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Fetal Alcohol Spectrum Disorder and The Youth Criminal Justice System: A Discussion Paper

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Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice System: A Discussion Paper

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Abstract

Legal issues related to Fetal Alcohol Spectrum Disorder (FASD) have been explored recently by a number of authors.[1] This discussion paper canvases issues specifically related to FASD and the youth criminal justice system. Where available, court decisions that have addressed these issues are reviewed. Issues are explored under six subject headings: (I) the FASD construct; (II) fitness to stand trial; (III) criminal intent; (IV) proportionality of youth court outcomes; (V) sentencing; and (VI) bridging with social services.

[1] Issues related to Fetal Alcohol Syndrome (FAS) and criminal justice have been explored recently by a number of authors. See. J. Conry & D.K. Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Maple Ridge: British Columbia Fetal Alcohol Syndrome Resource Society, 2000); J. Dagher-Margosian "Representing the FAS Client in a Criminal Case" in A. Streissguth & J. Kanter, eds. *The Challenge of Fetal Alcohol Syndrome* (Seattle: University of Washington Press, 1997) 125; R. LaDue & T. Dunne "Legal Issues and FAS" in A. Streissguth & J. Kanter, eds., *The Challenge of Fetal Alcohol Syndrome* (Seattle: University of Washington Press, 1997) 146; K. Page "Fetal Alcohol Spectrum – The Hidden Epidemic in our Courts" (2001) 52(4) Juvenile and Family Court Journal 21.

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1.0 The FASD Construct

The association between maternal alcohol consumption and birth defects is a relatively recent discovery.[2] The term Fetal Alcohol Syndrome (FAS) was first introduced in 1973[3] in an article that described a pattern of craniofacial abnormality, growth deficiency, and central nervous system dysfunction within a small sample of children who were born to women who had chronically abused alcohol during gestation. These features have remained the core aspects of FAS.

Universal standards for diagnosing and labelling FAS have not emerged. There are currently several diagnostic systems in use.[4] One of the most prominent systems was advanced by the American Institute of Medicine (IOM).[5] The IOM classification system sets out two broad categories of diagnoses: (a) Fetal Alcohol Syndrome (FAS) and (b) Alcohol-Related Effects.

There are three possible diagnoses under the FAS heading.[6] All of the diagnoses require that the distinctive facial features be present. The most conclusive diagnosis requires the presence of several factors: (a) documentation of maternal consumption of alcohol; (b) facial anomalies (e.g. short horizontal eye length, thin flat upper lip, flattened midface); (c) growth retardation; and (d) central nervous system developmental abnormalities. The latter criterion includes structural brain abnormalities, and neurological signs such as impaired fine motor skills, neurosensory hearing loss, poor tandem gait, and poor eye-hand coordination.

Alcohol Related Effects encompass two separate diagnoses: (a) Alcohol-Related Birth Defects (ARBD) and Alcohol-Related Neuro-Developmental Disorder (ARND). Both require confirmation of a history of maternal alcohol exposure, but neither requires the distinctive facial anomalies characteristic of FAS. ARBD applies to individuals who have congenital anomalies related to the heart, skeleton, kidneys, eyes, and ears. ARND applies where the patient is afflicted with the central nervous system developmental abnormalities noted above, or other cognitive and behavioural irregularities. The latter includes learning difficulties, poor academic performance, poor impulse control, problems in social perception, deficits in receptive and expressive language, poor capacity for abstraction or metacognition, deficits in mathematical skills, problems in memory, brief attention span, and poor judgment.[7]

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2 The notion that humanity has recognized the association between alcohol and birth defects for a millennia is a fallacy. The so-called historical allusions in the literature have been misconstrued; see E. Armstrong. “Diagnosing moral disorder: the discovery and evolution of Fetal Alcohol Syndrome” (1998) 42 Social Science Medicine, 2032-2034.

3 K.L. Jones & D.W. Smith, “Recognition of the fetal alcohol syndrome in early infancy” (1973) 836 The Lancet 999.

4 E. L. Abel, Fetal Alcohol Syndrome and Fetal Alcohol Effects. (New York: Plenum Press, 1984).

5 Institute of Medicine, K. Stratton, C. Howe, F. Battaglia, eds., *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment* (Washington, D.C: National Academy Press, 1996).

6 (1) FAS with confirmed maternal alcohol exposure, (2) FAS without confirmed maternal alcohol exposure; (3) Partial FAS with confirmed maternal alcohol exposure.

7 IOM, *supra* note 5 at 76-77.

In keeping with the lack of a universal diagnostic system for FAS, the terminology for the construct varies in the literature. For the purposes of this paper, Fetal Alcohol Spectrum Disorder (FASD), an umbrella term used to encompass all diagnostic categories associated with prenatal alcohol exposure, will be used. When discussing particular cases, however, the cited diagnosis will be retained.

The prevalence rate of FASD varies across cultures, and socio-economic strata.[8] May and Gossage,[9] based on a literature review, estimated the prevalence of FAS within the general U.S. population to be between 0.5 and 2 per 1,000 births. In contrast, a study based in northern Manitoba, reported the incidence of FAS to be 7.2 per 1000 live births.[10] The prevalence of FAS within the general youth justice population is not known. However, in a recent study of young Canadian forensic inpatients who had been remanded for a psychiatric assessment (n = 287), 1% met the criteria for FAS and 22.3% met the criteria for ARND.[11]

The most pressing legal issues arise from the cognitive[12] and behavioural expressions of the disorder. To date, there has been little systematic study of the cognitive and behavioural deficits that are associated with FASD amongst adolescents. Much of the information regarding the cognitive and behavioural deficits associated with FASD is based upon anecdotes and descriptive studies. In this context Abel cautions: "the plural of anecdote is not data."[13]

Streissguth, and her colleagues at the University of Washington, are conducting an ongoing longitudinal study of primary and secondary disabilities associated with FASD. According to their terminology, primary disabilities reflect the cognitive deficits associated with FASD, whereas secondary disabilities represent behavioural problems that are mediated to a greater extent by social factors.

A recent report[14] described the prevalence of primary and secondary disabilities among individuals affected by FASD. Regarding primary deficits, within the sample of persons with FAS (n = 173) the mean IQ was 79; within the ARND sample (n = 295) the mean IQ was 90. Based on these numbers,[15] an estimated 27% of the FAS sample would fall below two standard deviations from the average IQ; whereas only an estimated 9% of the ARND youth would fall below this cut-off.

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8 Abel concluded that the prevalence of FAS in low SES groups was ten times greater than in high SES groups: E. Abel, "An Update on Incidence of FAS: FAS Is Not an Equal Opportunity Birth Defect" (1995) 17 Neurotoxicology and Teratology 437.

9 P.A. May & J.P. Gossage, "Estimating the prevalence of Fetal Alcohol Syndrome: A Summary" (2001) 3 Alcohol Research and Health 159.

10 R.J. Williams, F.S. Odaibo, & J.M. McGee, "Incidence of fetal alcohol syndrome in northeastern Manitoba" (1999) 90 Canadian Journal of Public Health 192.

11 D.K. Fast, J. Conry, & C.A. Loock, "Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System". (1999) 20 Developmental and Behavioural Pediatrics 370.

12 The term "cognitive" is herein used to describe the concepts of thinking, learning, memory, and attention.

13 Abel, *supra* note 4 at 131.

14 A. Streissguth et al., "Primary and Secondary Disabilities in Fetal Alcohol Syndrome" in A. Streissguth & J. Kanter, eds., *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997).

15 Assuming a population standard deviation of 15.

The prevalence of secondary disabilities were reported: 90% had received treatment for mental health problems, 60% had disrupted school experiences, 60% had experienced trouble with the law, 50% had been confined involuntarily under civil or criminal law, 50% had displayed inappropriate sexual behaviours, and 30% had alcohol and drug problems. When interpreting the results of this study, it is inappropriate to attribute a causal relationship between FASD and these secondary disabilities. This is demonstrated by the fact that several confounded variables, which they described as protective factors, were identified. Protective factors, which attenuated secondary disabilities, included living in a stable nurturing home, early diagnoses, never having experienced abuse, being found eligible for social services, having a diagnosis of FAS rather than ARND, and not living in poverty.

The Washington group examined the co-morbidity between FASD and other mental disorders in greater depth.[16] A descriptive study of 25 adults with FASD found that 92% of the sample met the criteria for a clinical disorder according to the DSM-IV; diagnoses included alcohol or drug dependence (60%), major depressive disorder (44%), psychotic disorders (40%), bipolar I disorder (20%), anxiety disorders (20%), eating disorders (16%), and dysthymic disorder (4%). Relatively high prevalence rates of personality disorders were also found: avoidant personality disorder (6%), antisocial personality disorder (19%), and dependent personality disorder (14%). No diagnoses for intellectual impairment were reported because all individuals with an IQ of less than 70 were excluded from the sample at the outset; they reported, however, that 9% of the prospective sample met this criterion. Although these results indicate that mental health problems may be a significant issue for individuals with FASD, they should be tendered cautiously because of the absence of a comparison group, and the small sample size.

Overall, there is relatively little empirical information on the impact of FASD upon the youth criminal justice system. Much of what is known about the social and behavioural expressions of FASD can be attributed to the work of the Washington group. Given the current state of the literature, there is an opportunity to make a significant contribution to the knowledge base through promoting research on FASD.[17]

Important research questions include (a) the prevalence of FASD amongst youth in the criminal justice system (with special attention to gender differences), (b) the severity of cognitive deficits in relation to legal standards (e.g. what percentage of FASD accused are unfit to stand trial?), (c) the temporal stability of cognitive deficits from youth to adulthood, and (d) community treatment options and their relative effectiveness.

It is important to invest in sound research on FASD. The reliance on anecdotal information can lead to the formation of stereotypes. It is important to be mindful that there are individual differences amongst people who have been diagnosed with FASD.

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16 C. Famy, A.P. Streissguth, & A.S. Unis. “Mental Illness in Adults with Fetal Alcohol Syndrome or Fetal Alcohol Effects” (1998) 155 American Journal of Psychiatry, 552.

17 This initiative would be in keeping with the Standing Committee on Justice and Human Rights’ recommendation that the Department of Justice, in collaboration with their territorial counterparts, engage in “systematic, broad-based data collection and analysis”: Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code* (Ottawa: House of Commons, 2002) at 18 [Hereinafter *The Standing Committee Report*].

> The degree of abnormality in any one measure can vary greatly between individuals and can change with time in the same individual. For example, people diagnosed with FAS can have IQs from well within the normal range to the severely mentally retarded range. The physical anomalies can be slight or quite striking. Some people with FAS live fairly normal lives if given adequate and structured support throughout their lives, whereas others are severely impaired.[18]

The fact that there are individual differences amongst people who have FASD is an important factor to consider in relation to policy options that examine youth who have FASD as a class.

[18] IOM, *supra* note 5 at 18-19.

2.0 Fitness to Stand Trial

Section 7 of the *Charter* provides that the State may deprive an individual of his / her autonomy only in accordance with the principles of fundamental justice. The authority to impose criminal sanctions upon an accused is dependent upon his / her having received a fair trial and his / her having been found guilty. In principle, a trial is not fair if the accused is not present, or is otherwise unable to meaningfully participate in his / her full answer and defence. An accused person who is found to be unable to meaningfully participate in his / her defence, due to mental disorder, is held unfit to stand trial (UST).

Section 141 of the *YCJA* incorporates the mental disorder provisions of the *Criminal Code* with the effect that they also apply to youth. Section 2 of the *Criminal Code* defines "unfit to stand trial":

> …unable to on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings
>
> (b) understand the possible consequences of the proceedings, or
>
> (c) communicate with counsel

The issue of fitness can be raised by the accused, the Crown or the court.[19] The accused is presumed to be fit[20] and must otherwise be found unfit on the balance of probabilities.[21] According to *R.* v. *Taylor*,[22] the standard for fitness is the "limited capacity test", which requires that the accused has the capacity to understand that (a) he / she is being tried in a court of law and may be subject to punishment, and (b) the ability to get the gist of testimony adduced at trial. *Taylor* rejected the proposition that a fit accused must have the "analytical capacity" to make choices in his / her best interest. The court held that the limited capacity test balances the objectives of the fitness rule with the constitutional rights of the accused to choose his / her defence, and to be tried within a reasonable time. The test in *Taylor* was acknowledged by the Supreme Court of Canada in *R.* v. *Whittle.*[23]

If an accused person is found unfit, jurisdiction is transferred to the provincial / territorial Review Board. Under the *Criminal Code*, the accused may be detained in a hospital,[24] or released subject to

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19 Section 672.23(1), *Criminal Code.*
20 Section 672.22, *Criminal Code.*
21 Section 673.23(2), *Criminal Code.*
22 *R.* v. *Taylor* (1992), 77 C.C.C. (3d) 551 (Ont.C.A.).
23 *R.* v. *Whittle*, [1994] 2 S.C.R. 914.
24 Section 672.54(c), *Criminal Code.*

conditions.[25] The *YCJA* specifies that youth who are detained in hospital must be held within a designated youth hospital.[26] An unfit youth may be detained until he / she becomes fit to stand trial, until the Crown fails to make its annual[27] prima facie case, or until the charges against the youth are withdrawn or stayed.

A basic issue with respect to the s. 2 definition of unfit to stand trial is whether or not FASD is a "mental disorder". Section 2 defines mental disorder as being "a disease of the mind". Determining what constitutes a disease of the mind is a question of law.[28] In *R.* v. *Cooper*, Justice Dickson described the term as embracing

> …any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.[29]

In *Revelle* v. *R.*,[30] the Supreme Court of Canada held that organic brain damage, which causes a departure from normal consciousness, is a disease of the mind. Parallels can be drawn between brain damage caused by trauma, and the structural brain abnormalities related to FASD: the intellectual and cognitive deficits associated with FASD have an organic basis, are lifelong, and are not transitory.

In addition, there are several reported cases in which courts have held that FASD is a disease of the mind, and that the accused, on the facts, was unfit to stand trial.

In *R.* v. *D. (W.)*[31] Judge Turpel-Lafond refused to accept W.D.'s guilty plea because of her concerns regarding his fitness to stand trial. She ordered a hearing to determine the competency of the youth. In response, the Crown stayed the prosecution. Notwithstanding, the Court ruled on the issue in case the Crown should recommence the proceedings at a later date. The Court accepted expert evidence that W.D., because of FAS related cognitive disabilities, had a poor understanding of the court process and was unable to meaningfully instruct counsel. The Court found W.D. unfit to stand trial.

W.D.'s twin brother was also affected by FAS. In the later case of *R.* v. *D. (W.A.L.)*[32], he was successful in his application to be declared unfit to stand trial. Judge Whelan offered the following explanation for her decision:

> [W.A.L.D.]'s difficulties become further apparent when one envisages his discussing his case with his lawyer. To begin with it's expected that he would experience great difficulty taking in the information conveyed, particularly in an area with which he has no previous familiarity. When asked to indicate his wishes, he would be highly dependent intellectually on the lawyer or others and would likely not be able to give

25 Section 672.54(b), *Criminal Code*.
26 Section 141(11), *YCJA*.
27 Section 141(10), *YCJA*.
28 *R.* v. *Cooper*, [1980] 1 S.C.R. 1149.
29 *Ibid.* at para 51.
30 *Revelle* v. *R.* (1981), 48 C.C.C. (2d) 267, (S.C.C.).
31 *R.* v. *D. (W.)*, [2001] S.J. No.70 (Sask.Prov.Ct.) [hereinafter *W.D.*] .
32 *R.* v. *D. (W. A. L.)*, [2002] SKPC 38 (Sask.Prov.Ct.).

> instruction, which would be reflective of or in response to the information conveyed. There is a real danger that he would give instructions based solely on an earlier experience. This is so because it is said that he doesn't process information or learn well verbally and is functionally illiterate. He is said to be incapable of formulating a plan from information available to him.
>
> [W.A.L.D.] did not appreciate the roles of the participants in the courtroom and I doubt very much whether he had a sense of the overall purpose and principles governing court proceedings. He would likely have no sense of the adversarial role of a prosecutor, particularly during cross-examination. He has no sense of the consequences of a guilty plea and no concept of the range of sentences available; he understands only those aspects of the justice system that he has experienced, such as remand, an undertaking and probation.[33]

R. v. *J. (T.)*[34] involved an accused who had been declared unfit to stand trial because of cognitive and intellectual impairments associated with FAS. In contrast to the previous cases, T.J. brought an application to be found fit so that he could face his charges. He was unsuccessful. Expert testimony indicated that T.J. fell within the borderline intellectually impaired range and that his understanding of the judicial process remained "grossly compromised." T.J.'s knowledge of the judicial process was limited to rote answers rather than a genuine understanding. On the issue of whether or not T.J. could meaningfully communicate with counsel the court concluded the following:

> While he is able to communicate with counsel, his lack of appreciation of the process and the roles of the major participants, including his own lawyer, severely limits his ability or capacity to instruct his counsel and to make key decisions regarding his defence. In my view, it is not sufficient for an accused to merely understand and communicate the fact that he does not want to go to jail. That alone does not amount to instructing counsel, although I hasten to add that some counsel prefer to have as little interference from their clients as possible.[35]

In sum, there are several reported cases in which the cognitive deficits related to FASD have rendered the accused unfit to stand trial according to the current standard.

The Standing Committee on Justice and Human Rights conducted a review of the mental disorder provisions of the *Criminal Code* and published a report recommending, among other things, a review of the definition of "unfit to stand trial" to "consider any additional requirements to determine effectively an accused's fitness to stand trial, including a test of real or effective ability to communicate and provide reasonable instructions to counsel."

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33 *Ibid.* at paras 62-63.
34 *R.* v. *J. (T.)*, [1999] Y.J. No. 57 (Y.Terr.Ct).
35 *Ibid.* at para 18.

In response[36] to this report, the government of Canada noted that in setting the threshold for the test there is a need to balance the objectives of the fitness provisions, and (a) the accused's right to choose his defence, (b) the accused's right to be tried within a reasonable time, and (c) the consequences of being found unfit. The federal government expressed its intention to consult with the provinces and to consider the issue further.

The competing rights issues noted by the government are particularly salient in the context of accused persons who have FASD. There are potential *Charter* violations relating to setting too low a standard for being unfit to stand trial. Youth who have FASD face being chronically unfit, and subject to undefined periods of supervision. This issue will be explored more fully in Part 3, where it is suggested that it would rarely be in an FASD youth's strategic interests to be found unfit to stand trial.

As previously noted, the conviction of unfit accused violates his / her rights under s. 7 the *Charter*. It follows that youth courts have a positive obligation to identify accused persons who are unfit to stand trial. This duty falls upon all officers of the court, including defence counsel, the Crown, and the Judge. It has been held that the failure of an accused's lawyer to raise the issue of fitness to stand trial, where it is in question, amounts to incompetence.[37] Similarly, where there is reason to doubt the fitness of the accused the judge is obligated to order a hearing.

In *R. v. D. (W.)*, Judge Turpel-Lafond expressed her frustration over the previous failures of the system to recognize the accused's profound and permanent disabilities.

> While the Court records indicate that no less than five (5) lawyers dealt with him, counsel never raised the issue of his fitness or W.D.'s ability to instruct them or understand what was happening in the criminal justice system. At the same time, the Crown Prosecutor did not seem to have a file which flagged this youth's disability taking special care to consider how to proceed given his situation. With the information now before the Court, will this happen again?[38]

The complex ethical issues faced by defence counsel, however, should not be discounted. From the accused's point of view, being found UST, offers little advantage. If found unfit, the accused will be under the control of the provincial Review Board for an undetermined amount of time. If the accused eventually becomes fit, he / she may still have to face his / her charges. It is understandable why a defence counsellor, who is committed to protecting a client's liberty, might be motivated to present the client as being fit to stand trial.

As noted above, issues akin to fitness can arise as early as when a youth is first interviewed by the police. It is important to take account of individuals who have intellectual impairments to ensure that statements or waivers that they issue are voluntary.

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36 Response to the 14th Report of the Standing Committee on Justice and Human Rights: review of the Mental Disorder Provision of the *Criminal Code* (Ottawa: Department of Justice, 2002) [hereinafter "Government Response"].

37 *R.* v. *Brigham* (1992), 79 C.C.C. (3d) 365 (Que. C.A.).

38 *W.D., supra* note 31 at para 32.

The Youth Criminal Defence Office in Calgary has begun to issue cards (reproduced below) to clients who have FASD in case they have further contact with the youth criminal justice system.

> ***MEDICAL INFORMATION FOR POLICE***
>
> I have the birth defect Fetal Alcohol Spectrum Disorder, which causes brain damage. If I need assistance, or if you need my cooperation, you should contact the person listed on the back of this card.
>
> Because of this birth defect, I do not understand abstract concepts like legal rights. I could be persuaded to admit to acts that I did not actually commit. I am unable to knowingly waive any of my constitutional rights, including my right to counsel.
>
> Because of my disability, I do not wish to talk with law enforcement officials except in the presence of and after consulting with a lawyer. I do not consent to any search of my person or property.

Obviously, this strategy will only benefit a youth after his / her first contact with the youth criminal justice system.

A related issue is whether or not the Crown should be able to admit pre-trial confessions to meet its prima facie case when an accused who has FASD has been found to be unfit to stand trial. In Whittle,[39] the Supreme court held that the "limited capacity" test from *Taylor* applies to the "operating mind" test for determining if a statement is voluntary, and also with respect to determining whether the accused had the mental capacity to exercise their 10(b) right to counsel. Given that the cognitive deficits associated with FASD are likely stable, if a youth is found unfit at trial, issues arise in regard to whether or not prior confessions or waivers were valid.

[39] *R.* v. *Whittle*, [1994] 2 S.C.R. 914.

3.0 Criminal Intent

It is a principle of fundamental justice that an accused shall not be found guilty unless he / she possessed a blameworthy state of mind when they committed a prohibited act. According to Knoll,

> The minimum necessary mental element for most crimes is knowledge of the circumstances, which make up the *actus reus* of the crime and foresight or intention with respect to any consequences required to constitute the *actus reus* of the crime.[40]

3.1 The Defence of Mental Disorder

The defence of mental disorder is based upon the notion that some mental illnesses can undermine an individual's ability to form the blameworthy intent that is an essential component of an offence. The defence is set out in s. 16 of the *Criminal Code*, and applies equally to youth according to s. 141 of the *YCJA*:

> (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Accused persons are presumed not to suffer from a mental disorder[41] and the party that seeks to prove that the accused is not criminally responsible must do so on the balance of probabilities.[42] The determination of whether or not the accused was not criminally responsible by reason of mental disorder (NCRMD) occurs only after the guilt of the accused has been established.

As previously discussed, there are case precedents for the proposition that FASD is a disease of the mind, and therefore a mental disorder. The issue of whether or not FASD rendered an accused incapable of appreciating the nature and quality of his / her criminal act, however, is a question of fact; it must be determined on a case-by-case basis.

In *R.* v. *F. (R.),*[43] the youth was unsuccessful in her attempt to raise the defence of mental disorder, on the basis of her having FAS. The accused was facing several summary property charges, and multiple charges for breaching court orders. The Court accepted expert evidence that the accused had FAS. Her IQ fell within the borderline retarded range (3rd percentile). She had severe attention deficits (1st percentile), which were expressed as impulsivity, and poor decision-making ability.

The youth failed to demonstrate, however, that she was unable to appreciate the nature and consequences of her criminal acts. The expert testified that the youth had the capacity to appreciate the immediate consequences of her actions, but lacked the ability to contemplate more remote

40 P.J. Knoll Criminal Law Defences (Toronto: Carswell, 1988).
41 Section 16.(2), *Criminal Code*.
42 Section 16.(3), *Criminal Code*.
43 *R.* v. *F. (R.)*, [2002] SKPC 137 (Sask.Prov.Ct.) [herinafter *R.F.*].

consequences. In addition, there was evidence to suggest that the youth knew that her actions were against the rules, and that they could get her into trouble. The court held that the standard in this branch of the test is set relatively low, and that the youth's appreciation of the nature and quality of her acts need not be very sophisticated.

With respect to the second branch of the test, the trial Judge was not persuaded that the youth lacked the capacity to appreciate that her actions were morally wrong.[44] The Court accepted expert testimony that the youth was impulsive, and had a limited ability to reflect upon the rightness or wrongness of her actions. The Court also heard evidence that the youth lacked the capacity to appreciate the social contract aspect of morality, and that her moral reasoning was basically hedonic.

> I am very cognizant of the link between the maturity of the individual and the ability to apply moral reasoning when development is delayed such that a satisfactory stage of moral development is not reached by the age at which legal responsibility is presumed, age 12. This is a particularly thorny problem for persons suffering from Fetal Alcohol Spectrum Disorder.[45]

The judge did not attempt to resolve this issue. Rather, he held that the application must fail because the defence was being used in a blanket fashion for all the crimes that the youth had committed. The Court held that it did not have sufficient evidence concerning the youth's state of mind in relation to each particular offence to be persuaded in the youth's favour.

It is conceivable that a youth with FASD could be genuinely unaware, because of his / her cognitive and intellectual deficits, that his / her behaviour is illegal and offensive. For example, the offence of sexual assault might be particularly problematic for FASD youth to appreciate. An individual who has severe disabilities might not understand that it is harmful and offensive to touch other people without permission. In addition, the *actus reus* of sexual assault is dependant upon the abstract notion of consent: The same act can constitute an offence where consent is absent, but be legal where consent is expressed. Given the complex nature of sexual assault, s. 16 might provide a viable defence for youth who have significant cognitive and intellectual deficits related to FASD. Indeed, the case of *J.(D.)* v. *Yukon Review Board*[46] involved an accused who had successfully raised a s. 16 defence, based on FASD, in response to the charge of sexual assault.

It should be noted that the current mental disorder provisions do not provide a defence for *irresistible impulses.* Impulsivity related to FASD will not ground a s. 16 offence. Stuart suggests that that there is a case for widening the existing s. 16 defence to include a test for lack of control caused by mental disorder.[47]

A potential problem with expanding the defence of mental disorder to include irresistible impulses is that it may make the defence available to persons who have anti-social personality disorder.

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44 That is, contrary to the prevailing standards of society: *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303.

45 *R.F.*, *supra* note 43 para 84.

46 *J.(D.)* v. *Yukon Review Board*, [2000] YTSC 513 (Y.Sup.Ct.).

47 See D. Stuart., *Canadian Criminal Law. A Treatise (3rd ed.)* (Toronto: Carswell, 1996) at 376.

Impulsivity is a defining aspect of antisocial personality disorder.[48] It has been estimated that 50-80% of all offenders meet the diagnostic criteria for antisocial personality disorder.[49]

It has been suggested that FASD can be distinguished from personality disorders, such as antisocial personality disorder, on the grounds that it has an organic basis. This is a questionable assumption. The IOM issued the following statement regarding the brain to behaviour association in the context of FASD.

> Behavioural deficits have been described by many clinicians… While such patterns are often reported to be characteristic of affected individuals, they are not always seen… Although a teratogenic aetiology for these patterns is usually assumed, the relationship between specific neurological damage and particular behaviours or patterns of behavioural development has not been well established.[50]

3.2 General Intent

For most offences, criminal intent can be inferred from the criminal act. It is unlikely that the cognitive, intellectual, or attention deficits associated with FASD could fully negate the *mens rea* element of general intent offences. A possible exception is in defence to the charge of failing to appear. Knoll[51] cites a line of cases[52] in which it was held that an accused who fails to attend court because of forgetfulness ought not to be convicted. There is, however, a line of cases that hold the contrary view, that forgetfulness is not a good defence and that negligence is sufficient to establish the intent requirement for failure to appear.[53]

Individuals with FASD often have memory deficits. In particular they have been described as having problems with keeping track of time. The fact that an accused has FASD may assist him / her in persuading the Judge that he / she genuinely forgot the court appointment, and that he / she did not have the requisite intent for the offence. This is, perhaps, a narrow area where FASD might be seen by the court as impairing a youth's ability to form criminal intent. It is significant, however, considering that convictions for failing to attend court are very common amongst youth.

3.3 Specific Intent

> Where an accused is charged with an offence, which requires proof of a specific intent, evidence that the accused was suffering from a mental illness or disorder, although falling short of proof of insanity, may nevertheless be evidence to negative the specific intent required for the charged offence.[54]

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48 American Psychiatric Association, The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) Fourth Edition. (Washington: APA, 1999).

49 T.A. Widiger, E. Corbitt, "Antisocial personality disorder," in W.J. Livesley, ed. *The DSM-IV personality disorders.* (New York: Guilford, 1995) at 103.

50 IOM, s*upra* note 5 at 159-160.

51 Knoll, s*upra* note 40 at para 230.

52 *R.* v. *Neal.* (1982), 67 C.C.C. (2d) 92 (Ont.Co.Ct.); *R.* v. *Stuart* (1981), 58 C.C.C. (2d) 203 (B.C.S.C.).

53 *R.* v. *Preshaw* (1976), 31 C.C.C. (2d) 456 (Ont.Prov.Ct); *R.* v. *Ludlow* (1999) 136 C.C.C. (3d) 460 (B.C.C.A.).

54 Knoll, *supra* note 40 at para 100.

To establish crimes that require specific intent, the Crown must prove that the accused was aware of specific circumstances surrounding the offence, or that the accused was aware that specific consequences might flow from their actions. Crimes that require specific intent include the following:[55] assaulting a peace officer, attempted murder, being unlawfully in a dwelling-house, breaking and entering with intent to commit an indictable offence, breaking and entering and committing an indictable offence (of specific intent), causing bodily harm with intent, murder, offering a bribe, possession of stolen property, public mischief, robbery, and theft.

The intellectual, cognitive and social deficits of an FASD accused might be raised to create a reasonable doubt with respect to his / her awareness of specific preconditions of an offence. Characteristic impulsivity might be raised to argue that the youth did not turn his / her mind to the specific outcomes, basic to some of these offences. The impulsive aspects of FASD will likely only provide a partial defence, however, because the youth will likely remain culpable for lesser and included offences.

3.4 Criminal Negligence

There are some offences in the *Criminal Code* for which the criminal intent element of the offence can be satisfied objectively, on the standard of negligence. Section 219(1) defines criminal negligence.

> Every one is criminally negligent who
>
> (a) in doing anything, or
>
> (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

This definition underlies the offences of causing death by criminal negligence[56] and causing bodily harm by criminal negligence.[57]

According to the majority decision in *R.* v. *Creighton*,[58] the test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person; individual factors, short of incapacity, are not considered. Stuart documents the Supreme Court's difficulty in deciding upon the appropriate standard for negligence.[59] In particular, the Court struggled with whether or not the standard should account for the capabilities of the accused person. The case of a youth who has FASD represents an extreme example, which strains the notion that it is fair to expect the same level of conduct from all people.

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55 Knoll, *supra* note 40 at para 189.
56 Section 220, *Criminal Code*.
57 Section 221, *Criminal Code*.
58 *R.* v. *Creighton*, [1993] 3 S.C.R. 3.
59 Stuart, *supra* note 47.

Nevertheless, the test does make some allowances. First, the departure from the expected standard of conduct must be gross. Second, the "incapacity to appreciate the risk attendant on one's conduct" provides a defence to the charge of criminal negligence. This may afford youth with FASD adequate protection. Consider an example, provided by the expert in *R.* v. *F. (R.)*,[60] as summarised by Judge Whelan:

> After some further discussion Dr. Nanson agreed that she could understand that if she punches someone she may hurt them or if she throws a rock at a window it may break but she would not be able to abstract for instance that there may be someone inside a burning building who may be hurt.

According to this example, if the accused has been charged with criminal negligence causing death consequent to her setting an apartment building on fire her deficits related to FASD could have provided her with a defence.

[60] *R.F.*, *supra* note 43.

4.0 Proportionality

This section explores the possibility that youth who have FASD might face more intrusive interventions than warranted by the severity of their alleged offence. First, provincial Review Board dispositions will be discussed. Second, sentences issued to convicted youth will be considered.

4.1 Proportionality and Provincial Review Board Dispositions

Disposition options for mentally disordered accused are set out in s. 672.54 of the *Criminal Code*; they are (a) absolute discharge, (b) discharge subject to conditions, and (c) hospital detention. The choice of disposition must be guided by several factors, including the protection of the public, the accused's mental condition, the accused's reintegration into society, and the accused's needs. In addition, the accused is entitled to the least onerous disposition that will achieve these objectives.

If the accused was found UST then the Court may issue a mandatory treatment order.[61] There must, however, be a real possibility that the accused can be made fit in a short period of time. Given the stability of cognitive and intellectual deficits associated with FASD, it is unlikely that treatment orders will be applicable in the case of accused persons with FASD.

According to *R.* v. *Winko*,[62] in the case of an NCRMD accused person, the first question in a disposition hearing is whether the accused poses a threat to the safety to the public; if the accused does not, then he / she must receive an absolute discharge. The initial threshold decision does not apply to accused persons who have been found UST, according to the *Criminal Code*, because absolute discharges are not available to them.

If the accused represents a significant threat to the public, or was found UST, then the Court must determine if the test set out in s. 672.54 can be met with a discharge into the community with conditions.[63] Lastly, if the accused represents too great a risk to the public, they must be detained in custody.[64]

In the case of an NCRMD accused, disposition hearings must be held annually until the Review Board decides that the accused no longer posses a risk to society and is suitable for an absolute discharge. The UST accused is also granted regular hearings, which continue until he / she is fit to stand trial, until the Crown can no longer make their prima facie case,[65] or until the Crown otherwise stays the charges. Thus, under the *Criminal Code* provisions, accused persons who are UST because of the lifelong cognitive and intellectual deficits associated with FASD face the possibility of indefinite control by the State.

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61 Section 672.59, *Criminal Code*.

62 *R.* v. *Winko*, [1999] 2 SCR, 925 [hereinafter *Winko*].

63 Section 672.54(b), *Criminal Code*.

64 Section 672.54(c), *Criminal Code*.

65 Under the *YCJA* the Crown must make their prima facie case on a yearly basis.

4.2 Chronic Unfitness

The constitutionality of s. 672.54, which sets the dispositions that are available for mentally disordered accused persons, has been challenged under the *Charter*, on the grounds that it does not allow chronically unfit accused persons to extricate themselves from the powers of the Review Board.

As previously described, in *R.* v. *J. (T.),*[66] the accused had been repeatedly found unfit to stand trial because of his cognitive deficits associated with FAS. At the time of the hearing, the accused had been subject to state control for seven years. If he had been convicted at the outset, he could not have received a sentence greater than two years. In a subsequent case,[67] T.J. challenged the constitutionality of his ongoing supervision in the community, under s. 672.54(b). His challenge was based on sections 7 (life, liberty, and security of the person), 9 (detention or imprisonment), 12 (treatment or punishment), and 15 (equality before and under law) of the *Charter*.

The Court found that T.J.'s s. 7 rights had been violated. His liberty was restricted by the ongoing terms of the conditional discharge. He had not had the benefit of a fair trial to determine his guilt or innocence. The Crown's obligation to periodically demonstrate their prima facie case is not onerous enough to warrant the ongoing deprivation of liberty. The Court held that the sum effect of the legislation was to give the State more control over UST youth, who have not had a case proved against them, than NCRMD youth, who have had a case proved against them. The Court held that the violation could not be justified under s. 1 because the legislation was overbroad and because of the sanctity of s. 7.

The Court also found a violation of T.J's s. 15 rights. Individuals with mental illness have been subject to historic disadvantage. T.J. was disadvantaged compared to the population at large because he was subjected to indefinite control by the state without having been proved guilty. Further, because of the permanent nature of FAS, he was disadvantaged compared to other unfit youth who could be treated. T.J. was granted a judicial stay. The Court read down the legislation by empowering the Review Board to grant absolute discharges under 672.57(a) in cases where the accused is terminally unfit to stand trial.

The Supreme Court of Canada will be addressing this issue. *R.* v. *Demers*,[68] involved a man who was found UST because of intellectual impairment. The accused was granted a conditional discharge by the Review Board, but remained UST. The accused brought a motion for a stay of proceedings as a remedy for an alleged infringement of his rights under sections 7, 11(b) and 15(1) of the *Charter*, and challenged the constitutionality of s. 672.54 of the *Criminal Code*. In contrast to the holding in *J. (T.)*, the Quebec Superior Court dismissed the motion and held that the *Criminal Code* fitness provisions are constitutional. The accused appealed the decision. In an interesting development, the Supreme Court adjourned the case, and requested additional submissions on the issue of whether or not s. 672.54 is constitutional with respect to the division of powers.[69]

66 *R.* v. *J. (T.),* [1998] Y.J. No. 124 (Y.T.Youth Ct.).
67 *R.* v. *J.(T.),* [1999] Y.J. No. 57 (Y.Terr.Ct.).
68 *R.* v. *Demers*, [2002] J.Q. no 590 (Sup.Ct.Q).
69 *R.* v. *Demers* [2003] S.C.J. No. 58.

The Standing Committee Report explored the issue of chronic unfitness. The Committee stated that the *Criminal Code* provisions seem to be premised on the notion that the accused's unfit condition is temporary and can be treated to make the accused fit to stand trial. The Committee considered, and rejected, the option that Review Boards should be able to grant absolute discharges under s. 672.57(a). The Committee concluded that only courts should have the power to grant absolute discharges to chronically unfit accused persons. They are in the best position to weigh public interest factors against the rights of the accused.

> The Committee recommends that section 672.54 of the *Criminal Code* be amended to allow the courts to discharge a permanently unfit accused either on its own volition or following the recommendation of a Review Board.

In a response to this recommendation, which supported the current provisions,[70] the government of Canada stated that (a) the system must be flexible enough to detain people who are dangerous irrespective of the severity of the alleged offence, (b) it is the Crown's prerogative to prosecute, stay, or withdraw charges, (c) that the ongoing conditions of conditional discharges are not necessarily onerous, and (d) that the legislation includes safeguards which mandate the imposition of the least restrictive conditions upon the accused that are appropriate in the circumstances.

Nevertheless, the government recognized that that it may not be in the public's best interest to maintain supervision over chronically unfit accused. As a solution, it was suggested that the Review Board should be given the power to return an unfit accused to court for a hearing to determine if a judicial stay should be granted where (a) there is no reasonable prospect of their becoming fit and (b) the accused does not represent a significant threat to the public. At the court hearing, the Crown would have the opportunity to enter submission regarding the public interest and the risk posed by the accused. In reaching its decision, the court would also consider the length of time that the accused had been under supervision.

One way to reduce disproportionate outcomes would be to cap the length of time that a mentally disordered youth could remain under the jurisdiction of a provincial Review Board. The issue of capping will be addressed next.

4.3 Capping Provisions

The unproclaimed capping provisions of the *Criminal Code*[71] were set out to ensure proportionality between the time that a mentally disordered accused could remain subject to a provincial Review Board and the gravity of their alleged crime. Implementation of the capping provisions had been delayed to give the provinces time to review their civil commitment legislation, to ensure that it could be used to incapacitate and treat a dangerous individual upon his / her release from the provincial Review Board. The *YCJA* contains parallel capping provisions that are dependant upon the proclamation of the *Criminal Code* provisions. The *YCJA* provisions reflect the lesser magnitude of youth sentences relative to adult dispositions.

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70 "Government Response", *supra* note 36.

71 See ss. 672.65, 672.66, 672.79, 672.8, *Criminal Code*.

The *Standing Committee Report* recommended that the unproclaimed capping provisions should be repealed. The Committee noted that the capping provisions were not required by the *Charter,*[72] and was persuaded by the views of treatment providers who were opposed to the capping provisions on the grounds that dangerous persons would have to be released, and that the civil commitment protocols were not sufficient to ensure public safety.

The government of Canada,[73] in its response to the Standing Committee Report agreed that the unproclaimed capping provisions should be repealed. It was stated that there is a distinction between supervision aimed at restoring an accused's mental health, and supervision as punishment. The government noted that the mental disorder provisions had been upheld by the Supreme Court in the absence of the capping provisions.[74] The capping provisions are seen to be unnecessary because detention is not indeterminate: according to *Winko*, an absolute discharge must be granted to NCRMD accused persons who do not pose a risk to the public. Ultimately, the government declared its intention to amend the mental health provisions to better protect the rights of chronically unfit accused persons, and to repeal the capping provisions.

4.4 Duty to Provide Treatment

There are potential *Charter* issues relating to the conditions under which mentally disordered accused persons must serve their dispositions. Under the *Criminal Code* mentally disordered accused persons are entitled to the least restrictive conditions that are appropriate in relation to the risk they pose, and they must be provided with effective treatment. The positive duty to provide effective treatment stems from the fact that the length of the mentally disordered accused's imprisonment depends, in part, upon the quality of services afforded to him or her. These principles, however, often come into conflict with fiscal realities.

The case of *J.(D.)* v. *Yukon Review Board*[75] involved a young adult who had plead guilty to sexual assault charges, but who was found NCRMD because of deficits associated with FAS. Counsel for the accused brought a habeas corpus motion, backed by the *Charter*, to challenge the Review Board's decision to extend the accused's interim imprisonment in a secure correctional facility, which had been designated a hospital by the province. The Board had recognized that the facility was not, in actuality a hospital, and that the accused's treatment options were limited; overall, they described the circumstance as being "unacceptable". The best treatment option for the accused was a community-based program at the Adult Resource Centre. The board did not consider this a viable option, however, because there were administrative obstacles to transferring funds between the criminal and civil commitment systems.

The Court held that it had the power to respond to the motion, notwithstanding the fact that the accused had not exhausted the appeal process. The writ of habeas corpus has been adapted to provide a remedy to *Charter* violations, under s. 24(1). The court found that the accused's s.7 rights had been violated.

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72 *Winko, supra* note 62.

73 "Government Response" *supra* at note 36.

74 *R.* v. *Lepage*, [1999] 2 S.C.R. 744.

75 *J.(D.)* v. *Yukon Review Board*, [2000] YSTC 513 (Y.Sup.Ct).

He was entitled to the least secure form of detention, consistent with protection of the public. By the Review Board's admission, detention in the correctional facility was not the least restrictive option.

The Court recognised that an absolute discharge was not an appropriate remedy because of the ongoing risk posed by the offender. The Court ordered that accused must be transferred into the care of the Adult Resource Centre; the administrative and fiscal barriers would have to be overcome.

4.5 Proportionality and Sentencing

Assuming that FASD can be managed or treated to some extent, it is apparent that effective rehabilitation will require intensive support over a lengthy period of time. The principle of proportionality mandates that the State's response to an offender's crime must be measured. Proportionality is a principle of fundamental justice. It is expressed in the *YCJA* under s. 38.(1)(c): "the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence". Although the *YCJA* has a rehabilitative focus, which necessarily involves tailoring sentences to individual accused persons, dispositions must remain tethered to the principle of proportionality. Courts are not justified in "doing whatever it takes" to correct the lives of youth with FASD.

Whether or not youth who have FASD tend to receive more intrusive sentences relative to youth in general is a question that can be answered empirically. To date there has been no research on this issue. One way to explore this question would be to compare the sentences given to youth who have FASD with those given to other youth for similar offences. A lack of parity between sentences given to youth who have FASD and other youth would indicate a problem with proportionality. This study would have to account for a number of confounding factors. On average, Youth who have FASD would likely have a greater number of aggravating factors at sentencing due to secondary disabilities of the disorder.

5.0 Sentencing

The fact that an accused person has FASD is relevant at sentencing. It has been considered an aggravating and a mitigating factor at sentencing. It may also inform the court's determination of which sentence will best serve the purposes and principles of sentencing.

5.1 Identification of FASD at Sentencing

There are several ways in which the fact that a youth has FASD might come before the court at sentencing: counsel may raise the issue, a pre-sentence report (PSR) may document a prior diagnosis of FASD, or a youth court may order a psychiatric report.

Counsel may be reluctant to raise the fact that the accused has FASD in fear that it might be considered an aggravating factor, or that the accused may receive a more severe sentence because of their needs rather than the gravity of their crime. An additional barrier is the cost associated with diagnosing FASD. The diagnosis of FASD is a special service and is not covered by provincial health care.[76] Consequently, the fact that the accused has FASD may not come to the court's attention until the stakes are high: when the threat to the youth's liberty outweighs the tactical risk and financial cost associated with the diagnosis.

An accused person's prior diagnosis of FASD often comes to the Court's attention through a PSR. Pre-sentence reports are mandatory under the *YCJA* when the court is considering a sentence involving incarceration. The *YCJA* sets out the required contents of PSR in s. 40(2). The required contents do not include a review of the youth's mental health status. However, prior diagnoses of FASD are often included under s. 40(2)(f), which includes any information the director deems relevant.

A third way that FASD comes to the Court's attention is through direct inquiry. Section 34 of the *YCJA* empowers a Youth Justice Court to order a medical, psychological, or psychiatric assessment, if the court believes it is necessary to make or review a youth sentence. Section 34 is subject to certain restrictions: the court must have reasonable grounds to believe that the accused is suffering from physical, mental, or psychological disorder; the accused must have a history of repeated offences; or the accused must be facing a charge for a serious violent offence.

Under certain circumstances the court may remand a youth in a psychiatric facility for up to 30 days so that the assessment can be conducted: (a) where the consent of the youth has been obtained, or (b) it is necessary to complete the assessment, or (c) the youth is being detained on other grounds.

In *R.* v. *M.(B),*[77] Judge Turpel-Lafond ordered a psychiatric assessment, under s. 34, which resulted in the Aboriginal accused being diagnosed with Alcohol Related Neurological Deficits. Given the

[76] The provinces have been willing to bear the costs associated with diagnosing FASD under court ordered psychological assessments, s. 34, *YCJA*.

[77] *R.* v. *M.(B),* [2003] SKPC 48 (Sask.Prov.Ct.).

Judge's familiarity with FASD[78], and the fact that the doctor who assessed the accused was a specialist in FASD, it seems probable that the Court had directed an assessment specifically for FASD. Assessment for FASD is a specialized medical service. There are relatively few practitioners who are competent at diagnosing FASD. The provinces and territories have been willing to undertake specialized assessments according to court orders under s. 34 of the *YCJA.*

It is important to note that there has been litigation in the adult courts over the issue of whether or not is it appropriate for the courts to direct the provinces to incur expenses related to specialized assessments for FASD. In *R.* v. *Gray*,[79] the Crown was successful in its application to quash a judicial order, issued under sections 672.12 of the *Criminal Code*, for the accused to be assessed by a medical practitioner familiar with FASD. The Superior Court held that the *Criminal Code* does not empower judges to order assessments at medical facilities that have not been designated by the province. In addition, it was held that although judges are obliged to state the purpose of the order, it is inappropriate for them to direct the assessment towards a particular diagnosis. Lastly, it was held that the courts do not have the jurisdiction to order provinces and territories to expend funds in order to provide specialized services.

The Court rejected the accused's argument that the province's failure to provide an FASD assessment violated his *Charter* rights. The *Charter* would come into play only if a general forensic and neurological assessment, which had been offered by the province, indicated the possibility of FASD, and if the accused had exhausted all special requests to the Province's Minister of Health to pay for the assessment.

In a subsequent case, *R.* v. *Creighton*,[80] the Superior Court followed *Gray* and quashed a court order[81] that ordered the accused to be assessed, at the provinces expense, by a doctor who had expertise in FASD prior to sentencing.

Another way in which courts have attempted to recognize FASD is through judicial notice. In this context, the use of judicial notice is problematic. According to the rules of evidence, a court may legitimately take judicial notice of a fact that is notorious in the community and cannot be questioned reasonably. Judicial notice is not a vehicle for judges to exercise their special knowledge or expertise.[82] It might be reasonable to ask the court to take judicial notice of the fact that "maternal alcohol consumption can lead to significant birth defects in children". However, it would not be reasonable to ask the court to resolve the factual question of whether or not a particular accused suffers from FASD through judicial notice. The diagnostic criteria for FASD are not notorious in the community, or even within the medical profession. Judges cannot be called upon to, in effect, assign medical diagnoses to individuals.[83]

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78 As indicated by her other reported judgements related to FAS: *R.* v. *D. (W.),* [2001] S.J. No.70 (Sask.Prov.Ct.); *R.* v. *K. (L.E.),* [2001] SKCA 48 (Sask.Prov.Ct.); *R.* v. *L. (M.)* (2000), 187 Sask R. 195 (Sask.Prov.Ct.).

79 *R.* v. *Gray* (2002), 169 C.C.C. (3d) 194 (B.C.Sup.Ct).

80 *R.* v. *Creighton,* [2002] BCSC 1190 (B.C.Sup.Ct).

81 Under s. 672.12 of the *Criminal Code*.

82 See D. Paciocco & L. Stuesser, *The Law of Evidence,3rd ed.*, (Toronto: Irwin Law, 2002) at 376.

83 In *R.* v. *Harris,* [2002] BCCA 152, the Crown appealed a sentence where the trial judge had proceeded from her assumption that the accused had FAS. The offender subsequently received a forensic examination, which

5.2 FASD as an Aggravating and Mitigating Factor at Sentencing

Under the YOA, it may not have been in a youth's interest to be identified, at sentencing, as having FASD. It could have been argued that a youth who has FASD has untreatable deficits and lacks ordinary restraint, and that consequently he / she represents an ongoing risk to the public.

In *R.* v. *T. (D.L.)*[84] the youth plead guilty to manslaughter for beating his mother's boyfriend to death with a bat. The youth had been diagnosed with FAS, attention deficit hyperactivity disorder, and oppositional defiant disorder. The Court took notice of the youth's impairments when sentencing him under the YOA. Notwithstanding, the Court rejected the joint submission presented by counsel of two years secure custody and one year probation. The Court imposed a three-year term of incarceration. In giving reasons for the disposition, the Court expressed concerns that the youth would not be manageable in the community because of his poor prognosis for rehabilitation.

Similarly, in *R.* v. *J. (E.L.)*, [1998] Y.J. No. 19 (Youth Ct.), the Court, when sentencing a youth under the YOA, rejected a joint submission that recommended open custody. The Court held that open custody was inadequate to hold the youth accountable given the number and severity of the charges against the youth, and because of his prior record. The Court held that FASD is not necessarily a mitigating circumstance, but it is a relevant factor to consider at sentencing. In this context, the Court expressed frustration over a lack of appropriate treatment options.

> A case such as this clearly points out the inadequacy of the tools provided to deal with such offenders. In short, the options available to the Court reduce themselves to locking this youth up in jail or returning him to the community where there are few supports, and where inevitably, he will cause further disruption, and where he presents a significant danger to himself and others. It is true that open custody placements can be made available; however, E's history in open custody is not encouraging. There have been repeated breakdowns of such placements due to his defiant, aggressive behaviour or self-destructive threats. And of course, placing a young person in closed custody, simply because no more appropriate placement is available, can hardly sit well. Putting someone in jail is a punishment, it is not therapy, and it is not supposed to be a means of managing those with mental deficits. In sum, the Court is left to deal with persons who are unlikely to learn anything from their brush with the law, and without any appropriate programs or placements being available to otherwise modify or control the behaviour of these individuals.[85]

The dangerousness and poor treatment prognosis rationale, associated with FASD, was used by the Crown, under s. 16 of the YOA, to transfer several youth to the adult criminal justice system. In *Re. N.*

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diagnosed the accused with antisocial personality disorder, but found that his condition was not related to FASD. The court ultimately held that that the trial judge had erred in assuming that the accused had FAS.

84 *R.* v. *T. (D.L.)* (2000), 319 A.R. 29 (Alta.Prov.Ct.).

85 *Ibid.* at paras 10-11.

(S.L.)[86] and *R* v. *B. (J.A.)*[87] the Crown was successful in its applications under s. 16 of the YOA to have the young accused persons transferred to adult court. In both cases, the accused had been diagnosed with FAS. The poor treatment prognosis of the accused persons helped the Crown to satisfy its burden that effective rehabilitation was unlikely to occur within the limited time period afforded by youth dispositions.

Under the YOA, a youth could be transferred to adult court where it was held that the objectives of affording protection to the public and rehabilitation of the young person could not be reconciled. In contrast, s. 72 of the *YCJA* – which provides that a youth may be sentenced as an adult – places greater emphasis on the gravity of the offence. In addition, section 72 also directs the court to consider the age, maturity, character, and background of the accused. Youth who have FASD tend to be immature and lack sophistication. This factor would likely militate against their being sentenced as an adult.

The cognitive and intellectual deficits associated with FASD have been considered a mitigating factor with respect to the youth's degree of responsibility in a number of cases.[88] Section 38(2)(c) of the *YCJA* states that a youth's sentence must be "proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence". The argument is that a youth who has FASD is less able to restrain his / her behaviour compared to other youth because of the deficits associated with his / her disorder; accordingly, a youth who has FASD is not as responsible when he/she fails to exercise restraint, and commits a criminal act, compared to other youth.

The British Columbia Court of Appeal considered FASD to be a valid mitigating factor at sentencing under the YOA. In *R.* v. *L. (J.G.)*[89] the young Aboriginal accused successfully appealed his disposition resulting from multiple theft and driving charges. In expressing his agreement that the sentence ought to be reduced, Chief Justice McEachern noted:

> …I am persuaded to the view that has just been expressed in part because I think this young man has had a very difficult time. The pre-sentence report shows that he suffered from fetal alcohol syndrome and that he has had a series of serious misfortunes in his life…[90]

In *R.* v. *M. (R.B.)*[91] the Court granted the sentencing appeal notwithstanding the fact that there had been no error in principle below. The Court of Appeal ordered a pre-sentence report, which stated that the accused "was more than likely suffering from Fetal Alcohol Syndrome at birth". In his reasons for reducing the youth's sentence, the Chief Justice stated the following:

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86 *N.(S.L.), Re.*, [1998] CarswellSask 866 (Sask.Prov.Ct.).

87 *R.* v. *B.(J.A.)*, [2000] ABPC 141 (Alta.Prov.Ct.).

88 See *R.* v. *P. (S.L.)* (2002), 225 Sask. R. 22 (Sask.Prov.Ct.); *R.* v. *Jack*, [2001] YKSC 55 (Y.Sup.Ct.) (functions at a much younger age); *R.* v. *K. (D.E.)*, [1999] ABPC 110 (Alta.Prov.Ct.)(capacity warrants diminished accountability); R v. M. (B.), [2003] SKPC 83 (Sask.Prov.Ct.) (lack of insight into cause / effect relationship); *R.* v. *M. (L.E.)*, [2001] M.J. No. 62 (Man.Prov.Ct.)(major mitigating factor); *Contra R.* v. *J. (E.L.)*, [1998] Y.J. No. 19 (Y.Youth Ct.)(impulsivity related to FAS not a mitigating factor).

89 *R.* v. *L. (J.G.)* (1996), 75 B.C.A.C. 227, (B.C.C.A).

90 *Ibid.* at para 8.

91 *R.* v. *M. (R.B.)* (1990), 54 C.C.C. (3d) 132 (B.C.C.A.).

> It appears self evident to us that in any population there will be some disadvantaged members who, for many reasons, are likely to fall, or more likely drift, into a life of idleness and crime. Society must be protected from them as best it can, but in some cases it is unrealistic to think that some of these unfortunate persons can be rehabilitated once the cycle starts, by successive and increased periods of imprisonment, specially when, upon release, they are returned to the same environment, lifestyle, frustrations and temptations which contributed to their misfortune in the first place.
>
> This, of course, is especially the case with those of our citizens who have not had the advantages of a stable family structure in their formative years, or were harmed before or at birth, or afterwards by some form of alcohol syndrome, or from other physical or cognitive impairment or from the additional misfortune of abuse in childhood. It appears this accused may suffer from all of these disadvantages.[92]

5.3 Sentencing Options under the *YCJA*

This discussion will now turn to examine the range of sentencing options provided by the *YCJA*. In particular, their ability to meet the objectives of sentencing when dealing with youth who have FASD will be discussed.

The purpose of sentencing is set out in s. 38.(1) of the *YCJA*.

> The purpose of sentencing… is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

Thus, one of the main objectives of the *YCJA* is rehabilitation. The substantive provisions of the *YCJA* sentencing provisions[93] restate that rehabilitation is a dominant sentencing objective, subject to the principle of proportionality.

Section 42(2) of the *YCJA* sets out the range of sentencing options that can be used to achieve the objectives of sentencing.

The *YCJA* provides two sentences, which might be described as cautionary in nature: a reprimand,[94] and an absolute discharge.[95] These dispositions may be good options for dealing with offences committed by youth who have FASD: their criminal behaviour is acknowledged, and they are not placed at immediate risk for committing future administrative offences. It is important when sentencing youth to ensure that the limits of proportionality are observed and that the criminal law power is not misused to deliver social services.[96]

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92 *Ibid.* at paras 15-16.

93 Section 38(2)(e), *YCJA*.

94 Section 42(2)(a), *YCJA*.

95 Section (42(2)(b), *YCJA*.

96 The principle that punishment and the promotion of welfare must be considered separately is reflected in s. 39(5) of the *YCJA*, which prohibits the use of custody to deliver social services to youth.

Sanctions that order the youth to forfeit money, such as fines,[97] and other restitution orders,[98] may not be suitable for youth who have FASD. Judges are obliged to consider if the youth has the ability to comply with the order. As observed by Streissguth and colleagues,[99] unemployment is a common secondary disability amongst persons who have FASD.

Similarly, probation[100] may not be suitable for youth with FASD. It may be unreasonable to expect a FASD youth, who is having difficulty complying with basic societal norms, to internalize and comply with additional behavioural restrictions. However, subject to the availability of programming it is possible to attach conditions that order the youth to attend special programming in the community. Conceivably, programming aimed at providing FASD youth with daily structure could be of great benefit in assisting them with efforts to comply with the other terms of their probation.

The *YCJA* introduced the intensive support and supervision order, s. 42(2)(l). This disposition seems particularly well suited for youth who have FASD, and has been used in a number of reported decisions. Intensive support and supervision may provide youth with enough daily structure to give them a reasonable chance of successfully completing their probation. It should be noted that these dispositions are only available in provinces where programs have been implemented by the provincial director.

Under the *YCJA*, a sentence of incarceration can be given according to the custody and supervision provisions.[101] Some might argue that custodial dispositions are well suited for youth with FASD because they provide structure, which may encourage the youth to attend programming. For example, in *R.* v. *Daniels*,[102] the Court dismissed the adult accused's sentence appeal. The defence argued that the sentence of incarceration was too severe and should be reduced to probation because the accused was Aboriginal and had ARND. The respondent had been convicted of breach of probation consequent to his failure to attend sex offender treatment in the community. In dismissing the appeal, the Court noted that the respondent had made progress in the sex offender treatment program while in prison, whereas he had had difficulty following treatment conditions in the community.

There are, however, a number of factors that militate against the incarceration of youth with FASD. Under the *YCJA*, incarceration is available only if the youth commits a violent offence, if the youth has failed to comply with a non-custodial sentence, if the youth has committed a serious offence and has an extensive criminal history, or if there are exceptional circumstances that warrant the imposition of a custodial sentence, and if no other suitable sentencing alternative exists.

Specific provisions apply in the case of Aboriginal youth.

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97 Section 42(2)(d), *YCJA*.

98 For example, compensation 42(2)(e), restitution 42(2)(f), pay purchasers 42(2)(g), compensation in kind 42(2)(h), community service 42(2)(i).

99 Streissguth, s*upra* note 14.

100 Section 42.(2)(k), *YCJA*.

101 Sections. 42.(2)(n)(o)(p)(q), *YCJA*.

102 *R.* v. *Daniels* (1999), 130 B.C.A.C. 317 (B.C.C.A.).

> 38(2)(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;…

Section 38(2)(d) runs parallel to s.718.2(e) of the *Criminal Code*, which was interpreted by the Supreme Court in *Gladue*.[103] In *Gladue* the majority held that the sentencing judge must consider two factors: (a) the unique systemic and background factors which may have played a role in bringing the Aboriginal accused before the courts and; (b) the type of sentence that would be appropriate given the youth's Aboriginal heritage. It may be argued that the high prevalence of alcohol abuse within some Aboriginal communities can be linked to the historical process of colonization, and that FASD provides a significant contact point with historical disadvantage.

Incarceration may be counter-productive to the objective of rehabilitating youth with FASD. A common justification for not incarcerating youth with FASD is the fear that their risk level will be increased through bringing them in contact with anti-social individuals. Studies have identified that having anti-social associates is the best predictor of criminal behaviour.[104] In addition, it is possible that youth with FASD are vulnerable to being exploited by more sophisticated peers in correctional facilities.

The *YCJA* provides for a special therapeutic sentence, intensive rehabilitative custody and supervision.[105] This disposition is available if (a) the youth has committed a designated serious violent offence; (b) the youth is suffering from a mental illness or disorder, a psychological disorder or an emotional disturbance; (c) a treatment plan has been developed and there is a good chance that it will reduce the youth's risk to recidivate; and (d) the provincial director agrees to admit the youth. Intensive rehabilitative custody and supervision was intended to be a useful sentence for youth who might otherwise receive and adult sentence.

It is important to consider the issue of "consent" in the context of treatment. The *YCJA* does not empower the court to force treatment upon unwilling youth. Section. 42(8) of the *YCJA* states:

> (8) Nothing in this section abrogates or derogates from the rights of a young person regarding consent to physical or mental health treatment or care.

As a matter of practice, the court should determine if the youth is willing to undertake the treatment before applying a sentence of intensive support and supervision, or intensive rehabilitative custody and supervision. Youth cannot be compelled to participate in therapy sessions, or to take medication, unless the youth lacks the capacity to give their consent. If a youth does not comply with the terms of an intensive disposition then the provincial director can apply to a youth court for an order to convert the sentence into an ordinary custody and supervision order.[106]

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103 *R.* v. *Gladue*, [1999] 1 S.C.R. 688.

104 P. Gendreau, T. Little, C. Goggin "A meta-analysis of the predictors of adult offender recidivism: what works!" (1996) 34 Criminology 575.

105 Section 42(2)(r), *YCJA*.

106 Section 94(19), *YCJA*.

Overall, the *YCJA* sets out a robust sentencing framework, which provides judges with a range of options at sentencing. The intensive dispositions -- intensive supervision and support, treatment in the community, and intensive rehabilitative custody and supervision – may be well suited for accommodating youth who have FASD. It must be acknowledged, however, that all of these programs are subject to the discretion of the provinces. Bala provides the following observation:

> Despite the provision for new sentencing options such as intensive custody and supervision, some of the biggest difficulties in providing rehabilitative services and counselling to young offenders, both in custody and in the community on probation, arise from the failure of provinces to provide an adequate level of funding and service, not from legal concerns.[107]

However, the federal government provides full funding to the provinces and territories for the therapeutic aspects of the intensive rehabilitative custody and supervision disposition.

In *R.* v. *K. (L.E.)*,[108] the Saskatchewan Court of Appeal, allowed the Crown's sentencing appeal. The trial disposition, made under the YOA, had attempted to provide the youth, who had FAS, with an intensive form of treatment. As part of a probation order the judge ordered that (a) a youth worker with knowledge of FASD should be assigned to work with the offender, and (b) that a case plan should be prepared to arrange inpatient substance abuse treatment, educational opportunities, and suitable accommodation for the accused in the community. The Judge was aware that there were no youth workers with the skills necessary to implement the order.

The Court of Appeal held that the court did not have jurisdiction to supervise or direct the province in the performance of its duties, and in particular to direct that it assign a youth worker with specialized skills to work with the young person. Judicial power is derived from statute, and the YOA did not empower the judge to order a specific type of treatment. Similarly, in regards to the case plan, the judiciary cannot direct the executive branch of government.

The Court of Appeal did recognize, however, that the judge was trying to act in the best interests of the youth.

> Programs designed to deal with young offenders who suffer from FAS are urgently required. While we recognize the clear separation of powers between the judiciary and the executive branch of government and that the responsibility to develop and implement programming envisioned by the Act rests upon the executive, it is hoped that the executive will react positively to the recommendations which are made by this Court and by the youth court with respect to these young offenders.[109]

As noted, there has been progress in the development of programming that is suitable for youth with FASD. Recent initiatives will be explored in the next section.

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107 N. Bala. *Youth Criminal Justice Law.* (Toronto: Irwin Law, 2003) at p. 490.

108 *R.* v. *K. (L.E.)*, [2001] SKCA 48 (Sask.C.A.).

109 *Ibid.* para 51.

6.0 Bridging with Social Services

> Families affected by FAS frequently require the services of specialists in substance abuse, developmental disabilities, and education. Therefore, these disorders lie within the purview of many groups but are clearly not the full responsibility of any one. All groups will accept, or have accepted, an interest in handling an appropriate piece of the problem, but no one is in a position to lead and coordinate. Hence, there is no group to which government can look for leadership, and no group is focused on advocacy education about the disorders. Attention to FAS, ARBD, and ARND, then, is structurally marginalized, and like any problem that falls between organized disciplines, progress is unavoidably hampered. Both FAS research and service delivery suffers.[110]

The youth justice system must respond to criminal behaviour of youth in an appropriate way that takes account of their special needs. The criminal law may be used to justify proportional interventions into the lives of youth who have FASD. However, effective rehabilitation may require long-term life changes, such as establishing structured prosocial living environments, long-term mental health treatment, and extended education / vocational training. To accomplish these long-term changes it is necessary to look to various social services. The administration of child welfare services, mental health, and education, all fall within the jurisdiction of the provinces and territories. It is important that the youth justice system work collaboratively with these social services. This section examines the ways in which other systems can be constructively involved, when the youth justice system responds to a youth who has FASD.

It is axiomatic that it is necessary to identify individuals who have FASD in order to respond to their needs. Work to accomplish this objective is underway. However, the prospect of implementing a widely used screening or diagnostic tool raises issues related to resource limitations. In addition, mental health screening raises issues relating to consent. A diagnosis of FASD could have a significant impact on how a youth is treated by the system. Thus, an issue that would need to be explored is whether or not it would be necessary to obtain informed consent from the youth before administering the screening measure.

Section 35 of the *YCJA* was intended to help integrate the social welfare and justice systems.

> 35. In addition to any order that it is authorized to make, a youth justice court may, at any stage of proceedings against a young person, refer the young person to a child welfare agency for assessment to determine whether the young person is in need of child welfare services.

[110] IOM, *supra* note 5 at p. 194.

There are two points that are somewhat unclear within this provision. First, it is not clear what is meant by "child welfare agency". The term could be constructed narrowly to refer simply to "child protection services". An alternative interpretation, which is supported by the Department of Justice, is that that provision should be read broadly to include programs that promote social welfare, including mental health services, and education.

The second term that is subject to interpretation is "referral". A distinction should be drawn between a "referral" and "order".[111]

> Section 35 permits the court to refer a young person to a child welfare agency for assessment to determine whether the young person is in need of child welfare services. This referral is not an order for assessment. The section does not require that the assessment be conducted and it does not require that an assessment report be submitted to the court.[112]

In addition, s. 35 is not in and of itself a means to conclude proceedings in youth justice court.[113]

Barnhorst provides the following interpretation of the purpose of s. 35:

> The *YCJA* reflects a basic policy position that the criminal justice system should not be used as the primary way of addressing the child welfare needs of youth…
>
> A criminal justice intervention may attempt to address a youth's child welfare needs as part of a sentence that is intended to promote the rehabilitation of the youth. However, the sentence must not exceed what is a fair and proportionate response to the offence that the youth has committed. The child welfare needs of the youth may be well beyond the proper scope of the criminal law or may not be directly relevant to the offence committed.
>
> Section 35 is a legislative reminder to judges that the child welfare needs of youth in conflict with the law are important and should not be ignored simply because they cannot be addressed through the criminal law. If a judge believes that a young person before the court may have child welfare needs that are beyond the proper scope of the criminal justice system, it is in the interests of the young person and of society for the judge to bring his or her concerns to the attention of the child welfare authorities…[114]

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111 See *YCJA*, s. 34(1) "A youth justice court may, at any stage of the proceedings against a young person, *by order* require that the young person be assessed…"

112 D. Barnhorst "Section 35-*Youth Criminal Justice Act* – Referral to Child Welfare Agency" (October 2003) [unpublished, contact author] .

113 See Bala, *supra* note 107 at 314.

114 Barnhorst, *supra* note 112.

Thus, even in cases where a youth has committed a relatively minor offence, the court has the ability to call upon other social services, with the view to giving the youth the opportunity to accept help that is available.

The *YCJA* places a significant emphasis on the use of extrajudicial measures as an alternative to the formal prosecution of youth. The *YCJA* declares that extrajudicial sanctions are, in principle, "often the most appropriate and effective way to address youth crime"[115] and that "extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour".[116]

Sections 6 and 7 of the *YCJA* empower police officers to address youth misconduct using warnings, cautions, and referrals. Police referrals represent an initial point where a youth with FASD could be put into contact with social services that they require. It is desirable to educate police to recognize youth who may be affected by FASD so that they can make appropriate referrals.

The Department of Justice's Youth Justice Renewal Fund (*YJRF*) has supported two initiatives that have been aimed at educating and developing expertise amongst police. First, the *YJRF* provided resources to the Lethbridge Police Service, to support a project that engaged a community youth worker to identify youth affected by FASD and other developmental disabilities, to recommend whether or not a identified youth should be diverted from the legal system, and to liase between the youth's family, the school, and the community. Second, the *YJRF* provided a modest grant to the Winnipeg Police Service Training Division to reproduce a booklet entitled "Fetal Alcohol Spectrum Disorder – FASD Guidebook for Police Officers". The publication is being used to promote awareness, identification, appropriate intervention and prevention of Fetal Alcohol Spectrum Disorder.

Serious behaviour that requires a more formal response than a warning, caution, or referral, can be addressed with an extrajudicial sanction, which is provided by s. 10. For example, a sanction might specify that a youth receive treatment within the community for a set period of time. A youth cannot, however, be compelled to comply with the terms of the sanction. If the youth thinks the terms are too onerous they can express a wish to have the charge dealt with by the youth justice court.

Section 10(2) sets out a number of conditions that must be met for a youth to participate. In some cases youth with severe deficits related to FASD may not be able to satisfy these conditions. Section 10(2)(c) requires that the youth consent to participate in the program. Severely affected youth may not be competent to consent. Similarly, a young person may not be able to meaningfully exercise their right to counsel which is provided by s. 10(2)(d). In addition, if the youth is unfit to stand trial, then it might be argued that the prosecution is "barred at law" and that condition 10(2)(g) cannot be met.

In cases where the youth has committed a serious violent offence, the police and Crown will likely advance formal prosecution against the youth. In such cases, it may be within the realm of proportionality to address the youth's needs as part of a youth sentence. In the case of FASD youth, the development of effective programming will often require the collaboration with social services offered

115 Section 4(a), *YCJA*.
116 Section 4(d), *YCJA*.

by the province or territory. As previously discussed, the *YCJA* provides two sentences which may be useful for accomplishing this objective: probation / intensive supervision and support, and intensive rehabilitative custody and supervision.

A pilot project, which was launched in March 2003, is underway in British Columbia for the development of effective programming for youth in conflict with the law who have FASD. The project is titled the "Specialized Assessment and Program Pilot Project for Young Offenders with FAS/E". The project represents a partnership between Youth Justice Policy (Department of Justice Canada), the Pacific Legal Education Association, the Asante Centre for Fetal Alcohol Syndrome, and the Ministry of Children and Family Development for British Columbia.

The goal of the project is to provide an effective alternative to custody through the development of individualized treatment programs and coordinated care plans for youth who are in conflict with the law and have been diagnosed with FASD. This initiative involves (a) providing individualized assessments, (b) establishing an intensive support and supervision program, (c) arranging residential placements where needed, and (d) delivering post-program follow-up services with families. Probation officers will make referrals to the program. Placements will be accomplished through court orders under the intensive support and supervision sentence.

Another way in which experts could constructively inform the youth justice system is through the creation of youth justice committees under s. 18. These committees could have a positive influence on the youth process through the conferencing procedures set out is ss. 19 and 41.

> 19.(1) A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.
>
> (2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, including the review of sentences and reintegration plans.
>
> …
>
> 41. When the youth justice court finds a young person guilty of an offence, the court may convene or cause to be convened a conference under section 19 for recommendations to the court on an appropriate youth sentence.

It is important to consider practical, in addition to legal, ways to promote collaboration. A simple and direct way is to promote opportunities for dialogue between stakeholders in the federal government, the provincial and territorial governments, non-governmental organizations, and the private sector. The *YJRF* has participated in two such initiatives to date.

A conference was held in Hamilton Ontario in October of 2002. The focus of the meeting was discussion of the impact of FASD in relation to education, employment, welfare, and justice. The conference participants were service providers who work with homeless persons, criminal high-risk individuals, Aboriginal communities, and mental heath groups. The conference was funded jointly by Human Resources Development Canada, Health Canada, and the Department of Justice.

A provincial gathering, titled “Circle of Hope: Knowledge, Understanding, Solutions”, was held in Fredericton, New Brunswick in November 2002. It brought together community service providers, government service providers, policy makers, the private sector, and families of people affected by FASD. The gathering was intended to (a) build and strengthen networks between families affected by FASD and to link those families with service providers, (b) discuss best practices in providing service to persons who have FASD, (c) develop public education strategies on FASD, and (d) raise awareness about FASD.

7.0 For Discussion

The FASD Construct

1. (a) In what areas would it be most beneficial to promote primary empirical research on youth and FASD in Canada?

Fitness to Stand Trial

2. Considering competing *Charter* issues, does the "limited capacity" test adequately protect youth with FASD?

3. Do the existing procedures adequately ensure that youth who have FASD will be identified? If existing provisions are not satisfactory, how can the youth justice system better identify accused persons who have FASD?

4. What measures can be taken to ensure youth who have FASD are not providing involuntary statements or waivers?

5. Is it acceptable for the Crown to use pre-trial confessions as part of its prima facie case against an UST youth who has FASD?

Criminal Intent

6. Should the definition of not criminally responsible by reason of mental disorder be expanded to encompass irresistible impulses?

7. Should the intent requirement for failure to appear require the Crown to prove that the accused chose to ignore the court appointment, or is the appropriate standard akin to negligence?

8. Should the standard of criminal negligence for youth be changed to take into consideration individual factors such as deficits arising from FASD?

Proportionality

9. Is the solution, posed by the government, to the problem of the chronically unfit adequate to protect the liberty interests of youth with FASD? What incentives would a provincial Review Board have for returning a chronically unfit accused to court for a hearing to be discharged?

10. In light of the fundamental differences between the youth criminal justice system and the adult criminal justice system, would it be desirable to establish capping provisions within the *YCJA* independent of the mental health provisions of the *Criminal Code*?

11. Are there administrative and fiscal barriers to providing meaningful treatment options for youth with FASD who have been deemed UST?

Sentencing

12. Under what circumstances is it proper to consider FASD a mitigating factor at sentencing?

13. Under what circumstances is it proper to consider FASD an aggravating factor at sentencing?

14. What options does the court have in responding to a youth who has FASD who does not wish to participate in special programming?

15. How should the youth justice system constructively respond to youth with FASD who repeatedly breach the terms of their sentence?

Bridging with Social Services

16. Would it be desirable to implement a mental health screening procedure to identify youth who have severe mental disorders? At what point of the pre-trial criminal procedure would screening take place? Would mental health screening be economically viable?

17. Can social services be made available to FASD youth who are under the care of the provincial or territorial mental health Review Boards?

18. Could youth justice committees on FASD be an effective way to inform the courts of existing community resources and social services?

19. Could additional conferences on FASD be an effective method for disseminating information and establishing personal relationships between stakeholders in the federal government, the provincial and territorial governments, non-governmental organizations, and the private sector?