

The Sentencing of Offenders With Fetal Alcohol Syndrome

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Introduction

On May 29th, 2002, the *Globe and Mail* covered the story of a nine-year-old girl, Jessica Russel, who had been brutally slain by David Trott. A murder, although certainly tragic, would not necessarily garner in-depth coverage in a national paper. What caught the attention of the *Globe* reporter was the resignation of the accused's lawyer subsequent to his client's decision to plead guilty. Mr. Trott's personal history is not unlike the history frequently heard in court: he was bounced around the foster care system from the time he was 12 years old and was known to the police at an early age. In his teens he graduated from petty crimes, to assault and auto theft. Only days before Jessica's murder, Trott was in jail awaiting a psychiatric assessment stemming from a previous assault charge. The assessment never arrived and the judge released him.

When released from prison, Mr. Trott had no place to go and no access to appropriate treatment or support. He then, tragically, came in contact with Jessica Russel resulting in her brutal assault and murder. His lawyer, Howard Smith was prepared to raise a not guilty by reason of insanity defence, describing Mr. Trott as having the attention span of a "gnat," but his client wanted to get the proceedings over with. The reasons that Mr. Trott provided for his decision to plead guilty make little sense to anyone — Mr. Trott wanted to be in a federal penitentiary, where he could smoke.¹ Subsequently, Mr. Smith resigned, clearly attempting to send a message regarding his concerns. Mr. Trott has a mental disorder called fetal alcohol syndrome.

The Trott case is reflective of growing misgivings regarding the appropriate judicial treatment of individuals suffering from fetal alcohol syndrome (FAS) or alcohol related neurodevelopmental disorders (ARND).² There is a suspicion that

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¹ Jane Armstrong "Lawyer Quits over Guilty Plea" *Globe and Mail* (May 29, 2002) A3.

² The nomenclature of FAS and ARND has evolved over the years. Although the diagnosis of FAS has remained stable and requires a well defined set of characteristics to be present in the patient as discussed in the body of this paper, there is a wide category of patients that have been negatively effected by prenatal maternal consumption of alcohol that do not satisfy all the diagnostic characteristics of full blown FAS. Patients that have medical problems associated with maternal consumption of alcohol, but do not meet the definition of FAS have been variously labelled as fetal alcohol effect (FAE), and partial fetal alcohol effect (pFAE). More recent medical literature has classified the spectrum of disorders in this category as alcohol related neurodevelopmental defects (ARND) or "atypical FAS". For example Rachel Greenbaum, argues for the use of ARND in "Fetal Alcohol Spectrum Disorder — New Diagnostic Initiatives"

FAS/ARND may be largely unrecognized by the courts, contributing to inappropriate sentences for many suffering from fetal alcohol related disorders. Where the courts recognize the condition, there is a great degree of variation as to how it should be taken into account. Some courts do not acknowledge the presence of FAS/ARND as deserving of any special consideration, others may simply recognize it as one of several mitigating and aggravating factors and, in the opinion of the authors, fortunately, there are a growing number of courts that recognize that an offender with FAS/ARND should not to be treated like typical offenders. Their FAS/ARND diagnosis calls for specific attention to be given to the disorder and for sentencing to reflect the need for rehabilitation and treatment, addressing therapeutic needs rather than simply focusing on punishment and deterrence.

Courts are becoming increasingly aware of FAS/ARND and there is a line of authority concerned with the development of specific legal principles that are exclusively applicable to the sentencing of offenders with such a condition. However, the courts that take into account the specific and unique needs of an offender with FAS/ARND face challenges and barriers because of the lack of cooperation and resources in the correctional system to accommodate and treat offenders with FAS/ARND.

This paper will consider the jurisprudence in this area and describe how traditional sentencing principles are seen to be inappropriate and are rejected in favor of a sentencing approach that is sensitive to the unique circumstances of offenders with FAS/ARND. Beginning with an overview of the nature of FAS/ARND and its prevalence in the criminal justice system, we then examine the case law involving the sentencing of offenders with this condition and identify emerging sentencing principles and issues of concern. In particular, we discuss the problems identified by a number of judges who are prevented from being able to fashion appropriate sentences for offenders afflicted with FAS/ARND. Some of the problems with the initial assessment of FAS/ARND and of the failure of the existing corrections system to provide appropriate sentencing options for offenders with FAS/ARND have also given rise to various challenges based on *Charter* and potential human rights violations. Finally, we examine some of the responses to these problems and we offer a few suggestions for reform.

The Nature of FAS/ARND

David Trott is not alone. Using the Statistics Canada annual births and birth rate data and applying the US factor of 1.9 children born with FAS per 1000 live births³ one can estimate that 3,177 children with FAS came into the world in Canada

(2002) 7 Paediatric Child Health 139, whereas the Canadian Paediatric Society in "Fetal Alcohol Syndrome" (2002) 7 Paediatric Child Health 161, prefers to use the term "atypical FAS" to describe this category. For the purposes of this paper, the authors will use the term ARND to describe this category because it seems to be the most widely used term for the moment.

³Ernest L. Abel, *Fetal Alcohol Syndrome* (Ordell, NJ: Medical Economics Books, 1990) at 31 [Abel].

since July 1st, 1997 alone.⁴ It is not surprising that it has been identified that fetal exposure to alcohol is one of the leading causes of mental retardation in Canada.⁵ The mother's consumption and exposure of the fetus to alcohol may lead to organic impairment of the fetus⁶ causing brain damage and severe long-term effects.⁷ FAS is one form of alcohol related birth defects that subsumes a number of specific abnormalities in children.

For a positive diagnosis of FAS to be made, three essential traits must be present. They are:

- Growth retardation (prenatal and postnatal growth retardation, weight, length, and/or head circumference less than the tenth percentile, when corrected for gestational age).

⁴ Statistics Canada, *Births and Birth Rate* (Ottawa: Statistics Canada, 2003) product no. 91-213-XIB, table 051-001.

⁵ See Chis Famy, Ann Streissguth & Alan Unis, "Mental Illness in Adults with Fetal Alcohol Syndrome or Fetal Alcohol Effects" (1998) 155 *Am. J. Psychiatry* 552 at 552. See also *R. v. Abou*, [1995] B.C.J. No. 1096 (Prov. Ct.)(QL)[*Abou*] at para. 12, where the court described the prevalence of FAS in Canada as follows:

We have now come to understand that fetal exposure to alcohol is the leading cause of mental retardation in Canada. Moreover, fetal exposure to alcohol causes actual brain damage and the long term effects of fetal exposure to alcohol are more severe than those of other drugs, including heroin and cocaine.

⁶ Previous studies indicate only a small percentage of alcoholics have FAS children according to Abel, *supra* note 3 at 89-90. Citing R.J. Sokol, S.I. Miller & G. Reed's findings found in "Alcohol Abuse During Pregnancy: An Epidemiologic Study" (1980) 4 *Alcoholism: Clinical and Experimental Research* 135, where only 2.5% of pregnant abusive drinkers gave birth to children with FAS in a group of 204 women, Abel contends that if the chronic alcoholic women continue to drink through their pregnancy and the amounts the women in the studies drink is relatively equal, we should expect a much higher incidence of FAS births. The fact that the numbers are not higher suggests that some factor or factors in addition to chronic alcohol intake render some women more at risk for FAS/ARND than others.

In a later study Sokol found four significant predictive risk factors for FAS: black racial background, high parity, percentage of drinking days and positive Michigan Alcoholism Screening Test scores. Without any of these risk factors present, the likelihood of a child having FAS was 2% however, in the presence of all four there was a probability of 85.2% that the child would have FAS as described by R.J. Sokol, J. Ager, S. Martier, S. Debanne C. Ernhart, J. Kuzma & S.I. Miller in their article, "Significant Determinants of Susceptibility to Alcohol Teratogenicity" (1986) 477 *Annals of The New York Academy of Sciences* 87.

⁷ In an attempt to determine the physical and mental manifestations of the syndrome in adolescents and adults, Ann Pytkowicz Streissguth *et al.*, in "Fetal Alcohol Syndrome in Adolescents and Adults" (1991) 265:15 *Journal of American Medical Association* 1961 at 1967 [*Pytkowicz Streissguth*], conducted clinical trials on 61 individuals which confirmed what many in this field already suspected: the developmental and cognitive handicaps persisted as long in life as these patients had been studied and that individuals with FAS demonstrated extreme difficulties with abstractions like time and space, cause and effect, and generalizing from one situation to another. The severity of these deficits was often masked by superficial verbal skills and made even more difficult to recognize since the faces of the affected individuals became normalized as they aged to the point that early childhood photographs were seen as crucial in confirming the diagnosis. Pytkowicz Streissguth and her colleagues concluded that "Fetal alcohol syndrome is not just a childhood disorder. There is a predictable, long-term progression of the disorder into adulthood in which maladaptive behaviours present the greatest challenge to treatment. Gestational exposure to alcohol can cause a wide spectrum of disabilities that have *lifelong physical, mental and behavioural implications.*" [emphasis added].

- Characteristic facial features of at least two of the three following signs: microcephaly (head circumference less than the third percentile), Microphthalmia and/or short palpebral fissures, and a poorly developed philtrum, thin upper lip, and a flattening of the maxillary area.
- Damage to the central nervous system, resulting in neurological disorders, developmental delays, behavioural dysfunction and learning disabilities (signs of neurological abnormality, developmental delay, or intellectual impairment, e.g., mental retardation).⁸

If all three criteria cannot be met, the Fetal Alcohol Study Group of the Research Society of Alcoholism originally proposed that the term *possible fetal alcohol effects* be used for characteristics suspected of being related to prenatal alcohol exposure.⁹ This category has been broadened, making *alcohol related neurodevelopmental disorders* (ARND) the catchall category recognizing a fetus that has been exposed to alcohol but does not show all of the diagnostic features. Such children will have partial FAS phenotype but will not have all three of the features to warrant a firm diagnosis of FAS or there is inadequate medical history available to render a firm diagnosis.¹⁰ The fact that an individual has been diagnosed with ARND does not necessarily mean that his/her disability is less of a problem than that of a person diagnosed with FAS. A person diagnosed with ARND may have as severe or worse medical/behaviour problems than someone diagnosed with FAS.¹¹ This reality is compounded by the fact that it is often these very same individuals who slip through support service cracks because of their lack of visibility and their often typical facial appearance.

Without the obvious physical manifestation of the facial dysmorphism or confirmation from the birth mother of prenatal alcohol consumption it is difficult to diagnose FAS. 70 to 90% of the people with ARND have normal looking faces, normal physical development and normal scores on intelligence test. However, they may be profoundly compromised. They may be more cognitively challenged than those with FAS.¹²

Often it is these individuals who go unrecognized. Trueman J. in *R. v. Gray* speaks directly to this issue stating:

⁸For a useful discussion of the criteria of FAS and ARND see Julianne Conry & Diane Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: British Columbia Fetal Alcohol Syndrome Resource Society, 2000) at 8-14. This book is an excellent resource for legal professionals in understanding the impact of the criminal justice system on offenders with FAS.

⁹H.L. Rosett, "A Clinical Perspective of the Fetal Alcohol Syndrome" (1980) 4 *Alcoholism: Clinical and Experimental Research* 119.

¹⁰Fred J. Boland, Rebecca Burrill, Michelle Duwyn & Jennifer Karp, "Fetal Alcohol Syndrome: Implications for Correctional Service" (July, 1998), online: <<http://canada.gc.ca/>> at 9 [Boland].

¹¹*S.L.N. (Re)*, [1998] S.J. No. 709 (Youth Ct.) (QL) at para. 20.

¹²*R. v. Gray*, [2002] B.C.J. No. 428 (Prov. Ct.) (QL) [Gray] at para. 62.

Lawyers and Judges recognise mental illness and visible handicaps...[but] because [individuals with ARND] blend in, no one accommodates their brain injury because they are presumed to be competent. They are held to a higher standard than those with obvious developmental delays, facial dysmorphology, and mental retardation. Recognising something is absent is far more difficult than recognising something is present.¹³

Streissguth, *et al.*, supports Judge Trueman's contentions in stating, "subjects with FAE were somewhat more likely than those with FAS to commit crimes — possibly because more severely affected individuals receive more care and supervision."¹⁴ Within the justice system legally trained people are not typically able to recognize individuals with FAS/ARND particularly since the characteristics are often masked or subtle in adults.¹⁵ In the *R. v. Steeves* case, a police officer visited the defendant's home and suggested to his step parents that the accused might be suffering from FAS. It was only this particular officer's familiarity with the condition and the young man's supportive family that led to his eventual diagnosis.¹⁶ It must be assumed that a vast majority of the ARND victims go unrecognized by the courts.

The spectrum of FAS/ARND diagnosis creates a situation where a disability is very identifiable at one end of the spectrum and on the other, is often unnoticeable. Often the FAS/ARND manifestations are not obvious due to other individual dynamics and it must be remembered that this condition is not just simply a medical condition brought about by a mother who has drunk alcohol during pregnancy. "FAS is therefore not simply about alcohol abuse. It is a complex issue rooted in the underlying social and economic conditions that influence all aspects of maternal and child health."¹⁷ Other factors increase the risk of developing the condition such as prenatal health, nutrition, poverty, tobacco use, socioeconomic factors and, in the case of Aboriginal offenders, the intergenerational effects of colonization.¹⁸

¹³ *Ibid.* at para. 33.

¹⁴ A.P. Streissguth, H.M. Barr, J. Kogan & F.L. Bookstein, "Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)" (Report to the Centres for Disease Control and Prevention, August, 1996) [unpublished] at 5.

¹⁵ As mentioned previously, the physical characteristics of FAS/ARND may be pronounced in childhood but often become so normalized that early childhood photographs are needed to confirm the diagnosis of FAS/ARND. Additionally the severity of the individual's disability is often masked by superficial verbal skills. See Pytkowicz *Streissguth*, *supra* note 7 at 1966.

¹⁶ Boland, *supra* note 10.

¹⁷ Paul Pallan, *Fetal Alcohol Syndrome: A Call for Action in B.C.* (Vancouver: The Children's Commission, 2001) at 9 [Pallan].

¹⁸ Colonization is a process similar to colonialism encompassing the subjugation of the one culture by another. This subjugation is accomplished through the geological intrusion, the destruction of social, spiritual and cultural systems and relations, the imposition of external political control, the creation of economic dependency and the provision of lower quality health and social services within an environment of racist interactions. For a more complete look at this Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas* (Toronto: Douglas & McIntyre, 1991) is an excellent source.

A disproportionate number of persons with FAS/ARND are of Aboriginal heritage. Of the 40 offenders with FAS/ARND found in court cases identified in this paper, 31 of them were confirmed to be Aboriginal offenders, 5 non-Aboriginal and 6 unknown. Using only the reduced sample of known origin, over 86% of the cases reported of offenders with FAS/ARND involved Aboriginal offenders. This figure is consistent with the research reported in the literature that states that the proportion of Aboriginal persons with FAS/ARND is 10 times the national rate.¹⁹ Judge Trueman cautions us not to jump to conclusions based on the statistics because they may be misleading. FAS/ARND are not native problems, they are problems encountered when any woman consumes alcohol during pregnancy and Judge Trueman disagrees with the widely held belief that FAS and ARND are endemic in the native population. Instead she attributes the higher percentage to the poverty found in native populations.²⁰

The reasons for the link between women of low socioeconomic status and FAS/ARND are not completely understood. Russell has postulated several possibilities, including;

- a higher conception rate among alcoholics of low socioeconomic status than among alcoholics of high socioeconomic status;
- an interaction between alcohol and certain, as yet unknown, risk factors prevalent among lower socioeconomic status women;
- a greater degree of problem drinking among lower socioeconomic status women and, therefore, a bias in looking for FAS among their children; or
- a bias in recognizing facial features among certain racial groups.²¹

It is important that authorities be cognizant of these factors influencing the rates of FAS/ARND because it will help to explain why in some Aboriginal

¹⁹Canada, Correctional Service of Canada, *Fetal Alcohol Syndrome/effects (FAS/E) and Aboriginal People: Towards a Unified National Strategy*, Issue 3 by D. Phillips (Ottawa: Correctional Service of Canada, 1999) at 7. This report contains a wealth of recommendations to address the shortcomings of the existing criminal justice system and supports many of the calls for reform advocated by the judiciary studied in our paper. In their report, Boland, *supra* note 10, cautions the reader that it is important not to generalize about such statistics as there are important distinctions between different Aboriginal communities in Canada. A report by Caroline Tait, *Fetal Alcohol Syndrome among Canadian Aboriginal Peoples: Review and Analysis of the Intergenerational Links to Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2002) [unpublished][Tait] at 117, reviewed the existing studies of FAS/ARND in Canada and was critical of their findings due to problems with methodology and sampling. She concludes that while FAS/ARND is a serious health problem, "Aboriginal peoples should be critical of claims that suggest Aboriginal peoples are at a greater risk, and should be cautious in applying prevalence rates found in particular high risk communities to all Aboriginal groups."

²⁰*R. v. J.H.*, [2002] B.C.J. No. 313 (Prov. Ct.) (QL) [J.H.] at para. 63.

²¹M. Russell, "The Impact of Alcohol-related Birth Defects (ARBD) on New York State" (1980) 2 *Neurobehavioral Toxicology* 277.

communities, there may be a significantly high incidence of FAS/ARND afflicted individuals.²² The impact of colonization of Aboriginal peoples is no doubt directly related to the high incidence of FAS/ARND among such communities.²³

Adding to these extremely complex social, cultural, historical and personal dynamics, the social stigmatization factor raised in *R. v. Abou* often hinders diagnosis as well.²⁴ Women do not want to talk about drinking alcohol during pregnancy. Studies of alcohol consumption during pregnancy are typically based on self-reported consumption rates which are known to underestimate the actual consumption levels. Comparison of objective sales data demonstrates that self-reported alcohol use is consistently lower than the sales data suggests.²⁵ To add to the already lower self-reporting, it is possible that the increased awareness of the risk of alcohol use during pregnancy can lead pregnant women to even further under report their alcohol use.²⁶ Because experts are not able to determine what level of alcohol consumption during pregnancy places the fetus at risk, our society judges pregnant women who consume alcohol harshly.²⁷

The result is that a large number of individuals suffering from this organic brain disease are doing so in isolation: without recognition, diagnosis or support. Those trained in legal matters are not able or equipped to recognize, for the most part, the manifestations of this condition when it comes before them in either their legal practice or the courtroom. There are informed pockets of expertise to be found in the courts in British Columbia, Saskatchewan and the Yukon. These courts are supported primarily by the clinical expertise found in Doctors Looke, Conry and Fast in Vancouver. Outside of these locations, there is very little acknowledgement of the implications this condition may have on judicial decisions. American case law indicates that although the syndrome has been forwarded as a mitigating factor it has not been considered to warrant serious consideration.²⁸

²² Aboriginal offenders with FAS pose unique questions and issues. Although a number of studies have concluded that the incidence of FAS/ARND among Aboriginal peoples is greater than the general population, one recent study has reviewed this literature and questions such conclusions in light of the problems with the research methodology and lack of sufficient comparison data in the non-Aboriginal community. See Tait, *supra* note 18. This report provides an excellent overview of FAS/ARND and Aboriginal people. It contains a thorough analysis of the issues and provides an important list of “best practices” for improving the lives of Aboriginal women from Aboriginal communities that would most effectively address and prevent FAS/ARND pregnancies.

²³ *Supra* note 18 at 36.

²⁴ *Supra* note 5 at para. 29.

²⁵ P.F. Smith, P.L. Remington, D.F. Williamson & R.F. Anda, “Alcohol Consumption and Problem Drinking: Comparison of Sales Data with Survey of Self-reported Alcohol Use in 21 States” (1990) 80 *American Journal of Public Health* 309.

²⁶ Mary Serdula, David F. Williamson, Juliette S. Kendrick, Robert F. Anda & Tim Byers, “Trends in Alcohol Consumption by Pregnant Women: 1985 Through 1988” (1991) 265:7 *Journal of the American Medical Association* 876 at 879.

²⁷ Ernest L. Able, *Fetal Alcohol Syndrome and Fetal Alcohol Effects* (New York; London: Plenum Press, 1984) at 55.

²⁸ See for example, Michael Mears, “Fetal Alcohol Syndrome Evidence as Mitigation in Death Penalty

It is evident that many complex and interrelated dynamics play a role in the development and socialization of individuals with FAS/ARND, making it difficult to predict the individual's future. However there has been a growing recognition that individuals with FAS/ARND often come to the attention of law enforcement. It seems that the cognitive, social and behavioural problems associated with individuals with FAS/ARND frequently precipitate involvement with the criminal justice system. Streissguth and her colleagues recognized conduct problems, such as lying and defiance characterized a number of the FAS subjects in their 1991 study of adolescents and adults.²⁹ There is substantial evidence suggesting a link between FAS and crime.³⁰ Streissguth followed 415 individuals with FAS or ARND and determined the number of subjects who experienced trouble with the law. The researchers found that 14% of subjects between the ages of 6 and 11, 61% of adolescents and 58% of adults had run afoul of the law at least once. Overall 60% of FAS/ARND subjects age 12 or over had been in trouble with the authorities, having been either charged with a crime or convicted of an offense.³¹

In addition to the already complex nature and expression of the condition some have recognized that there seems to be a correlation between FAS/ARND and crimes of a sexual nature.³² About 50% of FAS/FAE subjects age 12 or over had exhibited inappropriate sexual behaviour, with sexual misbehaviour being most common among subjects who had themselves been abused.³³ Rather than link the

Cases," online:<<http://www.gidc.com>> and also *Foell v. State*, 2001 WL 1658885 (Iowa Ct. Appeals), *Lambert v. Blodgett*, 248 F. Supp. 2d 988 (E.D. Wa. 2003) and *Dillbeck v. State*, 643 So. 2d 1027 (Fla).

²⁹ *Supra* note 7 at 1966.

³⁰ Judge Henning gives a laudable summary of the effect of this syndrome on an individual's abilities, *R. v. R.C.P.*, [2000] S.J. No. 373 (Prov. Ct.) at para. 14, stating, "the effects include mental retardation, learning disabilities, motor skills impairment, seizures, attention deficit disorder and hyperactivity. The end result is that persons suffering from this syndrome do not have normal capacity to learn from experience, and retain learning. This includes appreciation of consequences both for the person with the syndrome and for persons affected by behaviour. There are also numerous ancillary effects of these deficiencies including mental disorders such as depression, panic disorder, hallucination, and suicidal tendency. Social relationships and functioning which may be low due to environmental factors are worsened by lack of insight and learning ability. Normal ability to process information is not present and consequently planning, perception and appreciation of situations is distorted. Socially unacceptable and criminal behaviours may result without any true appreciation of why such behaviour is not acceptable. The ordinary connection between negative consequences of unacceptable behaviour and the behaviour does not exist, and so deterrent sentencing is wholly ineffective." See also, Boland, *supra* note 10 at Part 3 and Conry & Fast, *supra* note 8 at 1-4. For an excellent summary of the medical literature see the decision of Judge Lilles of the Yukon Territorial Court in *R. v. T.J.*, [1999] Y.J. No. 57 (Terr. Ct.) (QL)[T.J.].

³¹ "Alcohol's Legacy: High Crime Rate Seen in FAS/FAE" (1997) 3:1 *Crime Times* 5, online: Washington Department of Education <<http://depts.washington.edu/fadu/>>.

³² This is supported by FAS/ARND caselaw where many of the cases describe the offender's history of abuse and neglect, see *R. v. Sam*, [1993] Y.J. No. 112 (Terr. Ct.) (QL) [*Sam*], *R. v. Clement*, [1994] B.C.J. No. 1247 (Prov. Ct.) (QL) [*Clement*], *J.H.*, *supra* note 19, *R. v. T.J.*, *supra* note 30, *R. v. Keewatin* (1999), 254 A.R. 159, (*sub nom. R. v. D.E.K.*), [1999] A.J. No. 1357 (Prov. Ct. (Crim. Div.)) (QL) [cited to A.R.], *R. v. D.G.O.* (2001), 46 C.R. (5th) 256 (Ont. Ct. J.), *R. v. Suarak* (2000), 199 Nfld. & P.E.I.R. 119 (Nfld. S.C. (T.D.)) [*Suarak*], and *R. v. S.R.J.*, [2001] Y.J. No. 123 (S.C.) (QL).

³³ According to the report by Boland, *supra* note 10, "[b]eing a victim of abuse or neglect seems to be fairly common in these children... 86% of the patients had been neglected, 52% had a history of physical

inappropriate sexual expression to the abuse or victimization history of the FAS/ARND individual, Judge Stuart suggests that this apparent propensity for sexual misbehaviour may be due to physiological aspects of FAS instead — resulting from lesions in the left frontal lobe, caused by the brain damage associated with FAS. He further postulates that this condition creates a general lack of ability to exercise control over impulses causing radical mood swings, poor impulse control, and an ability to inhibit immediate gratification of impulses.³⁴ Fraser, J. describes a theory of how FAS, sexual urges and impulsive behaviour interact:

Herein lies the problem relating to the commission of sexual offences. Having a mature body beyond his intellect, he has urges for sexual gratification which leads to impulsiveness and unpremeditated behaviour without using caution and with risk taking. This is followed by non-comprehension that the behaviour was inappropriate.³⁵

Regardless of which school of thought one wishes to align themselves with the fact remains that there are a considerable number of individuals with FAS/ARND who are coming in conflict with the Canadian court system and those in the legal profession are not trained to deal with this.

The Canadian judicial system, for the most part, is uninformed, misinformed and ill prepared to deal with the challenge these individuals present, particularly when sentencing offenders with FAS/ARND. Given the complexity of the medical, socioeconomic and environmental interactions surrounding FAS/ARND clearly this is not something which should go unrecognized in the court. The present manner of sentencing offenders with FAS/ARND raise a number of important and related matters:

- The manner by which the Canadian criminal justice system deals with FAS/ARND offenders presently.
- Emerging sentencing principles which allow for the criminal justice system to effectively and fairly deal with FAS/ARND offenders.
- Are courts able to fashion sentences that include a therapeutic element?

abuse and 35% had a history of sexual abuse. As well, most of the subjects did not live with either biological parent (77%), 26% were in foster homes, 21% were with relatives, 16% were adopted and 9% were in group homes or institutions.” Additionally A. P. Streissguth, H. M. Barr, J. Kogan, & F. L. Bookstein in their report to the Centers for Disease Control and Prevention entitled, “Understanding the occurrence of secondary disabilities in clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)” (August 1996) [unpublished] provides a solid discussion of the secondary disabilities often associated with FAS/ARND.

³⁴ *Sam*, *supra* note 32 at para. 9.

³⁵ *Keewatin*, *supra* note 32 at 161.

The Canadian Criminal Justice System and FAS/ARND Offenders

Despite the presence of recognized FAS/ARND individuals involved in the criminal justice system, the courts have been inconsistent in responding to the unique needs of these offenders. Some courts do not give significance to FAS/ARND as a factor in sentencing. This lack of attention is likely attributed to a lack of understanding and knowledge about the nature of FAS/ARND. It is only relatively recently that a minority of courts have become informed about the nature of the condition. Indeed, some judges have gone to great lengths to understand the impact of FAS/ARND and to sentence such offenders in a way that is just and meaningful to the offender and society. However, they have been met with frustration in designing a sentence that imposes elements of treatment specific to the condition because the existing provincial and federal corrections systems do not have appropriate services or programs available.³⁶

Part of the lack of understanding and knowledge of the syndrome stems from the fact that fetal alcohol syndrome is a relatively recent phenomenon. It was not until 1968 when a team of French researchers conducting a study of 127 children of alcoholic parents concluded that these children displayed a distinctive pattern of abnormalities which Lemoine considered distinctive enough that a diagnosis of maternal alcoholism could be made almost entirely from the physical appearance of the offspring.³⁷ Five years later that pattern of disabilities came to the attention of medical professionals in North America when Jones, *et al.* studied eight unrelated children all born to mothers who were chronic alcoholics and established that "maternal alcoholism can cause serious aberrant fetal development."³⁸ Later that same year, Jones and Smith followed up their original research with a second study confirming the association between maternal alcoholism and faulty development

³⁶Judge Turpel-Lafond in *R. v. L.E.K.* (2000), 153 C.C.C. (3d) 250, 203 Sask. R. 273 (C.A.) [*L.E.K.* cited to C.C.C.] frustrated perhaps at the lack of FAS/ARND specific services, rendered a very detailed and specific probation order of what was to be undertaken with reference to the offender. Judge Turpel-Lafond was concerned with a young offender with FAS that had committed an unusual number of criminal offences within a short time period. Given her earlier frustrations with probation authorities, she created a highly individualized probation order which was to include an in-patient treatment centre with an Aboriginal focus, special educational supports, special supports in terms of residence, a specially trained FAS youth worker and a comprehensive case plan.

This case was appealed to the Saskatchewan Court of Appeal on the issue of whether the probation order contained terms that were beyond the jurisdiction of the Youth Court Judge to impose. Empathy aside, the Saskatchewan Court of Appeal determined that Judge Turpel-Lafond had exceeded her authority and the Crown was successful at appeal. The Court was nonetheless empathetic to her concerns and frustrations, recognizing "She was attempting to ensure that the young offender who suffers from fetal alcohol syndrome (FAS) would receive the kind of treatment and post-disposition care most appropriate to permit him to function in society."

³⁷P. Lemoine, H. Harousseau, J.P. Borteryu & J.C. Menuet, "Les enfants de parents alcooliques: Anomalies Observées à propos de 127 cas" (1968) 21 *Quest Medical* 476.

³⁸Kenneth L. Jones, David W. Smith, Christy N. Ulleland & Ann Pytkowicz Streissguth, "Patterns of Malformation in Offspring of Chronic Alcoholic Mothers" (1973) 1 *Lancet* 1267 at 1271.

of subsequent offspring and first coined the term *fetal alcohol syndrome*.³⁹ In the next nine years following Jones and Smith's original research, a total of 1,438 articles were written and published on fetal alcohol effects,⁴⁰ however, outside of the medical and prenatal community the awareness remained surprisingly low. Judge Barnett in *R. v. Baptiste* noted that society has been "incredibly remiss in failing to understand the damage done by drinking during pregnancy"⁴¹ and in 1986 a British Columbia judge held that a court should not take judicial notice of whether an offender has FAS.⁴² There are still many barriers to overcome regarding FAS/ARND offenders.⁴³

Notwithstanding the clear message in *R. v. Mitchell*⁴⁴ that sentencing of offenders with FAS/ARND requires an emphasis on rehabilitation over traditional principles of denunciation and deterrence, some courts have simply treated the existence of FAS/ARND as one of several mitigating or aggravating factors to be weighed together in fashioning the appropriate sentence.⁴⁵ There are some decisions which suggest a more compassionate and informed body of knowledge exists. In Judge Stuart's response in *R. v. Sam* — an offender guilty of sexual assault,⁴⁶ he contextualized the sentencing based on considerable knowledge and awareness of the medical condition of FAS. In applying this knowledge, Judge Stuart attributes the inappropriate sexual behaviour of FAS/ARND afflicted offenders to the neurological/psychological dysfunction caused by brain damage, in particular, the inability to inhibit immediate gratification or impulses.⁴⁷ The Court emphasizes the need to make a distinction between normal offenders and those who have FAS/ARND, suggesting jail may be completely inappropriate for FAS/ARND offenders. The following extract from the case illustrates the dilemma that courts face when legal experts are placed in the position of dealing with complex medical cases well beyond their training and expertise in substantive procedural and evidentiary law.

The person who stands before this Court for the terrible crime is not conclusively a despicable criminal who must be severely punished, but

³⁹ Kenneth L. Jones & David W. Smith, "Recognition of Fetal Alcohol Syndrome in Early Infancy" (1973) 2 *Lancet* 999.

⁴⁰ Abel, *supra* note 27 at 25.

⁴¹ [1992] B.C.J. No. 2512 (Prov. Ct.) (QL)[*Baptiste*] at para. 9.

⁴² *Joe v. Y.T.* (1986), 5 B.C.L.R. (2d) 267 (S.C.).

⁴³ In *Gray*, *supra* note 12, the court suspected the accused had FAS/ARND and felt it was necessary to have an assessment undertaken by qualified medical personnel to confirm this suspicion. Unfortunately, the offender was not able to get one on his own because provincially funded health care did not fund such assessments. The court found that it had to rely on an order pursuant to s. 672.12(1) of the *Criminal Code* to order an assessment be undertaken.

⁴⁴ (1990), 54 C.C.C. (3d) 132 (B.C.C.A.) [*Mitchell*].

⁴⁵ *Suarak*, *supra* note 32.

⁴⁶ *Sam*, *supra* note 32, and also the decisions of Judge O'Regan in *Suarak*, *supra* note 32, or Judge Vertes in *R. v. J.H.*, [1998] N.W.T.J. No. 163 (S.C.) (QL) [*J.H. 1998*], not to be confused with the Judge Trueman decision of the same name mentioned previously, *supra* note 20.

⁴⁷ *Sam*, *supra* note 32 at para. 9.

a mentally retarded young man whose brain damage, abusive childhood, and inappropriate medical attention is as much the criminal as he is... [T]he most persuasive voice in this case are the medical experts whose expertise, much more than ours, is central to what can be done. The sentence of this Court, to maximize the chances of protecting the public, must significantly be moulded by medical recommendations. These recommendations focus on three principle aspects: a brief period of incarceration; a comprehensive, strict, maximum treatment plan, backed by court sanctions; and a regime of medication.⁴⁸

Sam is reflective of a growing sensitivity by the judiciary of the need to treat FAS/ARND offenders in a manner whereby the public interests of a safe community are promoted by the proper treatment of FAS/ARND offenders. Treatment that addresses the specific symptoms of FAS/ARND is necessary to ensure the proper rehabilitation of such offenders. In this way, the public will be safer in the long run.

To summarize we can conclude that some courts have generally:

- ignored the significance of FAS/ARND;
- some have accepted FAS/ARND as one of several mitigating factors, but otherwise not deserving of further consideration or deserving of an entirely different sentencing approach;
- consider that due to the nature of the crime, other sentencing factors such as safety for the public outweigh any other sentencing options; or
- in the unusual case of *R v. J.* and perhaps to some extent in *R. v. J. H.*, some courts have treated FAS/ARND as an aggravating factor.

There are a growing number of cases that reflect an informed and knowledgeable judiciary about the nature of FAS/ARND and have consequently responded by modifying the traditional sentencing approach to address the unique circumstances of cases involving FAS/ARND offenders.

Emerging Sentencing Principles

There is a growing recognition that traditional judicial approaches fail to reduce the likelihood of certain individuals reoffending, particularly in the areas of substance abuse, domestic violence, certain kinds of criminality, child abuse and neglect, and mental illness.⁴⁹ Traditional interventions have not been effective in bringing the reoccurrence of these problems to a halt, a consequence which many attribute to the fact that, for the most part, the traditional judicial model addresses

⁴⁸ *Ibid.* at paras. 10-12.

⁴⁹ Bruce J. Winick & David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, NC: Carolina Academic Press, 2003) at 5.

the symptoms, but not the underlying problem. There has been a movement, particularly in the United States, whereby some courts have come to realize that certain offenders react and make decisions that are largely a function of their disability. FAS/ARND offenders are “prone to becoming frustrated and to then over-reacting in impulsive, violent ways. It is not merely willful misbehaviour by [someone] who refuses to mend [their] ways.”⁵⁰ The 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. This is not to say that such offenders cannot be helped. With the proper treatment and care, many behavioural characteristics can be managed quite effectively. Recognizing the impeded abilities of an individual with FAS/ARND to understand cause and effect the more sophisticated concepts of deterrence and punishment are, for the most part, lost to them.

Given our understanding of the nature of this disability, Judge Barnett was not far off in claiming that it is, “simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person.”⁵¹ Consequently, in sentencing such an offender, the court should focus on two essential factors; 1) the need to provide protection to the public and 2) the provision of a realistic framework for the offender’s rehabilitation and personal security.

There is currently some judicial recognition at the trial level that more traditional judicial approaches such as deterrence are not appropriate in the sentencing of offenders with FAS/ARND. 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. This view of the irrelevance of deterrence is not entirely settled and there is some debate as to the extent to which rehabilitation principles should oust concerns for deterrence.⁵² Some hold that the sentencing judge should not tie the principle of denunciation to the crime, but rather to the blameworthiness of the criminal,⁵³ thereby creating a situation where the

⁵⁰ *Abou*, *supra* note 5 at para. 13.

⁵¹ *Ibid.* at para. 23.

⁵² *R. v. Sinclair* (1997), 10 C.R. (5th) 316, (1997), 118 Man. R. (2d) 249 (C.A.) [*Sinclair* cited to C.R.] and also *R. v. Lambert* (1996), 75 B.C.A.C. 227.

⁵³ See also *R. v. Charlette* (1993), 88 Man. R. (2d) 13 (C.A.) [*Charlette*]. In this case, a 17 year old was charged with the second degree murder of a 2 year old. For no apparent motive and while intoxicated, the accused smashed a rock into the child’s head. The Court acknowledged that the accused had FAS, but it was simply treated as one of several mitigating and aggravating factors, although in the analysis of the case, it did not appear to have been taken into account in sentencing. There was only a passing reference to rehabilitation by the Court. The Court clearly distanced itself from having any responsibility by stating that “[w]e can only hope that the prison authorities will offer him courses which will help to habilitate him for life on his release”. Unfortunately, as this paper demonstrates below, prison officials have not and continue to not provide any programs and services to meet the specific needs of FAS/ARND offenders. Boland, *supra* note 10 makes a number of important recommendations for Corrections Canada in terms of providing relevant rehabilitation treatment programs and services for such offenders.

principle of denunciation should be tailored by the degree to which the particular offender's coping mechanisms are below the norm. Recognizing that denunciation is still a factor to consider, Justice Huband, dissenting in *R. v. Sinclair*, held that the trial judge placed inordinate emphasis on the need for deterrence.⁵⁴ This dissent places more emphasis on the totality of the offender's incompetence and the incompetence of the child welfare authorities as opposed to any specific reference to her FAS disability. Huband J's comments are noteworthy, however, because they clearly demonstrate the need of courts to be realistic about the application of principles of deterrence to offenders who are seen as incapable of meeting society's expectations or modifying their behaviour in response to the threat of penalty. There is no value in deterrence if the offender cannot connect the punishment of the sentence to the crime.⁵⁵

Other more recent trial courts have been much more decisive about the irrelevance of the principle of deterrence to offenders with FAS/ARND. *R. v. E.L.J.*⁵⁶ describes a self fulfilling prophecy which is played out time and time again with FAS/ARND offenders in a psychological report. The hopelessness of the future of this young person resonates in the report's predictions:

...[that E. will have]...a series of crisis in the future. Unfortunately, [E.'s] FAS with resultant poor verbal [problem] solving ability, impulsivity, poor frustration tolerance, combined with his oppositional and defiant character, will leave him vulnerable to finding himself in situations which frustrate or anger him. As [E.] is not in good control over his behaviour, he will during some times of frustration, overreact with anger. When angered to such an extent, he will...lash out [first] against others, and if this is not possible, he will begin to direct his aggression towards himself, in the form of suicidal threats, gestures, or an actual attempt. The prediction for the long range is that he will have a series of crises in the future, and during these crises may present a risk to self or others.

...[E.] has few of the internal mechanisms and skills necessary to supervise his own behaviour which is consistent with other young person's who have been diagnosed with FAS.⁵⁷

It is one thing when traditional sentencing principles are simply not effective but it is quite another matter when these interventions cause harm. This is similar to the concept of iatrogenics in medicine — the idea that medical intervention can

⁵⁴ *Sinclair*, *supra* note 52 at paras. 13-14.

⁵⁵ Other courts and judiciary have recognised that deterrence is ineffective with FAS/ARND offenders, see also comments by Judge Trueman in *R. v. C.J.M.*, [2000] B.C.J. No. 2714 (Prov. Ct.), Judge Lenaghan in *R. v. Steeves*, [1998] B.C.J. No. 3135 (Prov. Ct.) and by Judge Turpel-Lafond of the Saskatchewan Youth Court in *R. v. L.(M)*, [2000] S.J. No. 17, and also *Keewatin*, *supra* note 32 at 160.

⁵⁶ [1998] Y.J. No. 19 (Youth Ct.)(QL)[*E.L.J.*].

⁵⁷ *Ibid.* at paras. 6-7.

create disease and ill health. In law the term “jurigenic”⁵⁸ has been coined to refer to the harmful effects of the ordinary judicial system. The continued failure to recognize the impact of FAS/ARND on the individual and the continued incarceration and lack of appropriate alternate sentencing and probation plans can only be seen as jurigenic. Winick and Wexler describe an approach which focuses attention on the traditionally under-appreciated area of the law’s impact on emotional life and psychological well-being and asks that we assess the therapeutic and anti-therapeutic impact of the law which they have termed *therapeutic jurisprudence*.⁵⁹ Legal rules, legal procedures and the roles of lawyers and judges constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences and that we ask whether the law’s antitherapeutic consequences can be reduced, and its therapeutic consequences be enhanced, without subordinating due process or other justice values.⁶⁰ On this basis therapeutic jurisprudence forms the theoretical foundation for problem-solving courts and the use of therapeutic approaches in traditional courts. Problem-solving courts are specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health or substance abuse treatment services. In the United States there are a growing number of these problem-solving courts being established: Drug Treatment Courts, Juvenile Drug Treatment Courts, Dependency Courts, Teen or Youth Courts, Domestic Violence Courts, Mental Health Courts and Re-entry Courts.⁶¹ Recently Canada has established a Mental Health Court in Toronto.

Problem solving courts are an attempt to better respond to the need for courts to achieve healthier outcomes for victims, litigants, defendants and communities while at the same time protecting individual rights. Although these courts are new and continuing to evolve, Berman and Feinblatt⁶² suggest there are certain common elements that distinguish the problem-solving courts from the traditional courts by attempting to:

- use their authority to forge new responses to chronic social, human and legal problems — including problems like family dysfunction, addiction, delinquency and domestic violence — that have proven resistant to conventional situations;
- broaden the focus of legal proceedings to include changing the future behaviour of litigants and ensuring the well-being of communities; and

⁵⁸ Michael A. Town, “Court as Convener and Provider of Therapeutic Justice” (1998) 67 *Revista Juridica U.P.R.* 671.

⁵⁹ *Supra* note 49 at 7.

⁶⁰ David B. Wexler & Bruce J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996).

⁶¹ *Supra* note 49.

⁶² Greg Berman & John Feinblatt, “Problem Solving Courts: A Brief Primer” (2001) 23:2 *Law and Policy* 125.

- make courts more accountable and responsive to the victims, jurors, witnesses, litigants or defendants.⁶³

Although there is only one Mental Health Court in Canada presently, many of these elements resonate in a number of the more informed decisions that we see coming from judiciary who are aware of how inappropriate and ineffective traditional sentences are for persons with FAS/ARND and are attempting to construct fair and just responses within the existing court system.

Are courts able to fashion sentences that include a therapeutic treatment element? Having recognized that “traditional” sentencing principles and approaches are inappropriate for offenders with FAS/ARND, a number of other Canadian courts have seen the need to fashion a sentence that begins from the presumption that positive therapeutic consequences for the offender are just outcomes of the sentencing process.⁶⁴

A number of decisions have attempted to address the unique sentencing issues judges face when confronted with an offender with FAS/ARND.⁶⁵ The British Columbia Court of Appeal has recognized that some offenders have been harmed before birth by alcohol and from the additional misfortune of abuse in childhood and that these individuals cannot realistically be rehabilitated by successive and increased periods of imprisonment.⁶⁶ This court noted that typical probationary procedures where offenders are only required to periodically check in with their probation officer are of little use in cases such as this. Rather, the court said that what is required, “in this and many similar cases, is intensive guidance, encouragement, training and supervision on preferably a daily or frequent basis by a person or persons in whom the accused has confidence.”⁶⁷ Two years later in the same province, Judge Barnett held that the presence of FAS is to be properly regarded as the subject of judicial notice and identified FAS as one of several personal factors related to the offender that would warrant sensitivity and compassion by a sentencing court.⁶⁸

Individuals with FAS/ARND require uniquely structured probation with intense supervision and rehabilitation services in order to break the cycle of criminal

⁶³ Berman, *ibid* at 125-126.

⁶⁴ In *Clement*, *supra* note 32 at para. 16, Judge Barnett noted that the disabilities possessed by the offender would likely make jail a more destructive place and would “cause problems that would outweigh anything good that might be seen as accompanying a gaol term”. He placed the offender on three years probation with specific requirements for psychiatric support, knowing that the community was willing to assist in the supervision of the offender.

⁶⁵ There are a growing number of reported cases that discuss at length various issues and problems in sentencing offenders with FAS/ARND. Several are discussed in this paper and referenced in the table of authorities at the end. In addition, this paper contains a chart in Appendix A which summarizes each decision identified in our research.

⁶⁶ *Mitchell*, *supra* note 44.

⁶⁷ *Ibid.* at para. 20.

⁶⁸ *Baptiste*, *supra* note 41 at para. 11.

activity.⁶⁹ However, the Court of Appeal did not officially order such probationary terms, but rather trusted that the kind of treatment needed would be provided by the relevant probationary services as a result of the opinion of the Court. Importantly, the Court nonetheless signaled that the standard principles of sentencing are not always appropriate for offenders suffering from FAS/ARND. Little did the Court know at the time that reliance on provincial or federal probationary services to provide the kind of intensive supervision and treatment envisioned would in many future cases not be forthcoming.

Although there is a certain amount of awareness, the cases that recognize the impact of FAS/ARND and attempt to develop a therapeutic response are few in number.⁷⁰ There is little consideration of offenders with FAS/ARND having cognitive barriers that prevent them from responding positively to traditional treatment and probationary programs. Nor does the court generally consider that rehabilitative principles of sentencing should prevail over other sentencing principles. In *R. v. Suarak*⁷¹ a case involving a repeat sex offender who was characterized as having a high probability of re-offending, the court placed very little weight on the offenders FAS/ARND disability. This may be more of a function of the court's lack of information and knowledge about FAS/ARND,⁷² rather than holding that the presence of FAS/ARND is not a relevant factor in sentencing. Alternatively, these decisions may reflect a growing, but unarticulated distinction between offenders with FAS/ARND who commit serious criminal offences such as murder or sexual assaults over minor offences.

In the case of major offences, the courts may regard the principle of "protection of society" as outweighing rehabilitation sentencing principles even where the courts are aware of the unique sentencing issues of FAS/ARND offenders. Certainly supporters of the therapeutic justice model are quick to point out that therapeutic jurisprudence does not trump other interests or take priority over important societal values. Rather, therapeutic consequences are merely one cate-

⁶⁹ *Mitchell*, *supra* note 44.

⁷⁰ See *R. v. McLeod*, [1996] Y.J. No. 150 (S.C.)(QL) where the court acknowledges that the offender has FAE, but did not regard it as a mitigating factor, instead the disability is only referred to in a manner of describing the youth before the court. The court notes in paragraph 7 that FAE was "mentioned with respect to these young people, although only in general terms." This indicates a role for defence counsel to do more than simply assert that an offender has FAE. Defence counsel need to educate themselves and the judge about the nature of FAE and how the condition affects the offender before the court. This may require that defence counsel be more pro-active in requesting proper medical assessments before sentencing.

⁷¹ *Supra* note 32.

⁷² For example, the case of *Charlette*, *supra* note 53, reflects the court's lack of understanding of the significance of an offender with FAS in terms of appropriate sentencing. The court notes that the offender has an FAS diagnosis, but does not specifically refer to it when determining sentencing. The case involved second degree murder of a two-year-old child. The court states that the offender suffered from "emotional and mental slowness as a result of fetal alcohol syndrome" but concluded that "having regard to his extreme youth, his unfortunate background... but emphasizing the protection of the public, we are all of the view that the sentence should now be imposed is one of six years' imprisonment."

gory of important factors that must be taken into account. Other equally important factors include individual autonomy, integrity of the fact-finding process, community safety and efficiency and economy.⁷³ The *R. v. J.H.*⁷⁴ decision is representative of this position. A young man was charged with two counts of sexual assault of young children (4 and 5 years old). Although the offender was diagnosed as having FAS, the court held that other factors in the case, such as his diagnosis of pedophilia and the repeat nature of the crime (two days after release from the first charge he assaulted a second child in a more brutal manner requiring hospitalization of the child) require that protection of society be the paramount consideration over rehabilitation considerations.⁷⁵

This concern for public safety principles outweighing rehabilitation principles has in the past, enabled the court to disregard FAS as a mitigating factor in sentencing. Indeed, a British Columbia Youth Court drew a parallel between the condition of FAS and pedophilia such that if anything, FAS offenders should be treated more harshly.⁷⁶ It may be that in some cases, the protection of the public must outweigh rehabilitation of an offender with FAS. Certainly the protection of society must be of paramount importance when structuring criminal sentences. However, for the court to equate FAS offenders as no different from pedophiles demonstrates a profound lack of understanding of the nature of FAS/ARND.⁷⁷

Lack of awareness aside, in some cases, the courts have to recognize the danger posed to society if certain criminals are released on probation or supervised in the community. In these cases, the courts face a real dilemma. The judges know that non-therapeutic jail terms are not the answer, but there are no credible alternatives suitable to such offenders. Thus, in some cases, the judge has no choice but to incarcerate the offender to protect the public and to access appropriate supports for the accused.⁷⁸ Judge Faulkner has remarked on the

⁷³ *Supra* note 60 at xvii.

⁷⁴ *J.H.* 1998, *supra* note 46.

⁷⁵ *Ibid.* at para. 9.

⁷⁶ *R. v. J.*, [1996] B.C.J. No. 2754 (Youth Ct.) (QL) at paras. 4 - 6 where the Judge claimed that "if offenders with FAS commit their offences as a result of impulses that are difficult to control, then they are not legally or morally in a different position from paedophiles. It is my understanding that paedophiles are also governed by impulses that they are unable to control when they molest children. They are often very intelligent people. So, often are offenders with FAS. ... 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."

⁷⁷ This case is different from the majority in that it appears that J is of at least average intelligence, so his FAS has not manifested itself in a learning disability which may account for the attitude of the court. However, as the medical literature explains, other cognitive dysfunctions may exist for offenders with normal I.Qs. See Conry and Fast, *supra* note 8 at 14 and also *Famy*, *supra* note 5 at 553-554, where results indicated individuals with fetal alcohol syndrome or fetal alcohol effects who are of normal intelligence manifested clinically significant mental illness as they matured — particularly elevated levels of alcohol and drug related psychopathology, high rates of major depression and high rates of psychosis were found in the subjects as compared to the normal population.

⁷⁸ In *Re. S.L.N.*, *supra* note 11, Judge Meekma was faced with an application of whether or not to agree to have a 16-year-old accused of second degree murder tried in adult court. It appears from the judgment

inadequacy of the tools provided to deal with such offenders... [W]e simply cannot throw up our hands and do nothing. Neither will we help by labeling FAS and FAE youth as victims of alcohol abuse or as mental defectives, incapable of change. To cynically write them off in this fashion is to guarantee the situation will never improve. Worse yet, to hold such an attitude is ultimately to deny the humanity of such individuals.⁷⁹

The courts seem to be trapped in a lose-lose situation — jail is not the right solution but there are no better alternatives out there. The case of *D.J. v. Yukon (Review Board)*⁸⁰ involved the alleged denial of the offender's s. 7 Charter right to liberty. It was argued that where the court is forced to detain the offender in prison due to a lack of therapeutic residential facilities, the accused could very well have a valid s. 7 Charter claim. In *Baptiste* Judge Barnett recalled the words of Mr. Justice Seaton of the British Columbia Court of Appeal in the case of *Mary Astaforoff*: "I think that everyone agrees that jail is not a good answer. Unfortunately, no one suggests another answer is any better."⁸¹

Outside of imposing a custodial sentence, the courts also have few options available to them because there are no specific treatment programs for FAS/ARND offenders in the most communities.⁸² Judges must rely on standard probation procedures and existing programs. The problem is that many judges are aware that the available probation and community supervision options are not satisfactory. They are concerned and frustrated that there are no specific community programs for FAS/ARND offenders⁸³ and attempts to structure individualized probation

that one of the reasons why Judge Meekma agreed to the transfer to adult court hinged on the lack of relevant programming in the young offender system for the accused's FAE condition, see para. 45. Similar concerns about the availability of appropriate alternatives were expressed by Judge Faulkner in *E.L.J.*, *supra* note 56. Echoing these concerns, in *Keewatin*, *supra* note 32 at 162, the Court was faced with an offender with FAS who was regarded as at very high risk to re-offend. Judge Fraser thought the case was one where there was a need for something between incarceration and releasing the offender outright in the community. Based on expert evidence, Judge Fraser suggested that such a "medium or in-between area" would be a "structured and supervised environment controlled by an Advocate, Guardian or Trustee assisted by a qualified therapist".

⁷⁹ *E.L.J.*, *supra* note 56 at para. 10.

⁸⁰ *D.J. v. Yukon Review Board*, [2000] Y.J. No. 80 (Terr. S.C.).

⁸¹ *Supra* note 68 at para 18. Although not expressly identified as a concern, this reasoning seems to explain the outcome of *J.H.*, *supra* note 19. The offender committed sexual assaults on two girls. Judge Vertes sentenced the offender who had been diagnosed as having FAS to 8 years imprisonment — probably in recognition of a lack of appropriate community support and resources.

⁸² Boland, *supra* note 10. Judge Trueman in *R. v. C.J.M.*, *supra* note 55 at paras. 71-72 states "the Probation Service of the Ministry of the Attorney General is not equipped to deal with FAS, nor is the Corrections branch. They apparently have no accredited experts in the field nor do they have programmes dedicated to those who suffer from this condition."

⁸³ Judge Turpel-Lafond identified the need for specific programming for the offender in the community. She observed that there was no school for FAS/ARND children or any one-on-one coaching or counseling for such children to model good behaviour. "This lack of support means that he cannot be protected from ongoing conflict with the criminal justice system... It may be only a matter of time until a more

orders with an Aboriginal focus, special educational supports, a specially trained FAS youth worker and a comprehensive case plan have been thwarted by other governmental departments.⁸⁴

The result is that such courts have little say in how probation is to be implemented. Judges can and do, in many cases, require as part of the probation order that the offender attend programs that deal with certain FAS/ARND secondary disabilities such as substance abuse, anger management or sexual dysfunction. Although many existing Corrections programs have the potential to be beneficial to FAS/ARND offenders in dealing with these secondary conditions, these would most likely need to be specifically tailored to the FAS/ARND offender. The materials need to be presented in a manner that is simplified, made very concrete and redundant with frequent reviews of presentation and where the pace of delivery allows plenty of time for practice and repetition.⁸⁵ Unfortunately the courts do not have control over the delivery of these programs and given the diverse population they are intended to serve there is little opportunity for individualization of the materials or presentation format.

The degree to which a judge can count on the cooperation of probation authorities seems to vary greatly. In the odd case, there was notable cooperation.⁸⁶ In most other cases, however, judges have met with frustration in either obtaining an assessment for FAS/ARND⁸⁷ or having probation authorities comply with certain FAS/ARND specific treatment requests. The role of the community is also paramount, particularly with Aboriginal communities. There are several FAS/ARND cases which have involved the input of the Aboriginal community in

sophisticated youth or adult takes advantage of *W. D.* and some real harm is done to him or someone else," see *R. v. W.D.*, [2001] S.J. No. 70 (Prov. Ct.) at para. 34 (QL).

⁸⁴ *R. v. L.E.K.* (2000), 153 C.C.C.(3d) 250, 203 Sask. R. 273(C.A.) [*L.E.K.* cited to C.C.C.] at 255 - 256. The recent *Youth Criminal Justice Act*, (2002) S.C., c.1 provides increased opportunities for community-based sentencing options, including the recognition of sentencing conferences and provisions for obtaining a medical assessment. In addition, the *Act* does not list deterrence as a sentencing principle. Rather, the emphasis in the *Act* is on rehabilitation, provided the principle of proportionality is not thwarted. However, despite these progressive developments in the *Act*, little will change at the trial level without a concomitant commitment to providing the necessary resources. This sentiment is expressed by Judge Turpel-Lafond in the recent *R. v. M.(B.)*, [2003] 3 C.N.L.R. 277 (Sask. Prov. Ct.) at paragraph 94 where she states that "no alternatives were placed before the Court and the new legislation was apparently not considered in any serious fashion. Perhaps this is because counsel were all too aware of the lack of resources to follow the spirit and intent of this new legislation."

⁸⁵ Boland, *supra* note 10.

⁸⁶ Judge Barnett commented in *Abou*, *supra* note 5, about how helpful the probation officers were in cooperating with him in providing the necessary reports and assessments of the offender at paragraphs 25 and 34. Indeed, Judge Barnett attached the pre-sentence report of the probation officer as an appendix to the judgment, perhaps to signal others of how such a report should be prepared. It should also be mentioned that this case came only a few months after *R. v. Williams*, [1994] B.C.J. No. 3160 (S.C.) (QL)[*Williams*], where the Court spent a considerable amount of time and energy describing in the case the problems the Court had with getting any cooperation from the probation officers at the time.

⁸⁷ *Gray*, *supra* note 12.

either the sentencing stage or as community resources in the overall probation plan set up for the offender.⁸⁸

In the research report conducted by Tait on behalf of the Aboriginal Healing Foundation, a number of “best practices” that address prevention, identification and intervention of FAS/ARND individuals are suggested.⁸⁹ Many of the best practices include the importance of involving the community and reinforcing Aboriginal identity and culture in programs. If Aboriginal communities are able to assist, then courts should involve them in the process.⁹⁰ The recommendations of the British Columbia Children’s Commission in his report entitled *Fetal Alcohol Syndrome: A Call for Action in B.C.* regarding Aboriginal persons with FAS/ARND are relevant. The Commission stated:

Culturally relevant, holistic (i.e. interdisciplinary) and community-based FAS programs are needed. There is also a need to address the links between alcohol abuse and the legacy of residential schools, racism and other historical and current factors. ... Aboriginal communities have a good sense of what they need to know and what they need to do. The work has to be community driven and community led.⁹¹

In her report, Tait makes the important observation that existing national and provincial funding structures for health programs, including FAS, involve agendas set by governments which in many cases have not taken into account the priorities set by communities themselves. Such approaches to health issues, she argues, may actually exacerbate problems rather than help since much needed funding is allocated based on what governments decide are the community’s problems and priorities. More pressing issues within the community, such as chronic poverty and underemployment may not be a governmental priority and therefore will go unrecognized by the funding sources. This approach takes away the community’s control and imposes the priorities of the government on that community.⁹²

In *R. v. Williams*,⁹³ Justice Vickers of the British Columbia Supreme Court suspected that the offender may have FAS/ARND and asked that an assessment be undertaken and a probation plan prepared that would assist the court in determining a sentence that would best meet the needs of the accused. Justice Vickers had considerable difficulty in having probation officials comply with his request because “the resources are not available to address this man’s needs in a secure

⁸⁸ See e.g. *Moses* (1992), 11 C.R. (4th) 357, 71 C.C.C. (3d) 347 (Y. Terr. Ct.), *Clement*, *supra* note 32, which involved cases that used “circle sentencing” processes where the Aboriginal community has a direct voice during the sentencing of the accused in an informal consensus decision-making format.

⁸⁹ Tait, *supra* note 21 at 258 - 264.

⁹⁰ Arguably, *Gladue*, [1999] 1 S.C.R. 688, (1999), 133 C.C.C.(3d) 385 (S.C.), requires judges to accept the input of the offender’s Aboriginal community where available.

⁹¹ Pallan, *supra* note 17 at 21.

⁹² Tait, *supra* note 21 at 199.

⁹³ *Williams*, *supra* note 86.

community setting.”⁹⁴ A commentary on the case written by Ekstedt, Director of the Institute for Studies in Criminal Justice Policy,⁹⁵ is critical of the handling of FAS/ARND cases and the lack of cooperation between the judiciary and the probationary authorities, claiming that:

the separation between the justice and social services bureaucracies and the judiciary has become so great that one often feels they are working not only to different rules but to different purposes.... The professional bureaucracy should not be threatened by the obvious need to develop innovative, interdisciplinary approaches to the custody and treatment of persons whose life circumstances have left them disadvantaged or dysfunctional. Bureaucratic managers and administrative judges should, to the extent possible within their mandates, encourage innovation and risk taking without threat to the person, livelihood or careers of those making such attempts. More important, since sentencing is a legitimate responsibility of the court, judges should be given all assistance possible *prior* to sentencing in order that their judgments may be fair, effective and efficient.⁹⁶

We would concur with Ekstedt that there is a professional obligation to develop appropriate probationary services for offenders with FAS/ARND. Certainly where the court errs on the side of incarceration, as opposed to probation, because there are no suitable probation services that are less confining for the offender, there may be an argument that the court is in violation of certain *Charter* and human rights.

Another aspect which involves the *Charter* surfaces in the decision of *Gray*,⁹⁷ which has significant implications for the relationship between the justice system and Corrections authorities. The courts have not always required that the offender be formally assessed for FAS/ARND even where there was a suspicion that the accused has such a disability. Rather, courts have taken judicial notice of the condition if there was enough circumstantial evidence lead by the lawyer for the defense.⁹⁸ Most often the courts likely turned a blind eye to the possibility or simply did not even have enough background understanding of the condition to alert them

⁹⁴ *Ibid.* at para. 47.

⁹⁵ Dr. John W. Ekstedt, “Justice in Sentencing” (Guest Comment) Institute for Studies in Criminal Justice Policy, Simon Fraser University at the invitation of the Ombudsman, online: <http://www.ombud.gov.bc.ca/publications/reports/report_1994/justice_in_sentencing.html>

⁹⁶ *Ibid.* at para. 5.

⁹⁷ *Supra* note 12.

⁹⁸ But see the *R. v. Harris* (2002), 167 C.C.C. (3d) 246 (B.C.C.A.), 2002 BCCA 152, decision where the B.C.C.A. held that it is inappropriate for judges to take judicial notice of whether an offender has FAS/ARND. A judge can only do so based on a professionally prepared assessment. This decision, unfortunately, is likely to increase the risk of offenders being sentenced without being diagnosed because of the difficulties the court has in obtaining such assessments.

to the possibility that the accused has FAS/ARND.⁹⁹ However, in *Gray*, the offender wished to have an assessment undertaken but found he could not because it was not covered under the provincial health care plan and there were no resources available to obtain one privately. As a result, it was argued that his s. 15 *Charter* rights were violated.

If an FAS/ARND offender is treated like everyone else, it is then possible for the court to infringe his s. 15 *Charter* rights by “failing to take his mental disability into account, when making a decision that will affect his liberty interests.”¹⁰⁰

Judge Trueman concludes:

Gray may be blamed for his behaviour when he did not have the ability to reason right from wrong and to choose right from wrong. Nonetheless, he will be held responsible and accountable, on the same standard as everybody else. If he has a developmental disability, being treated the same as everyone else will make his problems worse.

A person standing before a court to be sentenced is a person who is about to have their liberty interests affected. *Such a person has a right to have the fact of their developmental disability and the extent of it placed before the court for consideration.*¹⁰¹ (Emphasis ours)

Ultimately, the case was not decided on the s. 15 issue because Judge Trueman found that a provision of the *Criminal Code* allowed the court to make an order for an assessment to be undertaken. However, the court’s comments are nonetheless compelling and are equally applicable to government departments that must make decisions regarding incarceration and the provision of appropriate treatment programs. In other words, treating offenders with FAS/ARND like any other probationer or inmate is to risk violating the offender’s s. 15 rights and various federal and provincial human rights legislation.¹⁰²

⁹⁹For example in *R. v. George* (1998), 126 C.C.C. (3d) 384 (B.C.C.A.), the British Columbia Court of Appeal overturned the trial judge’s conclusion that the offender should be classified as a dangerous offender under the *Criminal Code*. The Court held that the trial judge erred in properly characterizing the offender because the trial judge failed to understand how the offender’s disability of FAS affected his behaviour. One of the characteristics of FAS offenders is that they may have a propensity to lose self-control and to lash out aggressively when challenged by their environment. This characteristic is part of their cognitive disability and should not necessarily be held against them in applying the dangerous offender provisions of the *Criminal Code*. In *C.J.M.*, *supra* note 55 at para. 60, Judge Trueman identified how courts could easily misunderstand the FAS/ARND condition, which may then lead to inappropriate punishment.

¹⁰⁰*Gray*, *supra* note 12 at para. 64.

¹⁰¹*Ibid.* at paras. 203-206.

¹⁰²*Ibid.* at para. 66. In the case of J.H., *supra* note 20. Judge Trueman recognized that the “custodial authorities do not recognize developmental brain damage in the people in their care. If J.H. were to go back to jail without an established diagnosis and if his probable cognitive disorder was not recognized by

The government correctional authorities' failure to provide appropriate assessment or therapeutic care in the least intrusive or restrictive environment discriminates against individuals with FAS/ARND on the basis of their disability. It sends a message that the disabled offender is not worthy of respect or dignity. It fails to accommodate their disability. This fundamental principle will be violated if there are no available "therapeutic" probationary programs or therapeutic programs in jail when the court declares that, for rehabilitation purposes, such are needed. This principle is most assuredly violated if the court, because of a lack of appropriate facilities, is forced to incarcerate an offender with FAS/ARND rather than to "place" him/her in a community-based therapeutic facility. Judge Trueman in *R. v. C.J.M.* spoke of the unfairness of the inadequacy of existing correctional services in these words,

To incarcerate an individual in a prison setting that fails to recognize FAS, and fails to accommodate those with the disability, is to further the development of socially maladaptive behaviours that occur from forcing those with compromised mental functions to respond daily in a hostile environment.¹⁰³

As we saw with Mr. David Trott, the learning disability often associated with FAS/ARND may impede the offender's ability to understand the nature or object of the proceedings, to understand the possible consequences of the legal proceedings and certainly it may limit their ability to communicate effectively with counsel. Is it appropriate to proceed to trial when the Court is aware of a diagnosis of FAS/ARND or a need for one?

In the case of *R. v. T.J.*,¹⁰⁴ the Court held that the offender was unfit to stand trial by reason of his FAE diagnosis. The trial judge relied on the expert testimony of Dr. Janke who describes T.J.'s condition and its impact on his ability to participate in the proceedings, stating, "T.J.'s intellectual deficit renders him incapable of participating in Court process or understanding the nature of Courtroom procedures. This is a product of his Fetal Alcohol Syndrome and is not amenable to treatment and should be considered a permanent state."¹⁰⁵

The lack of sophistication on the part of the accused was also raised as a concern in *W. D.*. Judge Turpel-Lafond questioned whether these offenders pos-

the institution, his rights under Section 15 of the *Charter* would almost certainly be abridged." In this case, Judge Trueman developed a pre-screening process whereby if she suspected that an offender had FAS/ARND, she would ask that the offender complete an Intake Form developed by the Asante Centre (a facility that specializes in FAS/ARND assessments in British Columbia). The offender in *J.H.* filled this out and there was sufficient cause for Judge Trueman to order a full assessment, but for the fact that the defence just wanted to get the matter over because of the offender's lengthy pre-sentence incarceration. As a result, she declined to order the assessment.

¹⁰³ *Supra* note 55 at para. 82.

¹⁰⁴ *Supra* note 30.

¹⁰⁵ *Ibid.* at para. 2.

sessed the ability to instruct counsel or understand the concepts of guilt or innocence.¹⁰⁶ Clearly, lawyers need to be educated about FAS/ARND so that offender's are not pleading guilty when there are important questions of capacity to stand trial or to commit the crime or possess the necessary *mens rea* for criminal offences.¹⁰⁷

Conclusion

We think Judge Trueman in *J.H.* may have hit the nail on the head when referring to the courts response to FAS/ARND in her closing statements:

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.¹⁰⁸

David Trott was before the courts numerous times before he ever came in contact with Jessica Russel.¹⁰⁹ Regardless, his criminal behaviour continued to escalate in severity, clearly indicating the judicial system was at best having no positive effect. There are alternatives which may prevent such tragedies from happening time and time again.

Across Canada the courts are inconsistent and divided on how to deal with FAS/ARND offenders despite the fact that the past decade has seen considerable experimentation in new ways to deliver justice, which has led to significant court reform. Throughout Canada and the United States the courts have been experimenting with problem-solving approaches motivated by a desire to improve the results that courts achieve for victims, litigants, defendants and communities.¹¹⁰ These reforms are changing the way in which offenders with chronic social, human and legal problems are dealt with by the courts such that the role of the legal system is extending beyond fact-finding and the imposition of sanctions and is now looking toward using the authority of the court to maintain the social health of the community.¹¹¹

In the United States, certain jurisdictions have responded to the perplexing social problem of mentally ill offenders being caught up in a revolving door of

¹⁰⁶ *Supra* note 83.

¹⁰⁷ For a discussion of the "insanity defence" in the context of FAS/ARND offenders and the lack of *mens rea* with regard to such offenders see Conry and Fast, *supra* note 8 at 45-47. For a personal account of one lawyer's confession in failing to adequately represent such clients see David Boulding, *Mistakes I Have Made with FAS Clients: Fetal Alcohol Syndrome and Fetal Alcohol Effects in the Criminal Justice System* (Coquitlam: Sept. 17, 2001) [unpublished].

¹⁰⁸ *Supra* note 19 at para. 167

¹⁰⁹ *Supra* note 1.

¹¹⁰ Berman & Feinblatt, *supra* note 62 at 125.

¹¹¹ Jeffery A. Butts, "Introduction: Problem Solving Courts" (2001) 23:2 Law & Policy 121.

crime and prison by implementing specialized mental health courts as a partial solution. The motivation for establishing these courts have been justified and supported by the therapeutic jurisprudence movement in the United States.¹¹² Kondo has identified two key advantages to such courts:

Judges of such courts are able to build up an expertise in mental health law because they only deal with such issues.¹¹³ As a result, they are better equipped to ensure that diagnostic conclusions are accurate and that adequate treatment and rehabilitative services are provided. Furthermore, such judges can take a more active role in the management and monitoring of mental health offender's cases than would otherwise be the case.¹¹⁴

Secondly, such a specialized court relying on the principles of therapeutic justice are better able to promote cooperative and non-adversarial court proceedings. Mental Health Court judges in the United States elicit the "participation of the prosecution, defense, correctional facilities, law enforcement, and treatment providers."¹¹⁵

The aim of such courts is to provide a treatment-oriented approach to dealing with mentally ill offenders. In addition, judges also have a monitoring role to ensure that patient's rights are respected within treatment facilities. Associated with many of these courts are treatment "diversion" programs where offenders that agree to a certain treatment plan will not be prosecuted on condition that the offender satisfies the treatment program. Initial research indicates that these courts have been effective in reducing crime and rates of recidivism.¹¹⁶

Although one such Mental Health Court exists in Toronto, on a broader scale it may be impractical to mirror such courts in Canada. The population base of most Canadian cities may not be sufficient to justify creating an entirely new and separate court system specifically for addressing the legal matters of the mentally ill. Canadians simply do not have the population density in most parts of the country to support such a specialized service.

¹¹²The concept of therapeutic jurisprudence has been defined as "the study of the role of law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behaviour of legal actors." See David Wexler, "Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence" in *Essays in Therapeutic Jurisprudence*, David B. Wexler & Bruce J. Winick eds., (Durham, NC: Carolina Academic Press, 1991).

¹¹³LeRoy L. Kondo, "Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders" (2001) 28 *American Journal of Criminal Law* 225 at 285 and also Michael L. Perlin, "The Americans with Disabilities Act and Mentally Disabled Persons: Can Sanist Attitudes be Undone?" (1993-94) 8 *J.L. & Health* 15.

¹¹⁴*Ibid.* at 288.

¹¹⁵*Ibid.* at 291.

¹¹⁶*Ibid.* at 311.

However, it may be possible to create within existing courts in Canada an office of Court Commissioner for the Mentally Ill. For example, in Los Angeles County Mental Health Court, there exists the Office of the Counselor in Mental Health. The responsibility of this officer is to assist the presiding judge in supporting courtroom operations.¹¹⁷ This aspect of the mental health court model could be adopted and expanded upon in Canada whereby such a Commissioner or Counselor would assist regular court judges in screening offenders that may have a mental illness such as FAS/ARND and coordinate services and develop treatment plans.¹¹⁸ Provinces may need to enact legislation to provide authority to the commissioner to monitor treatment plans and to intervene when appropriate. It must be kept in mind that such recommendations will only be as good as the extent to which there are appropriate treatment resources and facilities in the community to effectively implement treatment oriented plans.

In conclusion, we recommend that provinces establish Task Forces mandated to look into the establishment of specialized mental health courts and/or court mental health commissioners/counsellors and examine the suitability of such reforms for dealing with mentally ill offenders with special attention paid to offenders with FAS/ARND. This Commission should also be mandated to inquire into the ability of existing mental health resources and facilities to accommodate such offenders and make recommendations to address shortcomings. The inability of the present system to effectively provide meaningful rehabilitation or deterrence to individuals suffering from FAS/ARND combines with the increased vulnerability to further victimization within penal facilities clearly sends a message that it is not appropriate for the Canadian Judicial system to continue to minimize the very real impact FAS/ARND has on individuals.

¹¹⁷ *Ibid.* at 290.

¹¹⁸ Within these courts there is a very definite need for education and awareness training of FAS/ARND individuals by all justice personnel. Learning to recognize these symptoms will assist justice personnel in screening potential offenders with FAS/ARND. Each offender with FAS/ARND will likely have differing degrees of impairment and associated secondary disabilities. Wherever there is a suspicion of a FAS/ARND disability, the court should have a current FAS/ARND assessment undertaken by qualified medical personnel for a proper assessment of the offender's rehabilitation needs this is one of the main recommendations of Boland's report on "Fetal Alcohol Syndrome: Implications for Correctional Service," where it is suggested the "criminal justice system consider initiating its own pre-sentence investigative screening to determine if the individual in question has ever received a diagnosis of FAS/FAE." It may be possible for the Intake Form developed by the Asante Centre (a facility that specializes in FAS/ARND assessments in British Columbia) to be used as a prototype for this screening device. Judge Trueman used this completed form to determine if there was sufficient cause for a full assessment when dealing with *J.H.* *supra* note 19. As touched upon earlier, there are also very compelling arguments that such pre-sentence assessments are legally required, *Gray*, *supra* note 12.

Appendix A: Chart of Cases Reported

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>D.J. v. Yukon</i> (Review Board) [2000] Y.J. No. 80 (Terr. S.C.)	FAS		ADD		Order of habeas corpus, pursuant to s. 24(1) CCR&F, denial of s. 7 of <i>Charter</i>	Veale J.	Ordered habeas corpus of the applicant into the care and custody of the ARC (least restrictive alternative).	22		
<i>R. v. Abou</i> [1995] B.C.J. No. 1096 (Prov. Ct.)	FAS		MH		Two counts of assault	Barnett Prov. Ct. J.	Suspended sentence — 3 yrs probation with specific conditions.	24	yes	
<i>R. v. Baptiste</i> [1992] B.C.J. No. 2512 (Prov. Ct.)	FAS		MH AB			Barnett Prov. Ct. J.	1 yr incarceration 3 years probation.	32	yes	
<i>R. v. B.S.C.</i> [2002] Y.J. No. 17 (Terr. Ct.)	suspect		SUB LD AB SA		Assault causing bodily harm-musician	Lilles Terr. Ct. J.	12 months incarceration.	20	yes	
<i>R. v. Charlette</i> [1993] M.J. No. 317 (Man. C.A.)	FAS		AB negl LD		Man-slaughter	Twaddle, Lyon & Helper J.J.A	6 years imprisonment.	17		
<i>R. v. C.J.M.</i> [2000] B.C.J. No. 2714 (Prov. Ct.)	Partial FAS		SA SUB		Single count of robbery	Trueman Prov. Ct. J.	Two years less a day, to be served conditionally in the community.	26	yes	
<i>R. v. Clement</i> [1994] B.C.J. No. 1247 (Prov. Ct.)	suspect	suspect	MH		Sexual assault	Barnett Prov. Ct. J.	Suspended sentence and probation for three yrs. <i>Circle sentencing.</i>	35	yes	
<i>R. v. Creighton</i> also cited <i>R. v. C.G.C.</i> [2002] B.C.J. No. 1151 (Prov. Ct.)	FAS		SUB		Possession of stolen property	Trueman Prov. Ct. J.	Ordered assessment under s. 672.11.	35	yes	

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. Creighton</i> [2002] B.C.J. No. 2985 (Prov. Ct.).	sus-pect	sus-pect			Order of mandamus	Trueman Prov. Ct. J.	Free to go.	35	yes	
<i>R. v. Creighton</i> [2002] B.C.J. No. 1988 (S.C.).	Sus-pect	sus-pect			Order of Certiorari to set aside order made by J. Trueman.	Wong J.	Provincial ct order set aside.	35	yes	
<i>R. v. D.G.O.</i> (2001), 46 C.R. (5 th) 256 (Ont. Ct. J.).	sus-pect		PED LD SCH Z		Breach of probation unsupervised contact with children	Fairgrieve J.	30 days' imprisonment, concurrent on each count, served in the community conditional sentence.	29		no
<i>R. v. E.L.J.</i> [1998] Y.J. No. 19 (Youth Ct).	FAS		SUB		14 charges, B&E, breach of probation, mischief ...	Faulkner C.J. Youth Ct.	3 mo for B & E, 1 mo. careless use of the firearm, 2 mo each, concurrent but consecutive, on resisting officer, escaping custody/ uttering threats charges.			
<i>R. v. George</i> (1998), 126 C.C.C. (3d) 384 (B.C.C.A.).	sus-pect		LD		Appeal from a decision of dangerous offender	Cumming, Rowles and Donald JJ.A.	Appeal allowed.	18	yes	
<i>R. v. Gray</i> [2002] B.C.J. No. 428 (Prov. Ct (Crim. Div.)).	sus-pect				S.15 — the court should order an assessment for FAS/ARND as remedy as per S. 24(1).	Trueman Prov. Ct. J.		23		

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. Harris</i> [2002] BCCA 152.	sus-pect		LD SUB		Appeal of lower court sentence	Levine, Newbury, Thackray JJ.A.	Appeal dismissed — specific conditions were added to the conditional sentence.	43	yes	
<i>R. v. J.</i> [1996] B.C.J. No. 2754 (Youth Ct).	sus-pect		SUB		Motor vehicle theft	de Villiers Youth Ct. J.	One year of closed custody.	16	yes?	
<i>R. v. J.A.B. et al.</i> [2000] A.J. No. 1076 (Prov. Ct. (Youth Div.)).	FAS		ADD SUB		Request to transfer to ordinary court	Fowler Youth Ct. J.	Transferred to ordinary court (adult court).	17	no	
<i>R. v. JAB</i> has 2 accused — individual information separated (name: PDR).	No	No	SCD Negl SUB		Request to transfer to ordinary ct	Fowler Youth Ct. J.	Transferred to ordinary court (adult court).	17		no
<i>R. v. J.H.</i> [1998] N.W.T.J. No. 163 (Terr.S.C.).	FAS		AB SA ADD PED SUB		2 counts of sexual assault	Vertes J.	3 yrs imprisonment for first offence, five yrs consecutive for second offence.	18		
<i>R. v. J.H.</i> , also cited as <i>R. v. Harris</i> [2002] B.C.J. No. 313 (Prov. Ct.).	sus-pect		LD SUB		2 counts B & E — 1 count of breach of probation	Trueman Prov. Ct. J.	9 mo. conditional sentence. 13 mo. Probation. FAS/ARND Asante Center checklist.	43	yes	
<i>R. v. Keewatin</i> [1999] A.J. No. 1357 (Prov. Ct. (Crim. Div.)).	FAS		MH AB SA Negl SUB		Sexual assault	Fraser Prov. Ct. J.	Sentence suspended placed on probation for two years.	18	yes	

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. L.E.K.</i> (2000), 153 C.C.C. (3d) 250 (S.C.A.), 203 Sask. R. 273 (C.A.).	FAS		MH SUB		Possess. of stolen property, failing to appear & breach of probation	Bayda C.J.S., Vancise & Sherstobitoff J.J.A.	Specific Youth Ct. probation orders overstepped the boundaries. Appeal allowed. Set aside youth ct. disposition and a new probation order submitted.	17	yes	
<i>R. v. L.E.K.</i> [2001] S.J. No. 434 (Youth Ct.).	FAS		ARN D SUB		Court regularly to monitor his progress regularly.	Turpel-Lafond Prov. Ct. J.	Court will continue to monitor his progress regularly.	17	yes	
<i>R. v. Lalonde</i> [2000] O.J. No. 252 (Sup. Ct. of J.).	FAS		AB Negl		Criminal negligence causing death contrary to S. 220(b) Police chase	Byers J.	Two years in penitentiary. 10 year driving prohibition <i>FAS was not considered either mitigating or aggravating factor.</i>	21		
<i>R. v. Lambert</i> [1996] B.C.J. No. 745 (C.A.).	FAS		Re- cent death in fa- mily SUB	?	Series of motor vehicle thefts	McEachern C.J.B.C., Goldie and Williams J.J.A.	Appeal allowed. Sentence reduced.	youth	yes	
<i>R. v. M.L.</i> [2000] S.J. No. 17 (Youth Ct.).	FAS		AB Negl SUB		Fire-setting, shoplifting	Turpel-Lafond Youth Ct. J.	45 days open custody — probation for two yrs. Intensive supervision for first 12 months probation.	12	yes	

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. McLeod</i> [1996] Y.J. No. 150 (Terr. S.C.).		FAE	LD AB? SA? ADD SUB		Armed theft of property armed and kidnapping with intent to confine	Hudson J.	90 months imprisonment on each count to be served concurrently.	19	yes	
<i>R. v. Mitchell</i> [1990] B.C.J. No. 381 (C.A.).	sus-pect		MH		2 counts of Vehicle theft	McEachern C.J.B.C., Locke and Taylor J.J.A.	Reduced to time already served and 1 year probation.	22	yes	
<i>R. v. M.N.J.</i> [2002] Y.J. No. 49.	sus-pect		negl AB SA ADD		Physical and sexual assault	Stuart Terr. Ct. J.	8 yrs. Federal Penitentiary — lifetime firearms prohibition.	22	yes	
<i>R. v. Moses</i> [1991] Y.J. No. 272 (Terr. Ct.).	sus-pect		MH negl SA		Numerous property offences & assault.	Lilles Terr. Ct. J.	Resisting arrest, 30 days.. s. 430(1) (d), 30 days' concurrent. On the Section 740(1), 30 days concurrent. Breach of undertaking, 30 days concurrent. Offence S.740(1), 30 days theft, 30 days concurrent. liquor ticket, \$100 fine, Incarceration of 15 months, concurrent with other orders made. Probation 3 yrs.	24	yes	

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. Moses</i> [1992] Y.J. No. 50, 11 C.R. (4th) 357, 71 C.C.C. (3d) 347 (Terr. Ct.).	FAS		AB negl SA		Carrying a weapon, theft breach of probation.	Stuart, Terr. Ct. J.	Suspended sentence with probation for 2 years used <i>Circle sentencing</i> .	26	yes	
<i>R. v. R.C.P.</i> [2000] S.J. No. 373 (Prov. Ct.).	Partial FAS		SUB AB LD		Robbery, threat of violence	Henning Prov. Ct. J.	Forty-five days incarceration on the charge of robbery, and thirty days concurrent on each of the other charges.	19	yes	
<i>R. v. S.F.C.</i> [2001] B.C.J. No. 769 (C. A.).	suspect		AB SA Negl SUB ADD		Appeal particularly period of parole eligibility. Convicted of 2nd deg murder	McEachern C.J.B.C., Donald and Low J.J.A.	Appeal allowed. Eligibility for parole reduced to 12 years.	24	yes	
<i>R. v. S.R.J.</i> [2001] Y.J. No. 123, 2001 YKSC 55 (Terr. S. C.).	FAS		LD SA SUB		One count touching contrary to s. 151(a) sexual assault, contrary to s. 271	Veale J.	12 months, concurrent on each count, to be served in the community under specified conditions.	23 F	yes	
<i>R. v. Sam</i> [1993] Y.J. No. 112 (Terr. Ct.).	FAS		MH AB SA		Sexual assault	Stuart Terr. Ct. J.	Six mo prison & 3 yrs probation with conditions.	?	yes	
<i>R. v. Sinclair</i> [1997] M.J. No. 455 (C.A.).	FAS		SA AB SUB		Man-slaughter of 9 mo. old infant	Huband, Twaddle and Monnin J.J.A.	Appeal allowed. Sentence reduced to five years.	23	yes	

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. Steeves</i> [1998] B.C.J. No. 3135 (Prov. Ct.).	FAS		ADD LD SUB		Break and enter and robbery armed	Lenaghan Prov. Ct. J.	2 years less 1 day, followed by 3 years probation Imprisonment served in the community <i>parents played a very significant role in the sentencing process featured on a TV/CBC show about FAS; very persuasive.</i>	21		no
<i>R. v. Stewart</i> [1992] Y.J. No. 193 (Terr. Ct.).	Suspect Requested FAS testing		negl		Break & enter, probation breach, failure to appear & assault	Stuart Terr. Ct. J.	6 mo. for B&E and 2 wks each consecutive for the breach of probation & failure to appear.	19	yes	
<i>R. v. Suarak</i> [2001] N.J. No. 80 (S.C. Trial Div.).	Suspect		SUB		Break, entry & intent contrary to s. 348(1) (a) - 348(1) (d) breach of s.145(3) attempting to enter girl's window	O'Regan J.	5 years Imprisonment with credit for 18 months spent in pre-trial custody, leaving him with a sentence of 42 months to be served.	30	yes	
<i>R. v. T.J.</i> [1999] Y.J. No. 57 (Terr. Ct.).		FAE	MH		Sexual assault want to have UST stayed	Lilles Terr. Ct. J.	Judicial stay of proceedings, court read down s. 672.54(a).	22	yes	
<i>R. v. W.D.</i> [2001] S.J. No. 70 (Prov. Ct.).	FAS		ADD LD		Stay of proceedings based on UST	Turpel-Lafond Youth Ct. J.	Stay of proceedings granted.	13	yes	

	FAS	FAE	Other Factors		Charges	Judge	Recommended Sentence	Age	Aboriginal Decent	
			Yes	No					Yes	No
<i>R. v. Williams</i> [1994] B.C.J. No. 3160 (S.C.).	FAS		MH	HD	Robbery	Vickers J.	Four months imprisonment two yrs probation.	19	yes	
<i>S.L.N. (Re)</i> [1998] S.J. No. 709 (Youth Ct.).		FAE	AB	Negl	Aplic'n for transfer to Adult ct. first-degree murder committed while serving a sentence for man-slaughter	Meekma Youth Ct. J.	Transferred to adult ct.	16	yes	
			SUB							

- AB History of childhood abuse
- ADD Attention deficit disorder
- ARND Alcohol Related Neurological Disorder
- HD Hearing deficit
- LD Learning disability
- MH Mentally handicapped
- Negl. History of childhood neglect
- PED Pedophilia
- SA History of sexual abuse
- SCHZ Schizophrenic diagnosis
- SUB Substance abuse problem with the accused

Summary of Cases:

Table summarises the cases in the attached table based on geographical, diagnosis (FAS/FAE), other diagnosis, age (where available) and whether or not the accused is of aboriginal descent. A total of 42 cases representing 40 accused/convicted are presented.

Number of Cases Per Province													FAS		ARND		Other Diagnosis		Age	Aboriginal decent		
B C	A B	S K	M N	O N	Q B	N B	N S	P E I	N F L	Y K	N W T	Firm	Sus- pect	Firm	Sus- pect	Y	N	12 - 45	Y	N	Un- kno wn	
15	2	5	2	2	0	0	0	0	1	11	1	22	15	3	2	all	0		31	5	6	