
- R v Bisson*, 2004 CarswellOnt 2605, (*sub nom R v AB*) 62 WCB (2d) 189 (Ont Ct J).
- R v Bohemier*, 2002 MBQB 198, 165 Man R (2d) 191.
- R v Buffalo*, 2006 ABQB 267, 399 AR 280.
- R v Burnard*, 2005 ONCJ 518, 68 WCB (2d) 541.
- R v Cardinal*, 2017 ABCA 396.
- R v Carroll*, 1999 BCCA 65, 119 BCAC 219.
- R v Charlette* (1993), 88 Man R (2d) 13, (*sub nom R v MHC*) 20 WCB (2d) 1818 (Man CA).
- R v Charlie*, 2012 YKTC 5.
- R v Clarkson*, [1986] 1 SCR 383, 26 DLR (4th) 493.
- R v CMS*, 2005 YKSC 2, [2005] YJ No 6 (QL).
- R v CO*, 2006 NWTCA 3, [2006] NWTJ No 44.
- R v Cooper*, [1980] 1 SCR 1149.
- R v Creighton*, 2002 BCPC 182, (*sub nom R v CGC*) [2002] BCJ No 1151.
- R v Creighton*, 2002 BCPC 564, [2002] BCJ No 2985.
- R v Creighton*, 2002 BCSC 1190, 55 WCB (2d) 215.
- R v Dayfoot*, 2007 ONCJ 332, 74 WCB (2d) 298.
- R v DB*, 2004 SKPC 43, 252 Sask R 1.
- R v DC*, 2005 YKSC 30.
- R v Demers*, 2004 SCC 46, [2004] 2 SCR 489.

- R v DRB*, 2004 BCPC 47, [2004] BCJ No 480.
- R v Drysdale* 2016 SKQB 312 (CanLII).
- R v Farr*, 2005 YKTC 81.
- R v Faulkner*, 2007 CanLII 3092, [2007] NJ No 46 (NL Prov Ct).
- R v Ford*, 2006 NLCA 70, (*sub nom R v CPF*), sentencing: 2007 NLCA 34.
- R v Friesen*, 2016 MBCA 50 .
- R v Gladue*, [1999] SCJ No 19, [1999] 1 SCR 688.
- R v Grant*, [2009] 2 SCR 353, 2009 SCC 32 (CanLII)
- R v Gray*, 2002 BCPC 58, [2002] BCJ No 428.
- R v Gray*, 2002 BCSC 1192, 55 WCB (2d) 216.
- R v Harper*, 2009 YKYC 18.
- R v Harris*, 2002 BCPC 33, (*sub nom R v JH*) [2002] BCJ No 313.
- R v Harris*, 2002 BCCA 152, 55 WCB (2d) 133.
- R v Hart* 2014 SCC 52.
- R v Head*, 2004 SKPC 91, (*sub nom R v MJH*) 251
- R v Henry*, [1996] YJ No 39 (QL) (Y SC).
- R v J*, 1996 CarswellBC 2717 (WL Can) (BC Youth Ct).
- R v Jack*, 2001 YKSC 55, (*sub nom R v SRJ*) [2001] YJ No 123.
- R v JDM*, 2006 ABCA 294.
- R v JH*, [1998] NWTJ No 163 (NWT SC), 1998 CarswellNWT 153 (not available on CanLII).
- R v JIG*, 2015 BCSC 77.
- R v Jobb*, 2008 SKCA 156

R v Kearly, [2005] OJ No 5394 (QL) (Ont Ct J).

R v Kearly, 2006 CarswellOnt 5182 (WL Can) (Ont Ct J).

R v Kendj, 2011 YKTC 37 (CanLII).

R v Kruse, 2004 ABPC 194, 370 AR 87.

R v Luther, [1972] 1 OR 634, 5 CCC (2d) 354.

R v TK, 2006 NUCJ 15, 70 WCB (2d) 555.

R v MacKenzie, 2005 BCPC 102, [2005] BCJ No 792.

R v MacKenzie, 2005 BCPC 106, [2005] BCJ No 796.

R v MacKenzie, 2007 BCPC 57, [2007] BCJ No 508.

R v MacKenzie, 2007 BCPC 109, [2007] BCJ No 793.

R v Makela, 2000 BCPC 199, (*sub nom R v CJM*) [2000] BCJ No 2714.

R v Makela, 2006 BCPC 320, (*sub nom R v CJM*) [2006] BCJ No 1536.

R v Manitowabi, 2014 ONCA 301.

R v Mariash, 2005 CarswellBC 3301, [2006] BCWLD 2724 (WL Can) (BC PC).

R v Martin, 2001 CanLII 201, (*sub nom R v LEM*) 49 WCB (2d) 233, [2001] MJ No 62 (Man Prov Ct).

R v McNeely, 2006 NWTSC 63, [2006] NWTJ No 75.

R v NRR, 2013 ABQB 288.

R v Obed, 2006 NLTD 155, 260 Nfld & PEIR 286.

R v Oickle, 2000 SCC 38, [2000] 2 SCR 3.

R v Payne, 2005 NWTSC 42 (WL Can).

R v Powderface, 2014 ABPC 193 (CanLII).

R v Prosper, [1994] 3 SCR 236, [1994] SCJ No 72.

R v Proulx, 2000 SCC 5, [2000] 1 SCR 61.

R v Quash, 2009 YKTC 54 (CanLII). *R v R(A)*, 2003 CarswellOnt 1401, 2003 OJ No 1320 (QL) (Ont SC J).

R v Rae, 2006 BCCA 125, (sub nom *R v DJR*) 223 BCAC 115.

R v Ramalho, 2004 BCCA 617, (sub nom *R v JMR*) 206 BCAC 213.

R v Ramsay, 2012 ABCA 257. *R v Rathburn*, 2004 YKTC 24, 67 WCB (2d) 842.

R v RF, 2002 SKPC 137, 228 Sask R 111.

R v RJH, 2006 ABQB 656, (sub nom *Alberta (Attorney General v RJH)*) 64 Alta LR (4th) 255.

R v CPS, 2006 SKCA 78.

R v Sam, [1993] YJ No 112 (QL) (Y Terr Ct).

R v Sawchuk, 117 Man R (2d) 282, [1997] MJ No 186.

R v Singh, 2007 SCC 48, [2007] SCJ No 48.

R v Snow (1992), 76 CCC (3d) 43, 10 OR (3d) 109 (Ont Gen Div).

R v Soosay, 2012 ABPC 220.

R v Steeves, [1998] BCJ 3135 (QL) BC Prov Ct).

R v Suberu, 2009 SCC 33 (CanLII), [2009] 2 SCR 460.

R v Suarak (2001), 199 Nfld & PEIR 119, 49 WCB (2d) 342 (NL SC (TD)).

R v Synnuck, 2005 BCCA 155, 210 BCAC 150.

R v Synnuck, 2005 BCCA 632, 220 BCAC 210.

R v TJ, [1999] YJ No 57, (sub nom *R v J(T)*) 1999 CarswellYukon 99 (WL Can) (Y Terr CT).

R v Walsh, 2002 BCPC 644, [2002] BCJ No 3109.

R v W(C), 2001 ABPC 148, 96 Alta LR (3d) 381.

RAS (Re), [2001] BCRBD No 155(QL).

RAS (Re), [2004] BCRBD No 253 (QL).

Schachter v Canada, [1992] SCR 679, 93 DLR (4th) 1.

Tsakoza (Re), [2004] BCRBD No 221 (QL).

Weiss (Re), [2005] BCRBD No 285 (QL).

Weiss (Re), [2006] BCRBD No 208 (QL).

Williams (Re), [2000] BCRBD No 139 (QL).

Williams (Re), [2000] BCRBD No 52 (QL).

Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625, 175 DLR (4th) 193.

Wolfe (Re), [2001] BCRBD No 223 (QL).

WT (Re), [2000] BCRBD No 272 (QL).

SECONDARY MATERIALS: BOOKS & ARTICLES

Alberta Civil Liberties Research Centre, *Representing Mentally Disabled Persons in the Criminal Justice System: A Guide for Practitioners* Calgary: Alberta Civil Liberties Research Centre.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed).

Barnett, The Honourable Judge C. Cunliffe. "A Judicial Perspective on FAS: Memoirs in the Making of Nanook of the North" in Ann Streissguth and Jonathan Kanter, eds, *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* Seattle: University of Washington Press, 1997.

Boland, Fred J., Rebecca Burrell, Michelle Duwn And Jennifer Karp. *Fetal Alcohol Syndrome: Implications for Correctional Service, Correctional Service Canada, Research Branch* (1998), online: Correctional Service Canada, Research Branch <http://www.csc-scc.gc.ca/text/rsrch/reports/r71/r71_e.pdf>.

Buxton, Bonnie. *Damaged Angels: An Adoptive Mother Discovers the Tragic toll of Alcohol in Pregnancy* New York: Carroll & Graf, 2005.

Byrne, Caron. *The Criminalization of Fetal Alcohol Syndrome (FAS)* (Discussion Paper, Vancouver, British Columbia, 2001, revised 2002) [unpublished, available

- online: The Asante Centre for Fetal Alcohol Syndrome
<http://www.asantecentre.org/Library/docs/Criminalization_of_FAS.pdf>.
- Canadian Bar Association, National Criminal Justice Section, *Bill C-10 Criminal Code Amendments (Mental Disorder)* November 2004.
- Canadian Research Institute for Law and the Family, *Access to Justice for Individuals with FASD*, Whitehorse, Yukon, September, 2008 online:
http://people.ucalgary.ca/~crilf/publications/FASD_Final_Report_February2008.pdf.
- Chartrand, Larry N & Ella M Forbes-Chilibek, "The Sentencing of Offenders with Fetal Alcohol Syndrome" (2003) 11 Health LJ 35.
- Chudley, Albert E, Nicole Leblanc, Christine Look, Jocelynn L Cook, Ted Rosales, & Julianne Conry. "Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis" (2005) 172 Can Med Assoc J S1.
- Conry, Julianne, & Diane K Fast. *Fetal Alcohol Syndrome and the Criminal Justice System* Maple Ridge, BC: British Columbia Fetal Alcohol Syndrome Resource Society, 2000.
- Fraser, Charlotte & Susan McDonald. *Identifying the Issues: Victim Services' Experiences working with Victims with Fetal Alcohol Spectrum Disorder* Ottawa: Canada Department of Justice, 2009, online: Government of Canada
<http://www.justice.gc.ca/eng/pi/rs/rep-rap/2009/rr09_4/rr09_4.pdf>.
- Greenbaum, Rachel & Gideon Koren. "Fetal alcohol spectrum disorder: New diagnostic initiatives" (2002) 7:3 Pediatrics & Child Health 139.
- Hay, Marie. "A Practical Roadmap for the Imperfect but Practical-Minded Clinician" in Jeanette Turpin & Glenn Schmidt, eds, *Fetal Alcohol Syndrome/Effect: Developing a Community Response* Halifax: Fernwood Publishing, 1999.
- Kellerman, Teresa. *FASD in the Court System: Factors to Consider for Adolescents and Adults in the Court System with Fetal Alcohol Syndrome Disorders* [unpublished, available online: FASSTAR ENTERPRISES
<<http://www.comeover.to/FAS/PDF/CourtSystemFactors.pdf>>.
- Lukte, Jan. "Spider Web Walking: Hope for Children with FAS Through Understanding" in Ann Streissguth & Jonathan Kanter, eds, *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* Seattle: University of Washington Press, 1997.
- Lutke, Jan, & Tina Antrobus. "Fighting for a Future: FASD and 'the system': adolescents, adults and their families and the state of affairs" (Paper delivered at Forum of Connections: Serving Adolescents and Adults with FASD, Surrey, British

Columbia, June 19 & 20, 2004) at 15 [unpublished, available online:
Connections

<http://www.fasdconnections.ca/HTMLobj1807/fighting_for_a_future.pdf>.

Manson, Allan. "Fitness to be sentenced: A historical, comparative and practical review" (2006) 29:4 Int'l J L & Psychiatry 262.

Mattson, Sarah N, & Edward P Riley. "Neurobehavioral and Neuroanatomical Effects of Heavy Prenatal Exposure to Alcohol" in Ann Streissguth & Jonathan Kanter, eds, *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* Seattle: University of Washington Press, 1997.

McKee, Terralyn, Annette Laporte, Zenon Lisakowski, Albert E. Chudley, Julianne Conry. *Fetal Alcohol Spectrum Disorder: FASD Guidebook for Police Officers* Ottawa : Royal Canadian Mounted Police, 2002, online : Asante Centre
<<http://www.asantecentre.org/Library/docs/latestfasguide.pdf>>.

Milward, David, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47 UBC L Rev 1025.

Mitten, Rae. "Fetal Alcohol Spectrum Disorders (FASDs) and the Justice System" in *Commission on First Nations and Métis Peoples and Justice Reform, Final Report Volume 2*, section 9 at 5, online: Government of Saskatchewan Justice and Attorney General
<<http://www.justice.gov.sk.ca/justicereform/volume2/12section9.pdf>>.

Moore, Timothy & Melvyn Green. "FASD: A Need for Closer Examination by the Criminal Justice System" (2004) 19(1) CR (6th) 99.

Roach, Kent & Andrea Bailey. "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42:1 UBC L Rev 1.

Roberts, Julian V. & Simon Verdun-Jones. "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*" (2002) 39 Alta L Rev 788.

Roberts, Julian V., Cathy Hutchison & Rebecca Jesseman. "Supervising Conditional Sentence Orders: The Perceptions and Experiences of Probation officers in Ontario" (2005) 29 CR 6th 107.

Sampson, Paul D., Ann P Streissguth, Fred L Bookstein, Ruth E Little, Sterling K Clarren, Philippe Dehaene, James W Hanson, & John M Graham Jr. "Incidence of Fetal Alcohol Syndrome and Prevalence of Alcohol-Related Neurodevelopmental Disorder" 1997) 56:5 Teratology 317.

- Schneider, Richard D. "Sentencing Mentally Ill Offenders" in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* Toronto: University of Toronto Press, 1999.
- Sherrin, Christopher. "False Confessions and Admissions in Canadian Law" (2005), 30 Queen's LJ 601.
- Streissguth, Ann, Helen Barr, Julia Kogan & Fred Bookstein. "Primary and Secondary Disabilities in Fetal Alcohol Syndrome" in Ann Streissguth & Jonathan Kanter, eds, *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* Seattle: University of Washington press, 1997.
- Streissguth, Ann & Jonathan Kanter, eds. *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* Seattle: University of Washington Press, 1997.
- The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* Truth and Reconciliation Commission of Canada, 2015.
- Turpin, Jeanette & Glen Schmidt, eds. *Fetal Alcohol Syndrome/Effect: Developing a Community Response* Halifax: Fernwood Publishing, 1999.
- Williams, Robert J. "The Role of Psychological Tests in FAS/E" in Jeanette Turpin & Glenn Schmidt, eds, *Fetal Alcohol Syndrome/Effect: Developing a Community Response* Halifax: Fernwood Publishing, 1999.
- University of Washington, Department of Psychiatry and Behavioral Sciences Fetal Alcohol and Drug Unit of School of Law. *Judicial Decisions Regarding FASD*, [unpublished, available online: University of Washington <<http://depts.washington.edu/fadu/legalissues/website.revised.09.29.pdf>>].

SECONDARY MATERIAL: GOVERNMENT DOCUMENTS

- Alberta, Legislative Assembly. *Government MLA Review of Correctional Services: The Changing Landscape of Corrections* (2002) at 53, online: Government of Alberta <https://www.solgps.alberta.ca/programs_and_services/correctional_services/Publications/Report%20of%20the%20MLA%20Review%20of%20Correctional%20Services.pdf>.
- Alberta, Legislative Assembly. *Government MLA Corrections Review Report: Response and Status* (no date) at 5, online: Government of Alberta <https://www.solgps.alberta.ca/programs_and_services/correctional_services/>

[Publications/Report%20of%20the%20MLA%20Correctional%20Services%20-%20Response%20and%20Status.pdf](#)>.

Canada, House of Commons, Standing Committee on Justice and Human Rights. *Review of the Mental Disorder Provisions of the Criminal Code* (June 2002) (Chair: Honourable Andy Scott, M.P.) at 27 & 29, online: Government of Canada <<http://www.parl.gc.ca/content/hoc/Committee/371/JUST/Reports/RP1032130/justrp14/justrp14-e.pdf>>.

Canada, House of Commons, Standing Senate Committee on legal and Constitutional Affairs, *Issue 9: Evidence for April 14, 2005, Mr. Malcolm Jeffcock, Lawyer, Nova Scotia Legal Aid Commission* (April 14, 2005) (Chair: Senator Lise Bacon), online: Government of Canada <http://www.parl.gc.ca/Content/SEN/Committee/381/lega/09evb-e.htm?Language=E&Parl=38&Ses=1&comm_id=11>.

Nova Scotia, Public Prosecution Service. "Investigation and Prosecution of Cases Involving Persons with Special Communication needs" (1991; Revised 2002) [unpublished, available online: Government of Nova Scotia <http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/SpecCommNeeds.pdf>.

SECONDARY MATERIAL: OTHER (Websites)

Alcohol Related Brain Injury (FAS/FA) Resource Site, Lethbridge, AB, online: <<http://www.ohpe.ca/node/3046>>

Asante Centre for Fetal Alcohol Syndrome, *What is involved in an FASD assessment at the Asante Centre?*, online: The Asante Centre <<http://www.asantecentre.org/involved.html>>.

Asante Centre, Maple Ridge, BC, online: <<http://www.asantecentre.org/>>.

Calgary Region Community Board: Persons with Developmental Disabilities, *Intake Form*, online: Calgary Region Community Board <<http://www.calgary-pdd.org/dnn/Portals/0/webpages/eligibility100202.pdf>>.

Canada Northwest FASD Partnership, online: <<http://www.cnfasdpartnership.ca/>>.

FAS Community Resource Center, Tucson AZ, online: <<http://www.come-over.to/FASCRC/>>.

FAS Family Resource Institute, online: <<http://www.fetalalcoholsyndrome.org>>.

FAS World, online: <<http://fasworld.com/>>.

FASD Connections, online: <<http://www.fasdconnections.ca/>>.

FASD Lane, online: <<http://www.fasdlane.com/>>.

FAS/E Support Network of BC, online: <<http://www.fetalalcohol.com/>>.

FASlink, Fetal Alcohol Disorders Society, Ontario, online: <www.faslink.org>.

Fetal Alcohol and Drug Unit, University of Washington, Seattle, WA, online: <<http://depts.washington.edu/fadu/>>.

Fetal Alcohol Spectrum Disorders and the Justice System, Ontario, online: <<http://fasdjustice.ca/>>.

Fetal Alcohol Spectrum Disorders centre for Excellence, Rockville, MD, online: <<http://www.fascenter.samhsa.gov/>>.

Lakeland Centre for FASD, Cold Lake, AB, online: <<http://www.lcfasd.com>>

National Organization on Fetal Alcohol Syndrome, Washington, DC, online: <<http://www.nofas.org/default.aspx>>.