

**Revisions to Canada's Sentencing Regime as a Remedy to the Over-Incarceration of  
Persons with Mental Disabilities**

by

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## **Abstract**

Persons with mental disabilities make up a significant proportion of the prison population in Canada. In addition to being a group that is subject to discrimination and disadvantage generally in this country, individuals with mental disabilities are particularly vulnerable as prisoners and suffer serious adverse consequences from incarceration not experienced by other prisoners. Individuals with mental disabilities are being sent to prison at an increasing rate, despite recognition in the jurisprudence that the presence of a mental disability will in many cases reduce an offender's moral blameworthiness for her actions. This Thesis explores these issues through a review of social science literature, legal academic writing and jurisprudence. It concludes that an inconsistent application of sentencing principles developed through the common law and increasing implementation of "tough on crime" legislation by Parliament has resulted in many offenders with mental disabilities being sent to prison, despite the fact that in many circumstances alternatives to incarceration would be a more equitable result and better ensure ongoing public safety.

The second part of my Thesis proposes potential revisions to the *Criminal Code*'s sentencing provisions that could assist in combating the problem of over-incarceration of mentally disabled offenders. These proposals include a requirement that sentencing judges must in every circumstance consider the unique circumstances of offenders with mental disabilities, including both the impacts of mental disability on their behaviour and the systemic discrimination faced by this group in a variety of socioeconomic spheres. The second proposal is a legislative exemption to mandatory minimum sentences for offenders with mental disabilities, based on the principle

that individualized and proportionate sentences are crucial for these offenders to avoid perpetuating discrimination based on mental disability in the criminal justice system. A final proposed revision would give judges an increased ability to order conditional sentences for this group of offenders, as a counter to the increased legislative limitations on the use of this potentially beneficial sentencing alternative.

## **Preface**

This thesis is original, unpublished, independent work by the author, Moira Aikenhead.

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## List of Abbreviations

ADHD	Attention-deficit hyperactivity disorder
CBA	Canadian Bar Association
CSO	Conditional Sentence Order
DSM-5	American Psychiatric Association's <i>Diagnostic and Statistical Manual of Mental Disorders, 5th Edition</i>
FASD	Fetal Alcohol Spectrum Disorder
NCRMD	Not criminally responsible on account of mental disorder
PSR	Pre-Sentence Report
PTSD	Post-Traumatic Stress Disorder



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*to Matt. I could never have made it without your love and support.*

## Chapter 1: Introduction

### 1.1 The Problem

Currently, a large proportion of the Canadian prison population is made up of individuals with mental disabilities.<sup>1</sup> The courts in this country have recognized that offenders with mental disabilities may bear less moral blameworthiness for their actions, which, according to the fundamental principle of sentencing, must be reflected in a proportionate sentence for any criminal offence.<sup>2</sup> Courts have explicitly recognized that sentences premised on notions of punishing or deterring offenders with mental disabilities for their actions will in many cases be inappropriate, and the focus in sentencing should instead be on rehabilitation and treatment. Further, individuals with mental disabilities are subject to an ongoing legacy of discrimination in this country, and are a protected group under the equality provisions of the *Canadian Charter of Rights and Freedoms* [the *Charter*].<sup>3</sup> The pervasive and systemic discrimination against people with mental disabilities in Canada creates barriers for this population not experienced by others in society, which can contribute to their involvement in the criminal justice system.

The criminal justice system itself has a discriminatory impact on offenders with mental disabilities as research has shown this group is particularly vulnerable within the prison environment; in general people with mental disabilities serve a greater proportion of their sentence incarcerated than offenders without mental disabilities, and thus receive fewer

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<sup>1</sup> I have chosen to use the term “mental disability” to refer to a broad category of illnesses, developmental disabilities, personality disorders, intellectual disabilities and cognitive impairments. I will explore this choice in language further below in **Section 1.3.2**.

<sup>2</sup> *Criminal Code*, RSC 1985, c C-46, s 718.1.

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], s 15.

opportunities for rehabilitation. Further, they tend to commit a higher number of institutional infractions and may be subjected to segregation, restraint, and other inappropriate techniques to address instances of “acting out”. The result is that offenders with mental disabilities are generally in a worse position after serving any prison sentence than prior to entering the penitentiary, and are thus at a greater likelihood to reoffend, creating a cycle of criminal behaviour and incarceration that decreases their quality of life and puts the public at risk.

The criminalization of mental illness and the over-incarceration of offenders with mental disabilities has been recognized as a serious and pressing problem in recent years by a number of advocacy groups, task forces, academics, and judges. In a September 2013 decision from the Manitoba Court of Queen’s Bench, Justice Suche described the issue of how to appropriately provide for the circumstances of mentally disabled persons in the criminal justice system as “one of the greatest challenges in the years to come.”<sup>4</sup>

## **1.2 Objectives and Research Questions**

While there are a variety of complex, systemic factors contributing to the over-incarceration of individuals with mental disabilities, sentencing reform is one mechanism for partially redressing this issue. As noted by Roberts & Verdun-Jones, the high number of individuals in the criminal justice system with mental health issues “reflects – to some extent at least – the absence of a viable sentencing option that is specifically designed to ensure that such individuals are sent to

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<sup>4</sup> *R v Adamo*, 2013 MBQB 225 at para 144, 296 Man R (2d) 245 at 144 [*Adamo*].

mental health facilities rather than to prisons”.<sup>5</sup> In 2011 the Canadian Bar Association [CBA] passed a resolution calling for the federal, provincial and territorial governments to allocate sufficient resources to reduce the criminalization of mentally ill individuals and prevent them from coming into contact with the criminal justice system, and urged the federal government to amend sentencing laws to accommodate individuals suffering from mental illnesses.<sup>6</sup>

With such commentary in mind, my Thesis addresses two broad research questions:

1. In what ways is the current criminal sentencing regime failing offenders with mental disabilities?
2. What changes to the current sentencing regime could potentially counter or correct these failings?

My objectives in conducting this research are to contribute to the body of literature discussing the theoretical bases upon which those with mental disabilities should be considered less morally blameworthy for their actions, including an expanded understanding of this concept from an equality perspective, which takes into account the pervasive discrimination and socioeconomic barriers faced by mentally disabled persons in this country. In proposing legislative remedies for these issues, my hope is to demonstrate that Parliament can take steps to remedy the current

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<sup>5</sup> Julian V Roberts & Simon N Verdun-Jones, “Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*” (2002) 39 Alta L Rev 788 (QL) at 3.

<sup>6</sup> Canadian Bar Association, “Mentally Ill Persons in the Criminal Justice System”, Resolution (Halifax: Annual General Meeting 13 – 14 August 2011) at 2 [Canadian Bar Association, “Resolution”].

criminalization of persons with mental disabilities that are in keeping with both the purposes and principles of sentencing set out in the *Criminal Code*,<sup>7</sup> and *Charter* considerations.

### **1.3 Framework, Methodology and Exclusions**

#### **1.3.1 Framework and Methodology**

A review of relevant social science literature regarding discrimination against offenders with mental disabilities in this country, particularly in relation to their treatment by the criminal justice system, demonstrates that this issue has received a great deal of attention in recent years. Organizations such as the Canadian Centre for Addiction and Mental Health, Office of the Correctional Investigator [“Correctional Investigator”], and the Mental Health Commission of Canada have all published insightful studies and reports.<sup>8</sup> In conjunction with these materials, I also reviewed relevant academic literature from Canada and other jurisdictions relating to notions of reduced responsibility for offenders with mental disabilities.

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<sup>7</sup> *Criminal Code*, *supra* note 2 at ss 718 – 718.2

<sup>8</sup> Centre for Addiction and Mental Health, *Mental Health and Criminal Justice Policy Framework* (2013), online: <[http://www.camh.ca/en/hospital/about\\_camh/influencing\\_public\\_policy/Documents/MH\\_Criminal\\_Justice\\_Policy\\_Framework.pdf](http://www.camh.ca/en/hospital/about_camh/influencing_public_policy/Documents/MH_Criminal_Justice_Policy_Framework.pdf)> [CAMH]; John Service, *Under Warrant: A Review of the Implementation of the Correctional Service of Canada’s ‘Mental Health Strategy’* (Report Prepared for the Office of the Correctional Investigator of Canada) (Kanata, Ont: John Service Consulting, 2010); Canada, Correctional Investigator Canada, *Annual Report of the Correctional Investigator 2012-2013* (Ottawa: Her Majesty the Queen in Right of Canada, 2013) [Canada, “OCI Annual Report”]; Canada, Office of the Correctional Investigator, *Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women* (10 October 2013) online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20130930-eng.aspx>> [Canada, “Risky Business”]; Howard Sapers, *A Preventable Death* (Ottawa: Correctional Investigator of Canada, 2008); Mental Health Commission of Canada, *Changing Directions Changing Lives: The Mental Health Strategy for Canada* (Calgary: Mental Health Commission of Canada, 2012).

My review of the relevant case law focused primarily on a review of leading, appellate-level decisions discussing offenders with mental disabilities in the context of criminal sentencing, as well as lower court sentencing decisions from the previous five years involving the sentencing of individuals with mental disabilities. My intention was not to review every single sentencing decision within this timeframe where an offender had a mental health concern, and indeed as I will discuss below, to do so would be difficult if not impossible. Instead, my focus was on finding cases that demonstrated the various ways in which judges are currently dealing with the complicated issues that arise when sentencing offenders with mental disabilities.

After determining what areas of the current sentencing regime are most in need of reform for offenders with mental disabilities, I reviewed relevant case law and commentary related to the creation of subsection 718.2(e) of the *Criminal Code* in order to gain an understanding of its theoretical underpinnings and whether a similar provision could be beneficial for offenders with mental disabilities. In relation to legislative amendments to the mandatory minimum sentencing regime, I reviewed Canadian legal commentary on this topic, and I rely heavily on the research conducted for the Uniform Law Conference in 2013<sup>9</sup> regarding statutory exemptions from mandatory minimum sentences in other jurisdictions.

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<sup>9</sup> Uniform Law Conference of Canada Criminal Section, *Statutory Exemptions to Mandatory Minimum Penalties: Final Report* (Victoria, BC: Uniform Law Conference, 2013).

### 1.3.2 Language Choice Regarding Mental Health Issues

Throughout this thesis, I use the term “mental disability” to encompass a wide variety of mental illnesses,<sup>10</sup> developmental disabilities,<sup>11</sup> personality disorders,<sup>12</sup> cognitive impairments caused by brain injury, and intellectual disabilities. While these categories of mental health issues are diverse and cannot be equated directly with one another, the sentencing model I propose in this Thesis is intended to be equally available to individuals with developmental disabilities, mental disorders, brain injuries, etc., on the theoretical basis that these individuals may suffer impairments relevant to their moral blameworthiness, and likely face systemic barriers resulting from discrimination not faced by those with more robust mental health. My decision to use the term “mental disability” does not come from any notion that this term is the most descriptive or least troublesome label for this broad category of conditions. Rather, it was chosen given that this is the language of *Charter* equality rights and much of this Thesis is premised on the understanding that those with mental disabilities face direct and systemic discrimination that should not be exacerbated through the criminal sentencing process.

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<sup>10</sup> E.g.: those categorized in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, VA: American Psychiatric Publishing, 2013) <online: <http://dsm.psychiatryonline.org.ezproxy.library.ubc.ca/book.aspx?bookid=556>> [DSM-5] such as: major depression, schizophrenia, bipolar disorder, and Post-Traumatic Stress Disorder.

<sup>11</sup> E.g.: Fetal Alcohol Spectrum Disorders and Autism Spectrum Disorder.

<sup>12</sup> Whether personality disorders should properly be defined as “mental disorders”, and the consequences that should flow from such a definition in medical, legal, and other contexts, is an area of longstanding debate that is beyond the scope of this paper set out in any detail. For enlightening reading on this topic, see: Louis C Charland, “Moral Nature of the DSM-IV Cluster B Personality Disorders” (2006) 20:2 J Pers Disord 116; Craig Edwards, “Ethical Decisions in the Classification of Mental Conditions as Mental Illness” (2009) 16:1 Philosophy, Psychiatry & Psychology 73; HL Kober & S Lau, “Bad or Mad? Personality Disorders and Legal Responsibility – The German Situation” (2000) 18 Behav Sci & L 679; and Thomas Nadelhoffer & W Sinnott-Armstrong, “Is Psychopathy a Mental Disease?” in Nicole Vincent, ed, *Legal Responsibility and Neuroscience* (New York: Oxford University Press, 2013) 229).



Throughout the Thesis I will refer from time to time to specific mental disabilities and disorders. Further, I will use terms such as “mental illness” or “intellectual disability” when referring to research by previous authors dealing primarily or exclusively with these particular categories of mental health issues. Everywhere else, I will use the term “mental disability” to refer broadly to a broad spectrum of mental health issues that should be considered relevant at sentencing for reasons I will outline further below.

A noteworthy exclusion from the definition of mental disability adopted in this Thesis is addiction. I will justify my decision not to include drug or alcohol addiction under this broad definition of mental disability below.

### **1.3.3 Potential Criticisms**

#### Addiction and Mental Health

Drug and alcohol addiction is considered by many to constitute a mental disorder. The American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* [DSM-5] defines drug and alcohol addictions as mental disorders.<sup>13</sup> Even in some areas of Canadian law, such as provincial and federal human rights legislation and the employment law context, addiction is seen as a mental health issue rather than a criminal matter.<sup>14</sup>

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<sup>13</sup> See: American Psychiatric Association, “DSM-5”, *supra* note 10, “Substance-Related and Addictive Disorders”.

<sup>14</sup> See e.g. *Handfield v North Thompson School District No 26* (1995), 25 CHRR D/452 (BC Human Rights Trib), 1995 CarswellBC 3081 and *Babcock & Wilcox Industries Ltd v USWA, Local 2859* (1994), 42 LAC (4th) 209, 36 CLAS 262 (Ontario Arbitration) (in which alcoholism was found to be a disability under British Columbia and Ontario Human Rights statutes). See also *Yeager v RJ Hastings Agencies Ltd*, [1985] 1 WWR 218 (BCSC), 5 CCEL 266 (where it was held employers may not terminate an employee who suffers from alcoholism or drug addiction unless the contract has been frustrated).

In the criminal law, however, addiction has not been consistently understood as a mental health concern at sentencing. In *R v Fleming*,<sup>15</sup> the Court noted it had “no sympathy for some of the arguments presented, including the fact that this client’s drug abuse should be a mitigating circumstance. It must be understood that if one is going to enter the world of drugs, he or she is going to take the consequences that flow from the conduct... We do not consider that to be a mitigating factor in any way.”<sup>16</sup> Where addiction has been considered on sentencing, it is in light of an offender’s prospects for rehabilitation on sentencing, which is a valid sentencing objective under subsection 718(d) of the *Criminal Code*.<sup>17</sup>

While addiction and mental disability will clearly overlap in many cases, and share many similarities and mutual concerns for the purposes of sentencing, the treatment of addiction on sentencing carries with it unique considerations that I believe justify its treatment as a separate issue from mental disability. While statements like that made in *Fleming* treating addiction as the consequence of some initial choice or choices by the offender are likely inaccurate and falling out of favour,<sup>18</sup> addiction may still be seen as distinct from other mental health issues given its nature and potential for treatment. There is a general assumption that if an individual with a

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<sup>15</sup> *R v Fleming*, [1995] AWLD 1080 (ABCA), CarswellAlta 1086 (unreported) [*Fleming*].

<sup>16</sup> *Fleming*, *supra* note 15 at para 4. See also: *R v Will*, 2010 SKCA 94, 359 Sask R 105 at para 9.

<sup>17</sup> See, e.g. *R v England* (1976), 15 NSR (2d) 686 (NSCA), 1976 CarswellNS 73; *R v Preston* (1990), 47 BCLR (2d) 273 (BCCA), 79 CR (3d) 61 at para 31; *R v Lewandowski* (1996), 30 WCB (2d) 338 (ABPC), 180 AR 313 at para 14 (the consideration to be given to the offender’s drug dependency was that it provided “a rational and realistic foundation with which to view the prospects for rehabilitation”); *R v Hawkins*, 2008 NBCA 40, 331 NBR (2d) 129 (the sentencing judge’s failure to consider the effect of a lengthy period of incarceration together with available institutional detoxification programs might have in assisting the offender in controlling his drug addiction constituted an error in principle (para 19)); *R v Link*, 2012 MBPC 25, 276 Man R (2d) 157; *R v Lea-Mills*, 2013 BCSC 2417, 111 WCB (2d) 636.

<sup>18</sup> See e.g. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 3 SCR 134 at paras 27, 99 - 101, citing with approval Justice Pitfield’s findings at trial that addiction is an illness, and that those residents of Vancouver’s Downtown East Side engaging in controlled substances are not engaged in recreation, rather their situations result “from a complicated combination of personal, governmental and legal factors”.

serious addiction is placed in an intensive treatment program she can be cured of that mental health issue, at least for so long as she is under the strict rules of such a program. The problem of addiction in criminal offending is pervasive<sup>19</sup> and warrants its own, separate responses outside of the framework proposed in this paper. Initiatives such as the Drug Treatment Courts in various cities across the country are a potentially useful way to address the interaction of addiction and offending behaviour.<sup>20</sup>

While I treat addiction as a separate issue from mental disability for the purpose of this Thesis, one cannot ignore the fact that there is a high rate of comorbidity between the two areas. Many individuals who are most at risk for substance abuse also experience wider mental health challenges.<sup>21</sup> Estimates indicate that between one third and one half of individuals with a mental illness also have an addiction.<sup>22</sup> Given that the sentencing reforms I propose below require judges to consider offenders' mental disabilities in their broader social context, including the impacts those disabilities have on offenders' daily lives, addiction issues will often be taken into consideration by judges faced with sentencing offenders with mental disabilities, and addiction treatment may form part of an individualized disposition in many cases.

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<sup>19</sup> Between 70 – 80% of individuals entering the Canadian correctional system have been identified as having problems with substance use (Canada, Library of Parliament, *Current Issues in Mental Health in Canada: Directions in Federal Substance Abuse Policy* (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2014 at 1 [Canada, "Current Issues"]).

<sup>20</sup> Canadian Association of Drug Treatment Court Professionals, "DTC Program", *CADTC* (website), online: <<http://www.cadtc.org/DTCProgram.aspx>>.

<sup>21</sup> Canada, "Substance Abuse Policy", *supra* note 19 at 1.

<sup>22</sup> *Ibid.* See also Senate, Standing Committee on Social Affairs, Science and Technology, *Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada* (Ottawa: Senate, 2006) [Senate, "Out of the Shadows"], which indicates that 30% of people diagnosed with a mental illness will also have a substance abuse problem in their lifetime, and 37% of people who abuse alcohol (and 53% of people who abuse drugs) also have a mental illness (at 205).

### An Incomplete Solution

The model I propose below represents only a small part of the overall solution to the problem of offenders with mental disabilities in the criminal justice system. A total solution would require an end to the discrimination these individuals face in various aspects of their lives and the socioeconomic barriers this discrimination creates. It would also require improved and increased access to mental health programs that could divert those with mental disabilities into treatment (where useful) or connect them with resources to combat issues such as addiction, housing insecurity, and unemployment, reducing the likelihood individuals with mental disabilities will come into contact with the criminal justice system at all.<sup>23</sup>

Further, on an even more practical level, for the reforms I propose to be successful there must be viable alternatives to terms of incarceration available for offenders with mental disabilities, which will necessarily entail a substantial increase in funding to mental health programs by the Federal and provincial/territorial governments. Hopefully, shorter prison terms and an increased use of probation or conditional sentences would mean that the resources that formerly went to supporting individuals with mental disabilities within the prison system could now go towards community-based programs to assist and rehabilitate these offenders. Until that is accomplished, however, there remains an urgent need for increased mental health funding for programs *within* prisons, even if ultimately a desirable solution would have offenders receiving treatment and support in the community.<sup>24</sup>

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<sup>23</sup> See American Psychiatric Association, *Mental Illness and the Criminal Justice System: Redirecting Resources Toward Treatment, Not Containment* (Arlington, VA: American Psychiatric Association, 2004) [American Psychiatric Association, “Mental Illness”]

<sup>24</sup> See Centre for Addiction and Mental Health, *supra* note 8 at 8.

In addition, I acknowledge that the current government is unlikely to pass legislative revisions such as those I propose below, given that its policies towards criminal sentencing have generally emphasized decreased judicial discretion, less focus on mental health issues, and increased prison sentences, as I will discuss in the body of my Thesis. I acknowledge that the changes I propose would likely only be considered as feasible sentencing reforms if a government were elected with a substantially different criminal justice platform.

Ultimately, the theoretical exploration of the issue of the over-incarceration of offenders with mental disabilities and the proposed solutions are intended to be a helpful contribution to the literature on these issues. The legislative changes set out below, if implemented, would necessitate an increase in funding to mental health resources that is so desperately needed not only as an alternative to incarceration, but to ensure individuals with mental disabilities can participate fully in all aspects of Canadian society.

#### Difficulties Drawing Conclusions from Sentencing Decisions

The analysis below includes a review of recent sentencing decisions where judges considered offenders' mental disabilities. The ultimate conclusion that judges are not treating mental disabilities as appropriately mitigating in many circumstances is based primarily on statements from written judgments and statistical and social science evidence that offenders with mental disabilities make up a significant percentage of the Canadian prison population. The constraints of this Thesis and the nature of Canadian sentencing decisions make a more detailed and clear analysis of trends in sentencing impossible at this time.

Sentencing is an individualized process and each decision involves consideration of a unique set of facts, including any psychiatric diagnoses and other circumstances of the offender. It is very difficult to directly compare cases to identify any trends in sentencing offenders with mental disabilities. In some of the decisions I reviewed, judges specifically referenced what sentence they would have reached but for the offender's mental disability,<sup>25</sup> in others they referred to the mental disability as a mitigating factor but did not indicate the extent to which it impacted the sentence,<sup>26</sup> while in others they considered the mental disability but found it did not contribute to the offence and gave it no weight.<sup>27</sup>

The process of analyzing these cases was further complicated by the fact I examined only decisions where mental disability was explicitly mentioned by the sentencing judge. Therefore many cases involving offenders with mental disabilities that did not result in reported reasons, or where the mental disability was referred to at trial or in sentencing arguments but not noted by a judge in her written reasons, could not be included as part of the analysis.<sup>28</sup>

Given these shortcomings, I have attempted to avoid making broad claims about trends in sentencing offenders with mental disabilities, and rather use statements from sentencing

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<sup>25</sup> See e.g. *R v FJN*, 2012 ABPC 81, AJ No 483 (QL) [*FJN*]; *R v Ye*, 2012 ONSC 1278 at para 75, OJ No 1232 (QL) [*Ye*], *R v Walsh*, [2010] NJ No 163 (NLPC) (QL) at para 22.

<sup>26</sup> See e.g. *R v Fayemi*, 2009 BCPC 123, BCJ No 775 (QL) [*Fayemi*].

<sup>27</sup> See e.g. *R v Collier* (2013), 344 Nfld & PEIR 327 (NL Prov Ct), NJ No 429 (QL) [*Collier*].

<sup>28</sup> See Simon N Verdun-Jones & Amanda Butler, "Sentencing Neurocognitively Impaired Offenders in Canada" (2013) 55:4 Can J Crim & CJ 495 at 506 (which recognizes the analysis of judicial decisions in sentencing provide an incomplete picture, given that not all decisions are reported, there may be a bias toward reporting cases that involve the most serious offences, and the courts may be unaware of the extent and significance of impairing conditions suffered by offenders due to the lack of a systematic process that routinely screens accused persons for neurocognitive impairments).

decisions to demonstrate the many difficulties that can arise when sentencing offenders with mental disabilities, and the differential interpretations given by judges to the existing case law in this area. The finding that offenders with mental disabilities are not having their sentences reduced or sentencing alternatives considered in as many cases as they theoretically should is based primarily on the statistical information regarding the number of offenders with mental disabilities who are currently incarcerated.

### Offender-Centric Model

The theoretical basis for this paper is set out in **Chapter 2** and is premised on an understanding that an equality-based approach to sentencing requires that proportionate sentences for offenders with mental disabilities must take their disabilities into account, and treat them as mitigating factors or bases for an alternative for incarceration in the majority of cases.

I am aware that the practical realities of this model would, in many cases, mean that an individual who has committed an offence against another person or their property would be given a more ‘lenient’ sentence – a sentence of a shorter term or alternative to incarceration. However, as will be explored throughout this Thesis, the intent of the sentencing proposals is that offenders with mental disabilities must receive sentences that are in every case reflective of their level of responsibility, and focus on rehabilitation rather than deterrence and denunciation. Rehabilitation is a key goal of the proposed reforms, and proper rehabilitation has the intended result of ensuring offenders do not go on to commit additional crimes in the future. While a long period of incarceration may satisfy some victims’ perceptions of justice, if a perpetrator is freed after a lengthy prison sentence only to go on to recidivate, which currently happens at a fairly

high rate for offenders with mental disabilities,<sup>29</sup> this cannot be seen as a satisfactory outcome from any standpoint, be it victim- or offender-centric.

It is additionally incomplete and inadequate to characterize victims' interests in the criminal justice process as merely focused on punishment and sentence length. Victims of crime have a number of varied goals and interests that will not necessarily equate with longer sentences but will focus more on a sense of justice and having been heard.<sup>30</sup> Victims may also generally hope that an offender will not go on to victimize them or others in the same way again, a goal that is better served through rehabilitation than punishment.<sup>31</sup>

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<sup>29</sup> Studies from the United States have indicated that recidivism rates and reduction in the risk of technical violations among probationers with mental illness were significantly higher when compared to probationers without a mental illness. A continuity of care for inmates on probation or parole has been found to have the potential to significantly reduce the likelihood offenders with mental illnesses are rearrested. As with offenders without mental illnesses, additional factors such as alcohol and substance abuse are also highly correlated with an individual's likelihood of coming back into contact with the criminal justice system (Eladio D Castillo & Leanne Fital Alarid, "Factors Associated with Recidivism Among Offenders with Mental Illness" (2011) 55:1 Int J Offender Ther Comp Criminol 98). Not being connected to community resources upon discharge is thought to affect recidivism rates, and re-contact rates with the criminal justice system are significantly higher for inmates with mental illness than those without (Centre for Addiction and Mental Health, *supra* note 8 at 10).

<sup>30</sup> The International Association of Chiefs of Police identified victims' of crimes needs as generally falling into the following categories: Safety, Information, Continuity, Justice, Support, Access, and Voice (International Association of Chiefs of Police, *Enhancing Law Enforcement Response to Victims: A 21st Century Strategy* (Alexandria, VA: IACP, 2008) at 23 – 34). See also Canada, Office of the Federal Ombudsman for Victims of Crime, *Shifting the Conversation: A Look at Refocusing Canada's Justice System to Better Meet the Needs of Victims of Crime* (Special Report) (Ottawa: Office of the Federal Ombudsman for Victims of Crime, 2011).

<sup>31</sup> The Law Institute of Victoria noted that imprisonment or other detention may increase the risk of offender recidivism when compared to non-custodial or community-based sentences, due to: prisons serving as a criminal learning environment; the stigmatizing or labeling effect of prison; and the fact prison is rarely the best place to address the underlying causes of offending (Victoria, Law Institute Victoria, *Mandatory Minimum Sentencing* (Victoria, Australia: Law Institute of Victoria, 2011 at 9). See also Michael S Martin et al, "Stopping the Revolving Door: A Meta-Analysis on the Effectiveness of Interventions for Criminally Involved Individuals with Major Mental Disorders" (2012) 36:1 Law Hum Behav 1 at 8 (the limited interventions that currently exist for offenders with mental disorders, including findings of NCRMD or "not guilty by reason of insanity", diversion to mental health courts, and programs delivered in carceral institutions, do modestly reduce re-involvement with the criminal justice system).



It is not the intent of this Thesis to view the proposed reforms through the lens of victims of crime. Rather, this Thesis promotes an understanding of justice in sentencing that is based on proportionality, and which emphasizes rehabilitation over punishment. Such a model is intended to ultimately have a greater net-benefit to victims or potential victims of crime than a model focused on punishment and inflexible sentences.

#### **1.4 Structure of the Thesis**

I will begin by exploring the theoretical underpinnings of my Thesis in **Chapter 2**, including the systemic discrimination and disadvantage suffered by individuals with mental disabilities in this country, and the serious harms being brought about through the over-representation of individuals with mental disabilities in the corrections system. I will explore two theoretical bases for the idea that offenders with mental disabilities should be given special consideration at sentencing: they may have reduced moral blameworthiness for their actions in many circumstances; and they face discrimination and disadvantage which may lead to these individuals having fewer opportunities to avoid criminal behaviour. I will also briefly discuss why the “not criminally responsible on account of mental disorder” defence set out in the *Criminal Code* represents a unique remedy that should not be expanded to include a wider variety of individuals with mental disabilities.

In **Chapter 3**, I discuss the ways the current sentencing regime is failing offenders with mental disabilities, including a review of recent case law in this area to highlight the inconsistent reasoning in sentencing decisions regarding what will be considered a relevant mental disability, and the misguided approach adopted by judges that a mental disability must have contributed

directly to an offence for it to mitigate culpability. I will then go on to explore how, even where judges consider offenders' mental disabilities to be mitigating, legislative changes to the *Criminal Code* are increasingly limiting the available alternatives to prison sentences through restrictions on conditional sentence orders and the proliferation of mandatory minimum sentences.

**Chapter 4** contains my substantive proposals for dealing with the issues outlined in the previous chapters, beginning with an explanation of why legislative change is the most effective way to implement positive changes for offenders with mental disabilities at sentencing. I will go on to propose a broad definition of “mental disability” for the purpose of sentencing.

My first substantive proposed revision to the *Criminal Code* is a requirement that judges must consider the unique circumstances of persons with a mental disability in every case where an offender with a mental disability is to be sentenced. This proposal is based on a similar provision in the *Criminal Code* regarding aboriginal offenders. While these two groups are distinct, the reasons underpinning the need for such a provision for offenders with mental disabilities overlap considerably with the reasons Parliament requires judges consider the unique circumstances of aboriginal offenders in every case.<sup>32</sup>

I also propose legislative changes to the mandatory minimum and conditional sentencing regimes. While *Charter* challenges exist as a way of striking down unfair mandatory minimum

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<sup>32</sup> Giving effect to this provision will require specific pre-sentence reports similar to “Gladue Reports” used with aboriginal offenders, a concept which I explore in **Section 4.2.1**.

sentences, the high threshold that must be met to do so is often insurmountable. Further, given that there are now numerous offences that carry mandatory minimum sentences, striking each and every mandatory minimum down would be a lengthy and piecemeal process. I rely heavily on recent findings from the Uniform Law Conference which conclude that a statutory exemption from mandatory minimums would be the most effective way to avoid injustice, and propose an exemption that would allow judges to opt-out of applying a mandatory minimum when sentencing an offender with a mental disability. The conditional sentence provisions must also be revised to ensure that where a mandatory minimum sentence is not imposed, and in other cases involving offenders who do not constitute a significant threat to the public, community-based sentences may be imposed.

## **Chapter 2: Background and Theoretical Basis**

### **2.1 Introduction**

Individuals with mental disabilities are drastically over-represented in the Canadian criminal justice system. This over-representation is part of an ongoing legacy of discrimination against individuals with mental disabilities in this country. Below, I will briefly explore this history of this discrimination and mistreatment and the way it is being furthered through placing offenders with mental disabilities in prisons. I will then go on to outline how the Supreme Court of Canada [SCC] has characterized the criminal responsibility of offenders with mental disabilities through its interpretation of the “not criminally responsible on account of mental disorder” [NCRMD] provisions, and why an expansion of these provisions is not an appropriate way forward for remedying the problem of over-incarceration of people with mental disabilities.

Subsequent chapters will focus on Canada’s criminal sentencing regime and how it accounts for offenders with mental disabilities, before going on to propose amendments to the *Criminal Code*’s sentencing provisions which, if implemented, would have the result of fewer individuals with mental disabilities being incarcerated.

### **2.2 Mental Disability: Discrimination and Disadvantage**

In Canada there exists a legacy of discrimination against individuals with mental disabilities.<sup>33</sup>

Prior to the nineteenth century, mental illness was associated with evil,<sup>34</sup> and even as the

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<sup>33</sup> While the focus of my paper is on Canada, this problem is pervasive throughout much of the world. As noted in British Columbia, BC Minister of Health’s Advisory Council on Mental Health, *Discrimination Against People with*

religious undertones that gave shape to this association gained less importance, the fear created by this perception endured. In the early twentieth century, many respected authorities believed individuals with mental disabilities were not only more prone to commit crimes, but that they comprised virtually the entire offender population.<sup>35</sup> Mental disability eventually came to be perceived as a sickness, but one without a cure such that the primary solution was to warehouse individuals in mental institutions.<sup>36</sup>

Throughout Canada's history these false, harmful, and stereotypical narratives formed the basis for gross violations of the human rights of individuals with mental disabilities including segregation and reproductive sterilization.<sup>37</sup> Discriminatory legislation based on eugenic principles provided for forced sterilization of those considered to be "mentally deficient" in certain Canadian jurisdictions the 1920s and 1930s, and this legislation was accepted by the courts.<sup>38</sup>

The SCC recognized the historical oppression of individuals with mental disabilities in *R v Swain*,<sup>39</sup> where Justice Latimer noted:

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*Mental Illnesses and their Families: Changing Attitudes, Opening Minds* (Executive Summary and Major Recommendations) (Victoria, BC, Ministry of Health Services, 2002) at 2, discrimination against individuals with mental disabilities has existed for at least 2000 years.

<sup>34</sup> British Columbia, *supra* note 33 at 3.

<sup>35</sup> Canada, Correctional Service Canada, *Persons with Intellectual Disability Who are Incarcerated for Criminal Offences: A Literature Review* (Ottawa: Correctional Service Canada Research Branch, 1991) at 18 [Canada, "Intellectual Disability Literature Review"].

<sup>36</sup> Beverley McLachlin, "Medicine and the Law: The Challenges of Mental Illness" (2010) 33 Dalhousie LJ 15 at 4.

<sup>37</sup> McLachlin, *supra* note 36 at 4; Canada, "Intellectual Disability Literature Review", *supra* note 35 at 18; Gerald Robertson, "Mental Disability and Canadian Law" (1993) 2:1 Health L Rev 23 (QL) at para 5.

<sup>38</sup> McLachlin, *supra* note 36 at 4.

<sup>39</sup> *R v Swain*, [1991] 1 SCR 933, 47 OAC 81 [Swain].

The mentally ill have historically been the subjects of abuse, neglect and discrimination in our society. The stigma of mental illness can be very damaging. The intervener, [Canadian Disability Rights Council] describes the historical treatment of the mentally ill as follows:

For centuries, persons with a mental disability have been systematically isolated, segregated from the mainstream of society, devalued, ridiculed, and excluded from participation in ordinary social and political processes.

The above description is, in my view, unfortunately accurate and appears to stem from an irrational fear of the mentally ill in our society.<sup>40</sup>

Unfortunately, the situation for individuals with mental disabilities in this country remains greatly unchanged from the bleak picture presented in *Swain*. Research conducted in 2002 indicated 70% of people with mental illnesses and their families experienced discrimination.<sup>41</sup> The Standing Senate Committee on Social Affairs, Science and Technology [“Standing Committee”] identified common misperceptions and stereotypes still faced by individuals with mental disabilities in their daily lives. These stereotypes include that those with mental health issues: are dangerous; have brought their “problems” upon themselves; are of “weak character”; are “incompetent or irresponsible”; are childlike and in need of parental figures; have little hope of improving their circumstances; have poor social skills; and are not as intelligent as others.<sup>42</sup>

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<sup>40</sup> *Swain*, *supra* note 39 at 973-974.

<sup>41</sup> British Columbia, *supra* note 33 at 1. See also Ontario, Human Rights Commission, *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions* (Toronto: Ontario Human Rights Commission, 2012) at 7.

<sup>42</sup> Senate, Standing Committee on Social Affairs, Science and Technology, *Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada* (Interim Report) (Ottawa: Senate, 2004) at 40 [Senate, “Mental Health Overview”]. See also Robertson, *supra* note 37, who notes that fear and viewing mentally disabled individuals as childlike or less than human are common perceptions.

Simplistic and false stereotypes about persons with mental disabilities contribute to the widespread discrimination against these individuals in all facets of their lives.<sup>43</sup> Discriminatory policies and attitudes create substantial socioeconomic hardship for many people living with disabilities. The Standing Committee collected the testimony of members of three families affected by mental illness and one individual with a mental illness in order to put a human face to this very human social problem. The individuals with mental disabilities participating in the Standing Committee's study identified a pressing need for social supports such as employment assistance, adequate housing, education, research, self-help and peer support.<sup>44</sup> One participant noted: "individual recovery from mental health is impossible when struggling with the consequences of poverty alongside stigma and discrimination."<sup>45</sup>

Indeed poverty is common among individuals with mental disabilities, in part to the extremely high unemployment rate among this population.<sup>46</sup> Unemployment has been found to be as high as 90% for those affected by severe and persistent mental illnesses.<sup>47</sup> Individuals with mental illnesses who are able to obtain employment may experience long periods outside the labour force as a result of a mental illness or treatment for that illness, which will likely impede their

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<sup>43</sup> Senate, "Mental Health Overview", *supra* note 42 at 48 (this report found discrimination against individuals with mental disabilities in housing, employment, income, higher education, criminal justice, and parenting). See also Senate, "Out of the Shadows", *supra* note 22 (which found discrimination against individuals with mental disabilities was prevalent in finding adequate housing, dealing with health care professionals, entering or returning to the workforce, and general societal attitudes); British Columbia, *supra* note 33 at 1; Ontario, *supra* note 41 at 22.

<sup>44</sup> Senate, "Out of the Shadows", *supra* note 22 at 6.

<sup>45</sup> *Ibid* at 7.

<sup>46</sup> In Canada, individuals diagnosed with a mental illness are likely to experience long-term unemployment, underemployment, and dependency on social assistance (Senate, "Mental Health Overview", *supra* note 42 at 107).

<sup>47</sup> *Ibid*.

subsequent re-entry into the labour force.<sup>48</sup> Unemployment and an inability to return to work can result from discrimination by employers and colleagues, including an unwillingness to create flexible work arrangements for those who need them as a result of their mental disabilities.<sup>49</sup>

Discrimination persists in other social arenas as well. One participant in the Standing Committee's study spoke of her experiences having to relive the trauma of the manic psychosis and severe depression she experienced due to Bipolar Disorder each time she visited a new health care professional, a situation that was necessitated by a lack of continuity of service and lack of community mental health supports.<sup>50</sup> This lack of mental health support is common and can be understood as a form of indirect or systemic discrimination.<sup>51</sup> Systemic discrimination recognizes that seemingly neutral policies, systems, and procedures can be discriminatory in their impact. Indirect and systemic discrimination against those with mental disabilities can also be observed in the spheres of provision of housing, access to community supports, etc., and constitutes discrimination that is just as serious as persons with mental disabilities being expressly denied access to these areas.<sup>52</sup> The Standing Committee 2004 Report provides this example of how individuals with mental disabilities may be recipients of systemic discrimination through a lack of funding to treatment:

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<sup>48</sup> *Ibid* at 106. Long periods outside the workforce also make it more difficult for individuals with mental disabilities to gain and possess the credentials, skills, and employment experiences that make them attractive to employers after long periods out of the workforce.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at 7 – 9.

<sup>51</sup> Systemic or “structural” discrimination occurs where individuals suffer discriminatory impacts from policies, procedures or actions that might appear neutral on their face.

<sup>52</sup> See *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4th) 385, where the Majority noted at para 67: “Exclusion from the mainstream of society results from the construction of a society based solely on ‘mainstream’ attributes to which disabled persons will never be able to gain access... the discrimination does not lie in the attribution of untrue characteristics to the disabled individual... Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.”



... suppose that because it is a stigmatized illness, less funding is dedicated to research on schizophrenia than for other illnesses and less money is allocated to adequate care and management. As a consequence, people with schizophrenia are less able to benefit from scientific discoveries than they would have been if the illness they happened to develop were not stigmatized. To the extent that the stigma of schizophrenia has created such a situation, a person who develops this disorder will be the recipient of structural discrimination regardless of whether or not anyone happens to treat him or her in a discriminatory way.<sup>53</sup>

In 2010 a review conducted for the Correctional Investigator of Canada noted that the mental health sector “has always been seriously discriminated against in terms of funding”.<sup>54</sup> The impact of this lack of government funding to community-based mental health initiatives means that individuals with mental disabilities without strong support networks or financial resources will be unable to overcome the obstacles they face in multiple facets of their daily lives, which in turn may lead to these individuals becoming involved in criminal activities and behaviours.

Further, the fear of those with mental disabilities discussed earlier in this section continues to persist in Canadian society. Participants in the Standing Committee’s study noted that fear, including fear of violence, was the most common reaction they felt on disclosing their mental illnesses to potential employers, landlords, and members of the public.<sup>55</sup> One participant in the Standing Committee’s study noted discrimination against and fear of individuals with mental

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<sup>53</sup> Senate, “Mental Health Overview”, *supra* note 42 at 51.

<sup>54</sup> Service, *supra* note 8 at 52. The author notes that while it would be unthinkable to deny basic health services to those suffering from physical impairments and disabilities in Canada, “it is common place not to provide basic mental health services to Canadians of all ages.”

<sup>55</sup> Senate, “Out of the Shadows”, *supra* note 22 at 15.

disabilities is exacerbated by the media, through incidents such as their reporting on individuals with mental disabilities who commit crimes, resulting in headlines such as “schizophrenic kills wife”, while a similar crime would not be reported as “cancer patient kills his wife”.<sup>56</sup>

Individuals with mental disabilities face serious barriers to meaningful participation in many areas of social life in this country. Those who are not lucky enough to have a strong support network of friends and family and the resources to obtain secure housing, mental health treatment, or other daily needs run a serious risk of finding themselves living in poverty, struggling with issues of addiction, or both. Factors such as these greatly increase the risk a person with mental disabilities will become involved with the criminal justice system, as will be detailed further below.

### **2.3 The Crisis of Over-Representation of People with Mental Disabilities in the Criminal Justice System**

A significant portion of Canada’s prison population consists of individuals with mental disabilities. Estimates vary widely depending on the definition of mental disability or disorder adopted, the time frame applied, and the population examined.<sup>57</sup> A 2012 Correctional Service Canada [“Corrections Canada”] report cited various studies that indicated the prevalence of “major mental disorders” among offenders was as low as 15% and as high as around 80%, with

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<sup>56</sup> Testimony of Loise in Senate, “Mental Health Overview”, *supra* note 42 at 9.

<sup>57</sup> Lynn A Stewart, Geoff Wilton & Colette Cousineau, *Federally Sentenced Offenders with Mental Disorders: Correctional Outcomes and Correctional Response* (Research Report) (Ottawa: Correctional Service of Canada, 2012) at 1.

some of the highest rates found among offenders in the Federal correctional system.<sup>58</sup> In addition to individuals with serious mental illnesses, individuals with intellectual and developmental disabilities are also likely greatly over-represented in the criminal justice system,<sup>59</sup> however the precise scope of this issue is also very difficult to estimate.

There is no indication that the trend of incarceration of individuals with mental disabilities is slowing down. Nearly two-thirds of the 90% of newly admitted offenders who were comprehensively screened for potential mental health problems by Corrections Canada in 2012/2013 were flagged for follow-up mental health interventions.<sup>60</sup> Indeed, the proportion of the prison population dealing with mental disabilities appears to be increasing. Between 1997-2010, symptoms of serious mental illness reported by federal offenders at admission increased by 61% for males and 71% for females.<sup>61</sup> It is also noteworthy that while many offenders arrive in the federal prison system with mental disabilities, some develop these mental health issues as a result of imprisonment, due to the high-stress environment of prisons and separation from social networks.<sup>62</sup>

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<sup>58</sup> Stewart, Wilton & Cousineau, *supra* note 57 at 1. Estimates in the 80-90% range entail a very broad definition of mental disorder, including antisocial personality disorder and substance use disorder (See e.g. Alison MacPhail & Simon Verdun-Jones, *Mental Illness and the Criminal Justice System* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013) at 2.

<sup>59</sup> Canada, “Intellectual Disability Literature Review”, *supra* note 35 at 4-5.

<sup>60</sup> Canada, “OCI Annual Report”, *supra* note 8 at 15.

<sup>61</sup> Parliament, Standing Committee on Public Safety and National Security, *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System* (December 2010) (Chair: Kevin Sorenson) at 13.

<sup>62</sup> Canada, Library of Parliament, *Current Issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Background Paper) (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2013) [Canada, “Mental Health and Criminal Justice”] at 5. The high-stress, overcrowded, and socially isolating prison environment likely contributes to the deterioration of the mental health of many offenders.

While the exact number of individuals with mental disabilities in the criminal justice system is difficult, if not impossible, to ascertain, there is growing recognition and concern regarding the fact individuals with mental health issues make up a substantial portion of the prison population.<sup>63</sup> Verdun-Jones & Butler recently noted the “universal agreement that the great majority of offenders who are sentenced to prison live with a mental disorder and/or neurocognitive impairment”.<sup>64</sup>

Apart from the problematic moral implications of punishing the actions of offenders with mental disabilities, which will be discussed further in the next section, there are pressing practical reasons why offenders with mental disabilities should be kept out of the prison system wherever possible. The Office of the Correctional Investigator has consistently highlighted the problem of mental disability in Federal corrections facilities in recent years. The Correctional Investigator is mandated by Part III of the *Corrections and Conditional Release Act*<sup>65</sup> [CCRA] to act as an Ombudsman for federal offenders, and has a responsibility to review and make recommendations on Corrections Canada policies and procedures to ensure systemic areas of concern are identified and addressed.<sup>66</sup> Each year, pursuant to section 192 of the CCRA, the Correctional Investigator submits an Annual Report to the Minister of Public Safety.<sup>67</sup> The 2012/2013 Annual Report [2012/2013 Report] paints a clear picture of the strain the prevalence of mental disability within prison facilities places on Corrections Canada’s ability to adequately cope with this population.

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<sup>63</sup> See e.g. Martin et al, *supra* note 31 at 1, who note the general consensus that the rates of mental illness in the criminal justice system are high and have increased in recent years, and that this has led to considerable interest in improving outcomes for offenders with mental illnesses.

<sup>64</sup> Verdun-Jones & Butler, *supra* note 28 at 496.

<sup>65</sup> *Corrections and Conditional Release Act*, SC 1992, c 20, SC 1992, c 20 [CCRA].

<sup>66</sup> CCRA, *supra* note 65 s 167; Office of the Correctional Investigator, “Roles and Responsibilities”, (16 September 2013) *Government of Canada* (website), online: < <http://www.oci-bec.gc.ca/cnt/roles-eng.aspx>>.

<sup>67</sup> CCRA, *supra* note 65 s 192.

The 2012/2013 Report found that Corrections Canada “continues to face increasing costs and challenges in managing a higher proportion of the offender population with mental health concerns”.<sup>68</sup> The Report highlighted that healthcare remained the number one category for offender complaints to the Correctional Investigator, and access to mental healthcare at Corrections Canada facilities remained fragmented and variable, particularly at penitentiaries in remote locations.<sup>69</sup> The report found serious staffing, recruitment and retention challenges related to healthcare and in particular with respect to psychologists.<sup>70</sup> It noted that intermediate care remained without a source of permanent funding and lamented the cancellation of a pilot project intended to address this issue.<sup>71</sup> The report outlined certain concerns with Corrections Canada’s capacity and response to mental health service delivery including over-reliance on use of force and control measures to manage self-injurious offenders; non-compliance with voluntary and informed consent to treatment protocols; limited access to specialized acute services for federally sentenced female offenders; inadequate physical infrastructure, staff resources, and capacity to meet mental health needs; and inappropriate monitoring and inadequate oversight in the use of physical restraints for individuals with mental health issues.<sup>72</sup>

The failures and inadequacies of Corrections Canada in dealing with the large population of individuals with mental disabilities under its care significantly diminish the quality of life for these offenders and impede successful treatment or rehabilitation. Further, these failures can

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<sup>68</sup> Canada, “OCI Annual Report”, *supra* note 8 at 15.

<sup>69</sup> *Ibid* at 20.

<sup>70</sup> *Ibid* at 21. The vacancy rate for the financial year of 2011-2012 for psychologists in the CSC system was 16% nationally, and 29% in the Ontario region. Many of the occupied positions were filled by non-licensed staff who are unable to deliver the same level or range of services as licensed psychologists.

<sup>71</sup> *Ibid* at 16.

<sup>72</sup> *Ibid* at 17.

have potentially fatal results. In October 2007 an inmate with serious mental health concerns under the care of Corrections Canada, Ashley Smith, died via self-administered asphyxiation while in segregated confinement and under supervision by prison guards.<sup>73</sup> A Coroner's Inquest ruled Smith's death was a homicide and produced 104 recommendations for implementation by Corrections Canada.<sup>74</sup> A number of failures by Corrections Canada and its employees were found to have contributed to Smith's death, including the inconsistent provision of therapy as she was transferred between institutions on an almost constant basis during her incarceration,<sup>75</sup> and a general inability of Corrections Canada to deal with individuals with serious mental health issues in its facilities.<sup>76</sup>

The Correctional Investigator has drawn attention to the systemic issues within Corrections Canada that were found to have contributed to Smith's death on a number of occasions. Prior to the completion of the Coroner's Inquest, the Correctional Investigator published a report regarding Smith's death that highlighted systemic failures and set out recommendations for their correction.<sup>77</sup> In 2012, the Correctional Investigator provided the Minister of Public Safety with summaries of six cases involving acutely mentally ill offenders who could not be appropriately be managed or cared for in a federal penitentiary, owing to their complex mental health care

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<sup>73</sup> Sapers, *supra* note 8 at 3.

<sup>74</sup> John Carlisle, *Inquest Touching the Death of Ashley Smith: Jury Verdict and Recommendations* (Toronto, Office of the Chief Coroner, 2013).

<sup>75</sup> "Ashley Smith inquest broadened", *CBC News* (12 November 2010) online: CBC News <<http://www.cbc.ca/news/canada/ashley-smith-inquest-broadened-1.913597>>.

<sup>76</sup> Carlisle, *supra* note 74 at 1. The recommendations cited the "lack of communication, cohesiveness, and accountability" of Corrections Canada as concerns in Smith's death (para 1). Sapers, *supra* note 8 highlighted a number of individual and systemic failures that resulted in Smith's death related to inadequate mental health resources in Smith's case and in Federal Corrections more generally.

<sup>77</sup> Sapers, *supra* note 8 at 19-25, 31-33.

needs “well beyond the resources or capacity of the Service to safely or humanely manage”.<sup>78</sup> Finally, in 2013, the Correctional Investigator published a report entitled *Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women*,<sup>79</sup> which noted that self-injury incidents in federal correctional facilities had more than tripled in the ten years leading up to the report, and despite an investment of approximately \$90M in new funding to strengthen mental health care services in federal correctional facilities. The Report noted there had been little substantive progress since Smith’s death with respect to the management and treatment of chronic self-injurious women in federal custody.

Despite these and other<sup>80</sup> reports and recommendations spurred by Smith’s tragic death, little has in fact been accomplished to date, as highlighted by the 2012/2013 Report. Critics from prisoners’ advocacy agencies and the Correctional Investigator have expressed frustration and disappointment with the extremely slow and limited response to Smith’s case and others like hers.<sup>81</sup> The 2012/2013 Report section on “access to health care” includes a statement by the Correctional Investigator that he was “increasingly of the opinion that modest and incremental reform of a system that is fundamentally flawed is not in the public interest. Some mentally

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<sup>78</sup> Canada, “OCI Annual Report”, *supra* note 8 at 18.

<sup>79</sup> Canada, “Risky Business”, *supra* note 8.

<sup>80</sup> See e.g. Sapers, *supra* note 8; Nicole Leblanc & Jennifer M Kilty, *Ashley Smith (1988-2007): A Predictable Death* (Montreal: Institute for Research on Public Policy, 2013); New Brunswick, Ombudsman and Child and Youth Advocate, *The Ashley Smith Report* (Fredericton, NB: Office of the Ombudsman & Child and Youth Advocate, 2008).

<sup>81</sup> Brosnahan, Maureen. “Federal plan to help mentally ill female inmates on hold”, *CBC News* (18 July 2014) online: <<http://www.cbc.ca/news/canada/federal-plan-to-help-mentally-ill-female-inmates-on-hold-1.2710745>>. While Corrections Canada put forward a plan in response to Smith’s death, to move mentally ill female inmates who are in need of psychiatric care that cannot be provided in prisons into a specially-equipped unit at a mental health centre in Ontario, that plan was recently put on hold.

disordered individuals in federal penitentiaries do not belong there and should be transferred to outside treatment facilities as a matter of priority.”<sup>82</sup>

While in the majority of cases prisoners with mental health problems will not deteriorate to the point that they are at risk of death, there are other extremely troubling and less visible negative outcomes for prisoners with mental disabilities. In 2012, Corrections Canada conducted a study measuring correctional outcomes and responses for inmates suffering from “major mental disorders”.<sup>83</sup> This study found that these individuals were more socially isolated, more likely to be placed in maximum security institutions, and less likely to be placed in minimum security institutions, even where their Custody Rating Scale results did not differ from offenders without a mental illness.<sup>84</sup> Further, inmates with mental illnesses were more likely to incur more minor and major institutional charges leading to higher rates of voluntary and involuntary segregation than members of the prison population without mental health issues.<sup>85</sup> Involuntary segregation can have extremely negative mental health consequences for mentally healthy individuals, and its impact on those already suffering from mental disabilities can be disastrous.<sup>86</sup> These findings

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<sup>82</sup> Canada, “OCI Annual Report”, *supra* note 8 at 19.

<sup>83</sup> Stewart, Wilton & Cousineau, *supra* note 57 at 6. The data was collected for individuals suffering from at least one of: major depression, bipolar disorder, schizophrenia, other psychiatric disorders, or anxiety disorders. The definition did not capture brain injuries, organic brain dysfunction, personality disorders, developmental disabilities, and other mental health problems and cognitive impairments likely extremely prevalent in the prison population. The authors noted that antisocial personality disorder and substance abuse disorders were so prevalent in the federal offender population that individuals with these conditions were included in both the mentally disordered and comparator groups (at 6, note 3).

<sup>84</sup> *Ibid* at iii. The Custody Rating Scale consists of two independently scored sub-scales regarding institutional adjustment and security risk (at 10).

<sup>85</sup> *Ibid*. See also Canada, “OCI Annual Report”, *supra* note 8 at 20.

<sup>86</sup> Atul Gawande, “Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?”, *The New Yorker* (30 March 2009) online: The New Yorker <<http://www.newyorker.com/magazine/2009/03/30/hellhole>>. See also: *R v Boone*, 2014 ONCA 515, 114 WCB (2d) 319, where the Ontario Court of Appeal recently recognized a “growing recognition over the last half-century that solitary confinement is a very severe form of incarceration, and one that has a lasting psychological impact on prisoners” (paras 3, 21).



reflect the statement by Richard D Schneider that it is “now fairly well established that incarceration is of next to no utility so far as the mentally disordered accused is concerned and, indeed, the bulk of the available data suggest that prison is actually likely to exacerbate whatever mental illness is operative”.<sup>87</sup>

Even for those not concerned with the fate of offenders with mental disabilities within the prison system, the broader impacts of correctional facilities’ inability to properly treat and rehabilitate these individuals should be of concern to all members of the public. Outcomes for mentally ill offenders are poorer both within penal institutions and on release into the community.<sup>88</sup> These individuals are also less likely to be granted a discretionary release in the form of day parole, and more likely to be released on their statutory release dates, meaning as a group offenders with mental disabilities will serve longer periods in prison than mentally healthy offenders who received the same sentence.<sup>89</sup> This differential outcome is yet another example of adverse effect discrimination against individuals with mental disabilities.<sup>90</sup>

While the statistics cited above might appear to indicate that keeping mentally disabled offenders incarcerated increases public safety by removing dangerous individuals from the general population for a longer period of time, the lack of incremental integration back into the

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<sup>87</sup> Schneider, Richard D. “Sentencing the Mentally Disordered Accused” in Hy Bloom & Richard D Schneider, *Law and Mental Disorder: A Comprehensive and Practical Approach* (Toronto: Irwin Law, 2013) 703 at 705.

<sup>88</sup> Stewart, Wilton & Cousineau, *supra* note 57 at iii.

<sup>89</sup> *Ibid.*

<sup>90</sup> Corrections Canada maintains that the differential outcomes for offenders with mental illnesses cannot necessarily be ascribed to a differential correctional response, but rather might be a result of their “higher criminal history risk and criminogenic need profiles and more problematic behaviour while incarcerated” (*Ibid* at 30). However, “adverse effect”, “adverse impact”, and “indirect” discrimination arise from practices or standards that are neutral on their face, apparently applying to everyone equally, but have an adverse impact or effect on some groups of people more than others (See Evelyn Braun, “Adverse Effect Discrimination: Proving the *Prima Facie* Case” (2005) 11 Rev Const Stud 119 at 120).

community represents a missed opportunity for rehabilitation. The Corrections Canada Report indicates that offenders with mental illnesses are more likely than their counterparts to be reconvicted after release,<sup>91</sup> reflecting the disruptive and non-rehabilitative impact of prison terms in perpetuating the cycle of mentally disabled offenders' contact with the criminal justice system. In *R v Buck*,<sup>92</sup> the Court described the inappropriateness of terms of incarceration as a means of rehabilitating offenders with mental disabilities:

Mr. Buck's criminal activity appears to be primarily due to mental health issues. In such circumstances, prison appears to offer neither rehabilitation nor long-term protection for the public. On the contrary, time behind bars is more likely to exacerbate the problem. What is needed is treatment, not punishment; social assistance that provides the basic necessities of life without excessive red tape; and community support to aid him in following through with treatment and/or a rehabilitation plan.<sup>93</sup>

The information summarized above demonstrates that as a group, offenders with mental disabilities are treated differently than offenders without such disabilities in the federal corrections system. This differential treatment is clearly negative; offenders with mental disabilities spend a longer period incarcerated, are given fewer opportunities for rehabilitation, and are more likely to incur infractions resulting in greater restrictions on their limited liberty. The BC Minister of Health's Advisory Council on Mental Health has characterized the attitude of the corrections system in Canada towards offenders with mental disabilities as discriminatory in its effects, noting Corrections Canada "discriminates in the way decisions are made about

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<sup>91</sup> Stewart, Wilton & Cousineau, *supra* note 57 at iii. See also: Schneider, *supra* note 87 at 170; American Psychiatric Association, "Mental Illness", *supra* note 23 at 5.

<sup>92</sup> *R v Buck*, 2014 SKCA 92, SJ No 505 (QL).

<sup>93</sup> *Buck*, *supra* note 92 at para 16.

parole opportunities, placement in less restrictive facilities and opportunities to participate in programs.”<sup>94</sup>

The discussion thus far of the inability of correctional institutions to meet the mental health needs of offenders has focused on federal facilities, as that is where the bulk of research and statistical collection has taken place. Based on the limited information available, it does not appear provincial facilities are any better equipped to deal with offenders with mental disabilities than federal facilities. The Canadian Centre for Addiction and Mental Health “Mental Health and Criminal Justice Policy Framework” highlights that offenders with mental illnesses are extremely vulnerable in both federal and provincial corrections systems.<sup>95</sup> In Ontario, one of the larger and arguably better-equipped provincial jail systems in the country, a literature review conducted by the Schizophrenia Society of Ontario found a lack of trained staff; inconsistency and inadequacy in screening measures for mental illnesses; significant gaps in service delivery and program availability across institutions; safety concerns related to lack of treatment and segregation; and insufficient release planning procedures.<sup>96</sup>

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<sup>94</sup> British Columbia, *supra* note 33 at 12.

<sup>95</sup> Centre for Addiction and Mental Health, *supra* note 8 at 9. The authors note that individuals with mental health issues report feeling unsafe and being victimized through intimidation and violence by other offenders and correctional staff. These inmates may act out with disruptive behaviour, aggression, violence, withdrawal, and refusal or inability to follow orders and rules. They note further that self-injury and suicide are also prevalent in this population.

<sup>96</sup> See Schizophrenia Society of Ontario, *Provincial Correctional Response to Individuals with Mental Illness in Ontario: A Review of Literature* (Toronto: Schizophrenia Society of Ontario, 2012). The inability of provincial jail facilities to deal with individuals with mental disorders was recently discussed in the dissenting reasons for judgement in *R v Conception*, 2014 SCC 60 [*Conception*], where Justice Karakatsanis noted that fewer than 1/3 of Ontario provincial jails had special units for inmates with mental disorders, and where those units are full or do not exist, accused with mental disorders are typically held in segregation cells (at para 77).

The problem of mental disability in the prison population is serious and is not going away. The inability of Corrections Canada to appropriately deal with offenders with mental health problems has continued to make headlines in recent months. Almost three years after Ashley Smith's death, Edward Snowshoe, a 24-year-old prisoner with mental health issues, took his own life while in solitary confinement.<sup>97</sup> Snowshoe had pleaded guilty in 2007 to the offence of using a firearm in the commission of a robbery, a crime that carried with it a mandatory minimum prison sentence of 4 years.<sup>98</sup> At the time of his suicide he had been in isolation for 162 days at the Edmonton Institution.<sup>99</sup> While Snowshoe's death was ruled a suicide rather than a homicide in June 2014 pursuant to an investigation under the *Fatalities Inquiries Act*,<sup>100</sup> the investigation report noted that nothing was done to attempt to set up psychological communication with Snowshoe even though the admitting nurse had advised the psychology department of prior suicide attempts and self-harming incidents.<sup>101</sup> The Report concluded with recommendations echoing many that were called for by the Correctional Investigator and the Coroner's Inquest after Smith's death.<sup>102</sup>

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<sup>97</sup> Alberta, Fatalities Inquiry Act, *Report to the Minister of Justice and Attorney General Public Fatality Inquiry* (Edmonton: Fatalities Inquiry Act, 2014).

<sup>98</sup> *R v Snowshoe*, 2007 NWTSC 41, 74 WCB (2d) 481. No mental health issues were mentioned or considered in sentencing Snowshoe to five years' imprisonment, though the judge did appear to consider his young age and early guilty plea as mitigating factors (at paras 43-44).

<sup>99</sup> Alberta, *supra* note 97 at 1.

<sup>100</sup> *Ibid* at 1.

<sup>101</sup> *Ibid* at 3.

<sup>102</sup> *Ibid* at 5. Some of these recommendations included: a formalized system of providing a transfer report detailing mental health issues; review of the procedures in psychology departments in prisons to ensure when a serious mental health issue exists processes are put in place to ensure the individual receives help and prompt attention from psychologists; and a requirement that psychologists keep proper and complete files.

The inability of Corrections Canada to cope with self-injurious offenders with mental disabilities was also recently discussed by Saskatchewan Provincial Court Justice Whelan in *R v Carter*.<sup>103</sup> Marlene Carter is a 43-year-old First Nations woman who was one of the subjects of the Correctional Investigator's *Risky Business* study and report referred to above. While under the custody of Corrections Canada, Carter engaged in repeated, extreme self-injurious behaviour in the form of head-banging.<sup>104</sup> After committing a number of offences while in custody, the Crown applied to have Carter designated a dangerous offender. In denying this application, the Justice Whelan noted that between March and June 2009, Carter's self-injurious behaviour developed into an extreme practice, and during her five years at Corrections Canada's Regional Psychiatric Centre her mental and physical health deteriorated and a reduction in her intellect was documented.<sup>105</sup> The judge noted Carter was "caught up in a system which seems to lack the will or ability to make available a setting which appropriately addresses her mental health needs. Despite repeated recommendations that she be placed in a mental health facility where guards are not the first responders to self-harming behaviour... the system has proven unable to act upon this sensible solution".<sup>106</sup>

During her time in the care of Corrections Canada, Carter was often placed in administrative segregation and almost consistently restrained through the use of a Pinel Board, hospital bed, or Broda Chair.<sup>107</sup> She had also been subject to pepper spray during self-harming incidents on up to

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<sup>103</sup> *R v Carter*, 2014 SKPC 150, SJ No 432 (QL) [*Carter*].

<sup>104</sup> *Carter*, *supra* note 103 at para 251.

<sup>105</sup> *Ibid* at para 17.

<sup>106</sup> *Ibid* at para 18.

<sup>107</sup> The Pinel Restraint System is a flat stretcher with slots cut out on each side to permit carrying, with restraints for the wrists, legs, ankles, waist and shoulders. Eventually a hospital bed was brought in because Carter was spending so much time in these restraints. In early 2010 both were replaced by a Broda chair, which allowed her to be

35 occasions. Justice Whelan found the Canadian corrections system “operates pursuant to legislation, regulation and commissioner’s directives which are not geared to the thoughtful and necessarily individualized treatment of those with mental health difficulties on the scale experienced by Ms. Carter”.<sup>108</sup> In sentencing Carter for offences committed while in custody, Justice Whelan emphasized the opinion expressed by the Correctional Investigator that Carter be placed in a facility with a clinical approach and sufficient resources to respond to her mental health needs.<sup>109</sup>

Clearly, any incremental reforms implemented by Corrections Canada subsequent to Smith’s death have not been effective in preventing similar incidents from occurring. This unwillingness or inability to put procedures and policies in place that might reduce the particular hardships experienced by offenders with mental disabilities in prisons constitutes serious and ongoing discrimination against this vulnerable group of offenders. Offenders with mental disabilities in prisons are not receiving the access to treatment and services they require to be able to function on their release back into their communities and stop the revolving door of incarceration.<sup>110</sup>

The presence of numerous individuals with mental health issues in the criminal justice system and the lack of adequate resources to properly assist them has resulted in many commentators calling for change. In addition to the Correctional Investigator, in 2013, the Canadian Centre for

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restrained in a similar way to the Pinel Board, but in a chair that could be moved from place to place (*Ibid* at paras 194-207).

<sup>108</sup> *Ibid* at para. 20.

<sup>109</sup> *Ibid*. The judge noted that a number of alternatives to Carter’s placement were considered, the most viable of which was a hospital in Brockville that had received placements from Corrections Canada in the past (at para 244).

<sup>110</sup> See Kristen Howard, “‘Hurt People’ in the Courtroom: An Examination of Offender PTSD in Canadian Criminal Cases” (Masters Thesis) (Burnaby, BC: Simon Fraser University, 2009) at 120.

Addiction and Mental Health issued a “Mental Health and Criminal Justice Policy Framework” calling for an end to the criminalization of people with mental illnesses through a social justice approach.<sup>111</sup> Further, the Mental Health Commission of Canada’s Mental Health Strategy identifies reducing the over-representation of people living with mental health problems and disorders in the criminal justice system as a priority.<sup>112</sup> The Mental Health Commission of Canada argues that while efforts should be focused on preventing mental health problems and illnesses, and providing timely access to services and treatment should be a priority, diversion programs such as mental health courts and restorative justice programs should be the next line of defence.<sup>113</sup>

While the problem of mental disability in the criminal justice system is large enough to warrant and likely require significant changes at numerous points of intervention prior and subsequent to the commission of an offence, at trial, and in penal institutions and mental health facilities, my focus in the remainder of the paper will be on potential changes to Canada’s sentencing laws that could reduce the number of mentally disabled offenders who end up in prisons and subject to the harmful and discriminatory treatment outlined above.

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<sup>111</sup> Centre for Addiction and Mental Health, *supra* note 8 at 2. The Framework notes that all inmates have a fundamental right to healthcare, which includes mental health care, and identifies inadequacies and inconsistencies in mental health screening, resourcing of Residential Treatment Centres, mental health services in both provincial and federal prisons, and discharge planning (at 8 – 10).

<sup>112</sup> Mental Health Commission of Canada, *supra* note 8 at 46, “Priority 2.4”.

<sup>113</sup> *Ibid.*

## 2.4 Theoretical Basis For Differential Treatment of Offenders with Mental Disabilities

### 2.4.1 Reduced Moral Blameworthiness

Individuals with mental disabilities are vastly over-represented in the criminal justice system despite serious moral and ethical reasons why they should not be punished for their actions in many circumstances.

One theoretical basis for treating individuals with mental disabilities differently at criminal law is the basic moral presumption that offenders with mental disabilities may have reduced responsibility for their actions. This presumption has existed since ancient times.<sup>114</sup> Indeed, inherent to legal systems that require the presence of *mens rea* for a person to be found legally responsible is the notion that if a person was not able to make an unfettered choice about committing a criminal act, her criminal responsibility must be lessened or absolved.<sup>115</sup> Where a mental disability prevents an individual from exercising her free will in making a choice about committing a crime, she should not be held criminally responsible.

In the common law legal tradition, the rule from the *M’Naghten*<sup>116</sup> decision forms the basis for many exculpatory doctrines based on mental disability. This ruling, made by the English House of Lords in 1843, held that to establish a defence on the ground of insanity “it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect

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<sup>114</sup> Sarah L. Desmarais et al., “A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the *Winko* Decision” (2008) 7:1 Int J Forensic Ment Health 1 at 2.

<sup>115</sup> Desmarais et al, *supra* note 114 at 1. In many Western countries, specific provisions hold that those who do not choose to commit certain criminal acts or omissions should not be held responsible for these actions, as they did not possess the requisite *mens rea*.

<sup>116</sup> *Regina v M’Naghten*, (1843) 10 CL & Fin 200, 9 Eng Rep 718 [*M’Naghten*].



of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong”.<sup>117</sup>

The essence of the *M’Naghten* rule has been adopted in many Western legal systems which have provisions that exempt individuals with mental disabilities from responsibility based on the “common institutions of morality that people cannot be punished for actions over which they lack control, or of which they did not understand the moral nature.”<sup>118</sup> Punishment under the criminal law represents more than a mere penalty such as the payment of a fine – it serves as a moral sanction intended to demonstrate society’s condemnation of the crime.<sup>119</sup> Such moral condemnation is inappropriate for persons who are not truly morally responsible, such as those suffering from a significantly impairing mental disability.

In Canada, these principles are codified in section 16 of the *Criminal Code* as follows: “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”. Where a person meets the criteria articulated in this provision, she is held to be NCRMD.

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<sup>117</sup> See *M’Naghten*, *supra* note 116. M’Naghten attempted to assassinate the British Prime Minister but instead killed his secretary. At the time of the offence M’Naghten suffered from delusions of persecution and was mentally ill. He was acquitted and committed to a hospital for people with mental health problems. The House of Lords found that accused should be presumed sane and sufficiently reasonable so as to be responsible for their crimes until the contrary is satisfactorily proved. See also Canada, “Mental Health and Criminal Justice”, *supra* note 62 at 1-2.

<sup>118</sup> Adam R Fox, Trevor H Kvaran & Reid Griffith Fontaine, “Psychopathy and Culpability: How Responsible is the Psychopath for Criminal Wrongdoing?” (2013) 38 Law & Soc Inquiry 1 (QL) at 2. See also HLA Hart, “Punishment and the Elimination of Responsibility” in HLA Hart & John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford: Oxford University Press, 2008) which outlines the conventional doctrine that if punishment is to be justified at all it must be for a responsible act, reflecting the “fundamental principle of morality” that a person should not be found blameworthy for an act she could not help doing (at 174-175).

<sup>119</sup> See Cordella Fine & Jeanette Kennett, “Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment” (2004) 27 Int’l JL & Psychiatry 425 at 433.

The Canadian criminal justice system operates on the assumption that people act in a voluntary manner that is determined by free will, and that they can make informed and voluntary choices with respect to the exercise of their rights and decisions to commit crimes.<sup>120</sup> A finding of NCRMD, like other exculpatory doctrines based on mental disability, represents a departure from these assumptions that recognizes that a person rendered incapable of truly voluntary conduct by a mental disability should not be punished for her actions.<sup>121</sup> The SCC has articulated that the “insanity” provisions of the *Criminal Code* (the former iteration of the NCRMD provisions) reflect the “fundamental conviction that criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong”.<sup>122</sup> The importance of the doctrine of NCRMD was emphasized in *Bouchard-Lebrun*<sup>123</sup> as protecting “the integrity of our country’s criminal justice system and the collective interest in ensuring respect for its fundamental principles.”<sup>124</sup>

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<sup>120</sup> See *R v Bouchard-Lebrun*, 2011 SCC 58 at paras 45-59, 3 SCR 575 [*Bouchard-Lebrun*]. See also Kent Roach & Andrea Bailey, “The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing” (2009) 42 UBC L Rev 1 (QL) at para 4. This theoretical perspective and its articulated exceptions generally accords with the compatibilist framework first proposed by Hobbes, which holds that persons act freely only when they willed the act but could have done otherwise. From this perspective, free will is understood as playing a role in decisions to commit crimes, but there is also a requirement of recognition when cognitive impairments place burdens or limitations on actors’ free will in ways that do not exist for offenders without such impairments. The compatibilist framework may be contrasted against a “hard determinist” perspective, which essentially holds that all humans are determined in their choice of actions through their brain chemistry and upbringing, and there is no place for free will. Such an understanding holds that all aspects of a person’s background, impairments, etc., are hard-wired in the brain and cause every choice and action an actor undertakes. For more on these different theoretical frameworks see: RJR Blair, “Aggression, Psychopathy and Free Will from a Cognitive Neuroscience Perspective” (2007) 25 Behav Sci & L 25.

<sup>121</sup> Arlie Loughnan, “Mental Incapacity Doctrines in Criminal Law” (2012) 15 New Crim L Rev 1 at 8. Loughnan notes that models of exemption based on mental incapacity are premised on an understanding that the individuals exempted are not those to whom the criminal law as a normative system speaks.

<sup>122</sup> *R v Chaulk*, [1990] 3 SCR 1303, 119 NR 161 at 1397 [*Chaulk*].

<sup>123</sup> *Bouchard-Lebrun*, *supra* note 120.

<sup>124</sup> *Ibid* at para 44.

The principles codified by the NCRMD provisions, namely that an offender who commits a crime while suffering from a serious mental illness may not be responsible for her actions, may appear to be common sense. However when we think of an example of a person who should be found NCRMD, we tend to picture an individual completely out of control of her behaviour, suffering from severe psychosis or delusions, who commits a crime without any true understanding of what she is doing. In such cases, the absence of blameworthiness for this conduct and the inappropriateness of punishment is likely readily apparent to most readers. What is less clear is whether and to what extent an individual's criminal responsibility should be reduced where she was not completely unable to comprehend the situation she was in, but rather had a mental disability that had the more subtle impact of lessening her impulse-control or distorting her ability to fully appreciate the direct or indirect consequences of her actions. These types of impacts of mental disability are far more common and, I argue, there is sound theoretical basis for the criminal law to take these impairments into account for reasons related to those articulated above.

An offender with a mental disability will struggle with certain impairments and cognitive difficulties through no fault of her own, and these impairments can shape her perceptions and behaviours such that it may be unfair to consider her criminal actions to be truly a product of her free will. While many disabilities and impairments will not impact an offender's reasoning and decision-making behaviour to the extent that the law should absolve her of all responsibility for her actions, in cases where her responsibility is reduced or diminished as a result of her mental disability, this should be recognized by the criminal law.

Previous authors have advocated for greater recognition of reduced (but not absent) criminal responsibility for certain offenders with mental disabilities.<sup>125</sup> In the Canadian context, Manson has noted that psychological impairment should mitigate culpability due to its impact on judgment.<sup>126</sup> More recently, Verdun-Jones & Butler have argued that the “impairment of the capacity of individuals to make ‘good decisions’ that would prevent them from falling afoul of the criminal law is a factor that should be recognized as a mitigating factor in sentencing or at least as a basis for adopting a less punitive and more preventive approach.”<sup>127</sup>

Under Canadian criminal law, reduced responsibility based on mental disability is considered, if it is considered at all, at the sentencing phase of criminal proceedings, once criminal responsibility has been determined.<sup>128</sup> The ways in which mental disability has been found by the courts to be relevant at sentencing will be discussed in **Section 3.2**, but it is sufficient for now to note that judges have recognized that offenders with mental disabilities may have reduced moral blameworthiness for their actions and as such the illness or disability should act as a mitigating

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<sup>125</sup> Stephen J Morse, “Diminished Rationality, Diminished Responsibility” (2003) 1 Ohio St J Crim L 189. In the U.S. context, Morse has argued that this recognition should occur at the trial stage rather than on sentencing, and advocates for a mitigating excuse of “partial responsibility” for criminal actions where an offender’s rationality was non-culpably compromised. Morse notes that while partial responsibility can be fully considered at sentencing, this method suffers from defects given that sentencing is a matter of discretion, and there are wide disparities among judges sentencing similarly-situated defendants. Further, mitigating only at sentencing removes an important culpability determination from the more highly visible trial stage. While I agree with the theoretical basis that offenders with impairments that result in a reduced capacity for rationality in making choices about criminal behaviour should be seen as less morally responsible for their actions, I do not believe this determination needs to be removed from the sentencing phase for appropriate consideration in Canada, so long as the model outlined in **Chapter 4** is followed.

<sup>126</sup> A Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 134.

<sup>127</sup> Verdun-Jones & Butler, *supra* note 28 at 507.

<sup>128</sup> See e.g. *R v Hasad*, 2013 ABQB 192 at para 47, 559 AR 81, where the judge found that the offender’s cognitive impairment was a contributing factor to the offence and passed the threshold of relevance for sentencing, but did “not (at this late juncture) relate to his ultimate criminal liability”.

factor.<sup>129</sup> Further, the sentencing objectives of denunciation and deterrence are to be given lesser weight for offenders with mental disabilities,<sup>130</sup> with the focus shifting instead to rehabilitation and treatment. These observations are consistent with the recognition by most people that mentally disabled offenders may require treatment and supervision, not punishment.<sup>131</sup> However, as will be explored in greater detail in **Chapter 3**, while there is recognition in the jurisprudence that individuals who commit crimes while suffering from mental disabilities should be considered to have reduced moral blameworthiness for their actions, these principles are not being reflected in a consistent way in sentencing decisions.

#### **2.4.2 Mental Disability as a Cause of Crime**

In **Section 2.2** I discussed the longstanding legacy of discrimination faced by individuals with mental disabilities in this country. Given that courts recognize an individual with a mental disability may not be responsible for her criminal actions if the disability impaired her thinking in certain ways, I argue courts must also recognize a reduced responsibility where a mental disability contributed to the ultimate commission of a crime in a less overwhelming fashion.

Currently, as discussed above, mental disability is prevalent in the criminal justice system in part of what has been referred to in the literature as the “criminalization” of mental illness.<sup>132</sup> The

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<sup>129</sup> See e.g. *R v Batisse*, 2009 ONCA 114, 93 OR (3d) 643 [*Batisse*]; *R v Belcourt*, 2010 ABCA 319, 490 AR 224 [*Belcourt*]; *R v Edmunds*, 2012 NLCA 26, 322 Nfld & PEIR 337 [*Edmunds*]; *R v Resler*, 2011 ABCA 167, 505 AR 330 [*Resler*]; *R v Sellars*, 2013 NSCA 129, 336 NSR (2d) 204.

<sup>130</sup> *R v Ramsay*, 2012 ABCA 257, 536 AR 174 [*Ramsay*]; *R v Robinson* (1974), 19 CCC (2d) 193 (ONCA) at 197, 1974 CarswellOnt 1073 [*Robinson*]; *R v Manitowabi*, 2014 ONCA 301, OJ No 1924 (QL) [*Manitowabi*].

<sup>131</sup> *R v Valiquette* (1990), 60 CCC (3d) 325 (QCCA) at 331, 37 QAC 8 [*Valiquette*]. See also: *Edmunds*, *supra* note 129 at para 26.

<sup>132</sup> Centre for Addiction and Mental Health, *supra* note 8 at 2.

Canadian Centre for Addiction and Mental Health describes the phenomenon of the criminalization of mental illness as follows:

The reasons why people with mental illness end up in the criminal justice system are numerous. Societal factors such as poverty, inadequate housing and trauma can increase risk, as can substance use problems. There are also instances when mental illnesses actually cause people to behave in ways that lead to a criminal justice response.<sup>133</sup>

Barriers to individuals with mental illnesses remaining out of the criminal justice system have been identified as including homelessness, indigence, lack of insurance for medication, and the use of alcohol and/or drugs.<sup>134</sup> In the 1970s and 1980s in Canada there began a “community living” movement for individuals with mental disabilities, which entailed moving these individuals out of mental health institutions and into the community.<sup>135</sup> One of the consequences of this process of de-institutionalization was that individuals with mental disabilities began facing situations for which they were unprepared, due to their disability, lack of familial or social support, or the experience of institutionalization itself.<sup>136</sup> The process of de-institutionalization of individuals with mental disabilities coupled with inadequate re-investment in community-based services for those living with mental health issues have resulted in some individuals with mental disabilities committing crimes or behaving in ways that draw police attention.<sup>137</sup>

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<sup>133</sup> *Ibid.*

<sup>134</sup> Castillo & Alaird, *supra* note 29 at 99.

<sup>135</sup> Canada, “Intellectual Disability Literature Review”, *supra* note 35 at 10.

<sup>136</sup> *Ibid* at 10 (individuals who have spent most of their lives in institutions are less likely than those who have never been institutionalized to have sufficient natural support from family members and friends in the community).

<sup>137</sup> Centre for Addiction and Mental Health, *supra* note 8 at 2; Canada, “Mental Health and Criminal Justice”, *supra* note 62 at 8; Canadian Bar Association, “Resolution”, *supra* note 6 at 1. See also Stewart, Wilton & Cousineau, *supra* note 57, who acknowledge that the number of mentally ill offenders in prisons is rising, but refer to a 1984

As discussed above, people with mental disabilities face systemic barriers in a variety of socioeconomic spheres. The relationships between mental disabilities and these other hardships are often complex, and attributing causation for criminal behaviour to one aspect of an individual's life over another is difficult. For example, individuals with mental disabilities are more likely to experience housing insecurity or homelessness, yet homelessness and housing insecurity can also trigger or exacerbate mental health issues.<sup>138</sup> An individual's employment prospects may be greatly reduced when she has a mental disability,<sup>139</sup> which may in turn lead to financial instability, resulting in housing insecurity or homelessness, which will in turn negatively impact the person's mental health.<sup>140</sup> Complex, vicious cycles such as these are experienced by many Canadians with mental disabilities, and increase their likelihood of coming into the contact with the criminal justice system.

Recent case law is replete with examples of offenders who have come into contact with the criminal justice system as a result of complex factors related to mental disability. A series of decisions that provide a glimpse of the myriad systemic factors that can contribute to criminality for individuals with mental disabilities, and the failure of society to deal with these factors

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research report that failed to confirm the link between closure of psychiatric inpatient beds and increases of mental disorder in prison.

<sup>138</sup> Canada, Library of Parliament, *Current Issues in Mental Health in Canada: Homelessness and Access to Housing* (In Brief) (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2014) [Canada, "Homelessness"] at 1. Some estimates indicate that individuals who are homeless experience mental illness at a rate 2-3 times higher than the general population, and 4% of homeless persons claimed mental illness was the reason for their becoming homeless (Senate, "Mental Health Overview", *supra* note 42 at 98).

<sup>139</sup> Canada, "Homelessness", *supra* note 138 at 1. Some estimates indicate unemployment for individuals living with serious mental disorders is as high as 90% (Senate, "Mental Health Overview", *supra* note 42 at 49).

<sup>140</sup> Canada, "Homelessness", *supra* note 138 at 1. Senate, "Mental Health Overview", *supra* note 42 notes that unemployment leads to reduced social engagement, which may in turn worsen mental and physical illnesses and contribute to feelings of worthlessness and depression, which may lead to substance abuse (at 171).

adequately, are the sentencing decisions involving Franklin Junior Charlie. Charlie is an aboriginal man from the Yukon who has been diagnosed with Fetal Alcohol Spectrum Disorder [FASD]. In 2008, Charlie pleaded guilty to fourteen offences, which the judge noted were “the result of a combination of prenatal exposure to alcohol combined with his own addiction problems”.<sup>141</sup> Charlie was sentenced to two years plus a day based on the joint submissions of counsel, and the judge noted Charlie would likely have better access to programming and treatment in the federal system.<sup>142</sup>

Any treatment Charlie received in the federal penitentiary was inadequate to prevent him from re-offending, however, as after serving his sentence Charlie committed the additional offences of robbery, failure to appear in court, and failure to abstain from alcohol as required by his recognizance. In sentencing Charlie for these offences in 2012 Justice Lilles noted how a myriad of factors contributed to his coming into contact with the criminal justice system, including his FASD which the judge found was a “direct result of the residential school policies of the Federal Government”, as his parents’ traumatizing experiences in residential schools had caused them to abuse alcohol.<sup>143</sup> The FASD itself resulted in severe behavioural and learning issues for Charlie, which Justice Lilles noted “resulted in unstable living placements, educational opportunities, social difficulties and ongoing problems with the law”.<sup>144</sup> Further, Charlie had other mental health concerns including addiction issues, a diagnosis of attention-deficit hyperactivity disorder [ADHD], and an IQ in the “Extremely Low” range of intellectual functioning.<sup>145</sup> When abusing

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<sup>141</sup> *R v Charlie*, 2008 YKTC 9 at paras 14-15, 77 WCB (2d) 718 [*Charlie* 2008].

<sup>142</sup> *Charlie* 2008, *supra* note 141 at para 15.

<sup>143</sup> *R v Charlie*, 2012 YKTC 5 at para 37, 2 CNLR 184 [*Charlie* 2012].

<sup>144</sup> *Charlie* 2012, *supra* note 143 at para 13.

<sup>145</sup> *Ibid.*



substances Charlie would lose his limited cognitive skills almost entirely, and Justice Lilles identified management of his substance abuse upon release as critical to preventing his re-offending.<sup>146</sup>

Justice Lilles further noted that Charlie would often misinterpret situations, leading to confusion and frustration and resulting in excessive emotional reactions.<sup>147</sup> Charlie did not have the ability to live successfully as an independent adult, being functionally illiterate and requiring structure and supervision to avoid contact with the law. Finally, Justice Lilles noted that Charlie was “a follower” who could be easily led and was at a high risk of being victimized by others.<sup>148</sup> In light of Charlie’s multiple difficulties related to his FASD, Justice Lilles held that it was not surprising Charlie continuously breached his parole and found that his criminal record was “consistent with his FAS assessment”.<sup>149</sup>

Justice Lilles recognized the serious barriers to avoiding criminality Charlie would face on his release from prison. He expressed an expectation that while Charlie was incarcerated his probation officer, Health and Social services, his parents, his community, and other supporting agencies would work together to develop a treatment and supervision plan to support Charlie on his release.<sup>150</sup> Unfortunately, this did not take place, and Charlie once again found himself before a sentencing judge in 2014.<sup>151</sup> In that case, the judge quoted from an expert report that noted a FASD diagnoses “raises questions about our ability as a society to support people... who are

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<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid* at paras 19-21.

<sup>150</sup> *Ibid* at para 42.

<sup>151</sup> *R v Charlie*, 2014 YKTC 17, para 60, quoting from Gladue Report, YJ No 36 (QL) [*Charlie* 2014].

suffering from organic brain injuries caused by prenatal exposure to alcohol.”<sup>152</sup> The report noted Charlie required a level of support to avoid criminal activity that does not exist in his home community.<sup>153</sup> The judge noted how between his release from his previous conviction and the present offence, Charlie obtained a workplace certification for heavy equipment operation but was unable to obtain employment due to a lack of experience, and quit a job building houses after being teased about only getting the job through his father.<sup>154</sup> The judge quoted from a Gladue Report, which noted that Charlie, in addition for being punished for committing the offence, “may end up being penalized a second time precisely because of the lack of support services available for people with his level of disability. Without adequate supports in place, Franklin may find himself incarcerated by default and, as we all know, Franklin’s continued incarceration can only be a short-term solution for him and for society.”<sup>155</sup>

Charlie’s involvement and re-involvement with the criminal justice system is not an uncommon situation for many individuals living with mental disabilities. Charlie’s FASD resulted in him being easily manipulated by others, and a lack of insight into the direct link abusing alcohol and drugs had to his offending behaviour. While Charlie was luckier than many other offenders with mental disabilities in that he was able to obtain employment, at least for a short period, his issues with alcohol and the lack of available treatment in his community make it unlikely he will be able to break the cycle of offending behaviour without attention and intervention by friends, family, and external agencies.

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<sup>152</sup> *Charlie* 2014, *supra* note 151 at para 43, quoting from Dr. Lohrasbe’s report.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid* at para 59.

<sup>155</sup> *Ibid* at para 61, quoting from Gladue Report.

The recent Saskatchewan Court of Appeal decision in *R v Buck*<sup>156</sup> provides another stark example of the types of barriers to avoiding contact with the criminal justice system that operate for many individuals with mental disabilities. In *Buck*, the offender had been diagnosed with schizophrenia, and was 20 years old and homeless when he committed the offences of theft under \$5000 and breach of probation. On the offender's appeal of his sentence of six months' imprisonment, the Court described the interaction between the offender's mental illness and offending behaviour as follows:

It is obvious Mr. Buck is a man who suffers from mental illness and because of that illness he is unable to provide for himself. His family are ill-equipped to assist him. Resources that could assist him are available in the community at large, but because of his mental health issues Mr. Buck has been unable to successfully access them. When, with help, he has connected with those resources the administrative hurdles he has had to overcome have doomed him to failure and guaranteed his return to a life on the streets. Mr. Buck has stolen out of necessity. He is unable to access social assistance benefits because he has no permanent address. Unaided he is powerless to break the vicious cycle of mental health issues, addictions, poverty and increasing involvement with the criminal justice system that plagues him.<sup>157</sup>

The lack of appropriate treatment and supports can “cause” criminal behaviour in a way that is as real and significant as an offender's mental disability actually influencing her judgement at the time of an offence.<sup>158</sup> A 2010 report regarding drug and alcohol addiction in the federal

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<sup>156</sup> *R v Buck*, *supra* note 92.

<sup>157</sup> *Ibid* at para 15.

<sup>158</sup> See Centre for Addiction and Mental Health, *supra* note 8 at 2.

corrections system noted that untreated mental health problems increase the risk of contact with the criminal justice system and that “offenders with serious mental health issues are more likely to be charged and to reoffend thereafter”.<sup>159</sup> As recently noted in *R v Adamo*,<sup>160</sup> a failure by the justice system to treat mental health issues has been considered a mitigating factor in sentencing.<sup>161</sup> The situation for the offender in that decision was described as follows by the sentencing judge: “[a]t best, he can be said to have fallen through the cracks; and at worst, he is the victim of systemic failures. Whatever label is attached, this circumstance is to some extent a mitigating factor.”<sup>162</sup>

Involvement in the criminal justice system can increase the stigma and discrimination already experienced by individuals with mental disabilities.<sup>163</sup> Media coverage of violent incidents and criminal cases involving offenders with mental disabilities reinforces a narrative that offenders with mental disabilities are dangerous, despite a lack of compelling evidence on this point.<sup>164</sup> Indeed, the vast majority of people living with mental health problems and disorders do not commit crimes, and are in fact much more likely to be victims of violence than perpetrators.<sup>165</sup> Prison terms will disrupt any gains in treatment or employment made by individuals with mental disabilities, and may decrease their opportunities to access employment or housing opportunities

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<sup>159</sup> Parliament, *supra* note 61 at 22.

<sup>160</sup> *Adamo*, *supra* note 4.

<sup>161</sup> *Ibid* at para 43. See also: *R v Muldoon*, 2006 ABCA 321, 213 CCC (3d) 468; *R v MNJ*, 2002 YKTC 15, YJ No 49 (QL) [*MNJ*].

<sup>162</sup> *Adamo*, *supra* note 4 at para 63. See also *MNJ*, *supra* note 161 where the judge held that where the state plays some part in the circumstances that contribute to the offending behaviour, its failure makes an offender somewhat less accountable to the state for violating its laws (at para 94).

<sup>163</sup> Centre for Addiction and Mental Health, *supra* note 8 at 2. See also Service, *supra* note 8 at 51, which notes that mentally disabled offenders must deal with the double stigma of being both “crazy” and criminal.

<sup>164</sup> Senate, “Mental Health Overview”, *supra* note 42 at 43-45. Estimating the rates of violence by people with mental disabilities is an extremely complex issue, given to the different types of research methods used. A definitive causal relationship between mental illness and violence has not been established (Ontario, *supra* note 41 at 22).

<sup>165</sup> Canada, “Mental Health and Criminal Justice”, *supra* note 62 at 1.

upon release back into the community. As discussed above, incarceration can have a direct and serious negative impact on offenders' mental health. Further, as found by Raina et al, individuals with intellectual disabilities who have previous involvement with the criminal justice system are more likely to be arrested on subsequent police interventions than those who do not, suggesting that the "forensic" label subsequently effects police perception regardless of the actual offence committed.<sup>166</sup>

As will be discussed further below, the role of systemic discrimination and socioeconomic barriers faced by offenders with mental disabilities needs to be taken into account at sentencing in much the same way systemic and background factors are considered when sentencing aboriginal offenders.<sup>167</sup>

## **2.5 Why Expansion of NCRMD is Not the Answer**

The NCRMD provisions discussed above represent a codified recognition that an offender's mental disability may impact her responsibility and blameworthiness for her actions.<sup>168</sup> A verdict of NCRMD represents a unique third option for findings of criminal liability, apart from

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<sup>166</sup> Poonam Raina et al, "Pathways into the Criminal Justice System for Individuals with Intellectual Disability" (2013) 26 J Appl Res Intellect Disabil 404 at 408.

<sup>167</sup> *R v Gladue*, [1999] 1 SCR 688 at para 66, 171 DLR (4th) 385 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 at para 59, 1 SCR 433 [*Ipeelee*].

<sup>168</sup> A further recognition of the impact of mental disability in the *Criminal Code*, *supra* note 2 are the "Fitness to Stand Trial" provisions contained at ss 672.22 – 672.33. An individual is unfit to stand trial where she, on account of "mental disorder", is unable to conduct a defence at any stage of the proceedings before a verdict is rendered or instruct counsel to do so (s 1). Where an accused is found unfit to stand trial any plea made is set aside and any jury discharged (s 672.31). The court has jurisdiction to hold an inquiry no later than two years after the fitness verdict, and every two years thereafter, to decide whether sufficient evidence can be adduced to put the accused on trial (s 672.33). This may go on until, on the completion of an inquiry, the court is satisfied that sufficient evidence cannot be adduced to put the accused on trial, at which time the court must acquit the accused (s 672.33(6)).

conviction versus acquittal.<sup>169</sup> An accused found NCRMD is not criminally responsible for her behaviour, however this determination does not amount to a complete acquittal as the public may still require protection from future dangerous behaviour.<sup>170</sup> An accused will receive an absolute discharge where she is found to be NCRMD and “is not a significant threat to the safety of the public”.<sup>171</sup> Where she does represent such a risk, she may be discharged or detained in a hospital, both subject to conditions.<sup>172</sup>

Given that offenders with mental disabilities may be less morally blameworthy for their actions than offenders without such disabilities, one potential solution to their over-representation in the criminal justice system might appear to be an expansion of the circumstances in which the NCRMD provisions can apply. Given that the purpose of NCRMD is to “protect... the integrity of our country’s criminal justice system and the collective interest in ensuring respect for its fundamental principles” through ensuring offenders who did not act in a morally voluntary manner are not sent to prison,<sup>173</sup> why should this verdict not serve to divert a greater proportion of offenders with mental disabilities out of correctional facilities?

As is demonstrated by the large numbers of individuals with mental disabilities in federal and provincial prisons, the NCRMD provisions do not apply in every case where an individual with a mental disability commits an offence. While the provisions appear to be quite broad on their

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<sup>169</sup> See Canada, Department of Justice, *The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Research Report) (Ottawa: Department of Justice Research and Statistics Division, 2006) [Canada, “Review Board Systems”] at 1.

<sup>170</sup> Canada, “Review Board Systems”, *supra* note 165 at 1; *Criminal Code*, *supra* note 2 s 672.38; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at paras 31-32 [*Winko*].

<sup>171</sup> *Criminal Code*, *supra* note 2 s 672.54(a).

<sup>172</sup> *Ibid* s 672.54(b)-(c).

<sup>173</sup> *Bouchard-Lebrun*, *supra* note 120 at paras 44-47.

surface (the term “mental disorder” is further defined only as a “disease of the mind”,<sup>174</sup> and the SCC has acknowledged that what constitutes a disease of the mind is to be interpreted broadly<sup>175</sup>) in practice only an exceptionally small number of criminal matters are resolved with findings of NCRMD.<sup>176</sup> Further, the persons who successfully plead NCRMD generally suffer from certain types of mental disabilities, generally major mental illnesses such as schizophrenia.<sup>177</sup> This limited application is due in part to the restrictive and narrow interpretation by the courts of the second part of the test set out in section 16 of the *Criminal Code*: whether the disease of the mind “rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”.<sup>178</sup> In essence, the law has developed such that an accused must prove she either could not appreciate the physical character and physical consequences of the criminal act<sup>179</sup> (i.e., she was in a state of psychosis so severe she was unable to understand she was choking another individual and that this could cause that

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<sup>174</sup> *Criminal Code*, *supra* note 2 s 2 “mental disorder”.

<sup>175</sup> See *R v Cooper*, [1980] 1 SCR 1149 at 1159, 110 DLR (3d) 46 [*Cooper*] in which the SCC found that a “disease of the mind” includes “any illness, disorder or abnormal condition which impairs the human mind and its functioning...” More recently the SCC acknowledged that the types of diagnoses that will fall under the definition of “disease of the mind” will broaden as scientific knowledge of mental illness progresses (*Bouchard-Lebrun*, *supra* note 120 at para 60).

<sup>176</sup> Approximately 0.001% of individuals charged with a criminal offence are found NCRMD annually. See Centre for Addiction and Mental Health, *supra* note 8 at 6.

<sup>177</sup> The majority (51.7%) of offenders found NCRMD have a primary diagnosis of schizophrenia, and over 78% have a primary diagnosis of either schizophrenia or an affective disorder (including Bipolar disorder, schizo-affective disorder, and major depression) (Canada, “Review Board Systems”, *supra* note 169 at 20, “Table 10: Legal Status (NCRMD/UST) By Primary Diagnosis”). See also Benjamin L Berger, “Mental Disorder and the Instability of Blame in Criminal Law” in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2012) 117 at 135-136; Verdun-Jones & Butler, *supra* note 28 at 497.

<sup>178</sup> *Criminal Code*, *supra* note 2 s 16.

<sup>179</sup> See: *R v Palma*, [2001] OJ 3283 (Sup Ct) (QL) at para. 65, where the court characterised the test as a “restatement, specific to the defence of insanity, of the principle that *mens rea*, or intention as to the consequences of an act, is a requisite element in the commission of a crime.” See also *R v Race*, 2014 NSSC 6 at 26, 339 NSR (2d) 351.

person harm), or she did not know members of society would view the act as wrong.<sup>180</sup> While on the surface understanding that reasonable members of society would view an act as morally wrong might appear distinct from an understanding that an act is against the law, in reality this distinction is likely artificial given that the criminal law is in fact a codification of society's moral standards.<sup>181</sup> Therefore, if an individual is able to comprehend what she is doing is against the law, she should not be found NCRMD.

The primary reason why an expanded use of these provisions is likely not an appropriate solution to the problem of mental disability in the criminal justice system is the extraordinary remedy the provisions provide. A finding that a person physically committed a criminal act but is not responsible for that action requires an extraordinary set of circumstances to be justified, such as a person committing a crime in the throes of a severe delusion. There are, of course, a number of theoretical problems with the idea that certain mental disabilities or levels of impairment will serve to absolve a person of criminal liability while others will not, and commentators have argued convincingly that any bright-line distinction between offenders with mental disabilities that remove culpability and those with disabilities that do not is inherently artificial and flawed. For example, Morse has noted that excusing conditions based on a lack of rationality, such as “insanity” provisions or young offender legislation, are presented in the law as “doctrinal all-or-

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<sup>180</sup> While the SCC has found that knowledge of whether an act was “wrong” encompasses either legal or moral wrongness, moral wrongness is judged by the “ordinary moral standards of reasonable members of a society” and not “by the personal standards of the offender but by his awareness that society regards the act as wrong... The accused will not benefit from substituting his own moral code for that of society” (See *Chaulk*, *supra* note 122 at 1357).

<sup>181</sup> For an articulation of this perspective, see the dissenting reasons of McLachlin J in *Chaulk*, *supra* note 122 at 1407-1414.



nothing, bright line tests” despite clearly being continuum concepts.<sup>182</sup> With NCRMD, it is assumed that a distinction can be drawn between offenders whose mental disabilities caused their criminal behaviour, by rendering them incapable of appreciating the nature and quality of their actions or knowing they were wrong, and those whose disorders did not, such that a completely separate system of disposition is applicable in one case but not the other. Berger has argued that Canadian courts have taken the vague and fluid concept of “mental disorder” and used it as a basis for an “all-or-nothing” exemption that excludes those suffering from many types of mental disabilities.<sup>183</sup>

Despite the potential artificiality of any notion that a person suffering from a mental disability should be either fully criminally responsible or absolved entirely of any such responsibility, such a premise is important to the proper functioning of the criminal law in Canada: the NCRMD exception must be perceived as having a precise and definite scope.<sup>184</sup> Since the dispositions undertaken for those who are found to be criminally responsible and those who are not are qualitatively different (criminal sanctions versus an absolute discharge or disposition by a provincial Review Board), the doctrine that informs this differential treatment must be perceived

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<sup>182</sup> Morse, *supra* note 125 at 294-295.

<sup>183</sup> Berger, *supra* note 177 at 123. Extreme forms of personality disorder are often excluded from the NCRMD provisions, and the defence is shaped in such a way as to be most responsive to, and largely focused on, extreme forms of disorders such as schizophrenia. The question then becomes at what point on the spectrum from a person who commits a crime while in the throes of a powerful delusion to the person who commits a crime because they are incapable of feeling empathy for the victim or understanding the moral code of society should culpability be found? If the person lacking in empathy were found to be NCRMD, this finding would raise serious questions beyond the confines of that individual case about individuals’ responsibility for their actions generally, and the extent to which a person’s behaviour may be attributed to “them” as opposed to “their brain”.

<sup>184</sup> Loughnan, *supra* note 121 at 28.

as being precise for it to have legitimacy.<sup>185</sup> Loughnan describes the basis for such a binary view of culpability as follows:

The notion that an identifiable and delimited category of defendants lie beyond the reach of the criminal law preserves the norms of responsibility that the law encodes. By constructing the nonresponsible subject as abnormal, the “normal” individual becomes a responsible legal subject, one to whom ordinary principles of responsibility, liability, and punishment apply.<sup>186</sup>

It is therefore understandable that the SCC would choose to limit the scope of the NCRMD defence as it has, even if this result is not entirely reflective of the true nature of mental disability.<sup>187</sup>

In addition to the disruptive potential a broadening of the NCRMD provisions would have on the law’s foundations regarding individual responsibility and assignment of blame,<sup>188</sup> the NCRMD provisions should not be broadened for more practical reasons as well. As noted above, section 672.54 of the *Criminal Code* requires that if a court or Review Board is of the opinion that the accused is not a significant threat to the safety of the public, she should be discharged

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<sup>185</sup> See Berger, *supra* note 177 at 123.

<sup>186</sup> Loughnan, *supra* note 121 at 28.

<sup>187</sup> Berger, *supra* note 177 notes that the current NCRMD test is “inhospitable or even actively hostile to certain mental disorders found with surprising frequency in our general penal population. The current test for NCRMD excludes volitional impairments as well as issues of emotional appreciation, and that the level of disruption required is high, requiring extreme cognitive impairments” (at 123). See also Roach & Bailey, *supra* note 120. Traditionally the law has been preoccupied with intellectual, not emotional, intelligence, and has been unresponsive to the role of emotional impairments impacting upon volition and decision-making (Ian Freckelton & David List, “Asperger’s Disorder, Criminal Responsibility and Criminal Culpability” (2009) 16:1 Psychiatry Psychol & L 16 at 35).

<sup>188</sup> See Berger, *supra* note 177 at 132, who notes that if the NCRMD defence were extended, an enormous group of offenders would need to be excluded from responsibility given the prevalence of mental health issues in the criminal justice system, and that this would disrupt the broad systemic comfort with the attribution of individual responsibility for crime.

absolutely.<sup>189</sup> Where a court or Review Board determines an individual constitutes a significant threat, she is to be discharged subject to conditions or detained in custody in a hospital.<sup>190</sup> While recent amendments to the *Criminal Code* will most likely have the result of ensuring fewer individuals found NCRMD receive an absolute discharge and the NCRMD system will be more reflective of a punitive sentencing regime,<sup>191</sup> fundamentally this doctrine represents a unique and distinct system outside of criminal liability.

The available dispositions for offenders found NCRMD would be a poor fit for the majority of offenders with less-serious mental disabilities for two reasons. Firstly, many offenders with mental disabilities will exert some degree of choice or control over their behaviour, even where those choices may have been heavily influenced by mental disability. If the presence of a mental disability that had any direct or indirect impact on an offender's decision to commit a crime served as a basis for absolving that person of criminal responsibility, the range of individuals who could be absolved of liability are endless, unworkable, and not reflective of the fact that

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<sup>189</sup> *Criminal Code*, *supra* note 2 s 672.54(a). Due to recent amendments to the *Criminal Code*, as a result of Bill C-14, the *Not Criminally Responsible Reform Act*, 2014 c 6 [Bill C-14], a determination of whether an accused constitutes a significant threat to the safety of the public is made after the court takes into account safety of the public as the "paramount consideration", as well as the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused. "A significant threat to the safety of the public" means a risk of serious physical or psychological harm to members of the public, including any victim or witness to the offence or any person under the age of 18 years, resulting from conduct that is criminal in nature but not necessarily violent (s 672.5401).

<sup>190</sup> *Criminal Code*, *supra* note 2 s 672.54(b),(c).

<sup>191</sup> Bill C-14, *supra* note 189, received royal assent on April 11, 2014. This legislation amended certain provisions of the *Criminal Code* dealing with the disposition of offenders found NCRMD, and created a new category of "high-risk accused" who are to be subject to less frequent reviews in the Review Board system. Significantly, the amendments removed a requirement that in determining a disposition for accused found NCRMD the court or Review Board had to select the "least onerous and least restrictive" form of disposition available in the circumstances. The amendments also created the requirement that public safety is to be the "paramount" consideration in determining an appropriate disposition. For a critique of these amendments see Canadian Bar Association, National Criminal Justice Section, "Bill C-54: *Not Criminally Responsible Reform Act*" (Ottawa, CBA, 2013).

persons with mental health issues will often be highly-functioning individuals capable of independent thought and choice.

Secondly, the ultimate disposition regime for NCRMD is based on an assumption mental disabilities can be treated and mitigated.<sup>192</sup> While the court or Review Board may not order any involuntary treatment as a condition of a disposition for an accused found NCRMD,<sup>193</sup> in many jurisdictions accuseds' compliance with treatment is essentially mandatory as it is a factor that is to be considered by the Review Board in determining a disposition.<sup>194</sup> Any disposition made with respect to an accused found NCRMD is to be reviewed by the Review Board at least every twelve months,<sup>195</sup> and the Review Board conducting such a review is under an obligation to order an absolute discharge if the offender is not a significant threat to the safety of the public.<sup>196</sup> Such a system is premised on the notion that in the majority of cases where an offender is found NCRMD her mental health can improve to a point where she no longer poses a danger to the community and may be released.<sup>197</sup> It represents a movement away from the former "insanity"

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<sup>192</sup> Roach & Bailey, *supra* note 120 at para 22.

<sup>193</sup> *Criminal Code*, *supra* note 2 s 672.55(1). The court or Review Board may not direct any psychiatric or other treatment of the accused be carried out, or that the accused submit to such treatment, unless the accused has consented to the condition and the court or Review Board considers the condition reasonable and necessary in the interests of the accused.

<sup>194</sup> *Mental Health Act*, RSBC 1996, c 288 ss 25(2.1)(a)(ii), 24(2.1)(a)(ii), 33(5)((a)(ii); *Mental Health Act*, RSA 2000, c M-13 s 42(1)(c).

<sup>195</sup> *Criminal Code*, *supra* note 2 s 672.81(1). An exception exists where an accused consents to an extension to a maximum of twenty-four months after making or reviewing a disposition (s 672.81(1.1)), or where the accused has been found NCRMD for a "serious personal injury offence" (involving violence or attempted violence, conduct endangering or likely to endanger the life or safety of another person, or certain indictable offences), she is being detained in hospital, and the Review Board is satisfied that the condition of the accused is not likely to improve and that detention remains necessary for the period of the extension (s 672.81(1.2), (1.3)). An extension may be of an even greater length for a "high-risk" accused (s 672.81(1.31)).

<sup>196</sup> See *Swain*, *supra* note 39 at 1008, where the SCC held that once an accused found NCRMD is no longer a significant threat to public safety, the criminal justice system has no further application. See also *Winko*, *supra* note 170 at para 33.

<sup>197</sup> See Roach & Bailey, *supra* note 120 at 22, who note that the systems of NCRMD and fitness to stand trial are based on a presumption an individual's mental disability is capable of improvement with treatment, and that those

regime where an offender found not guilty by reason of insanity was held at the pleasure of the Lieutenant Governor,<sup>198</sup> to a system that involves a Review Board comprised of legal and psychiatric experts who decide on the appropriate treatment and control options. In *Winko*,<sup>199</sup> the SCC emphasised that the disposition regime for NCRMD offenders required individualized assessment and the provision of opportunities for appropriate treatment, and that restrictions on liberty imposed upon those found NCRMD are for essentially rehabilitative and not penal purposes.<sup>200</sup> While the reality of statements such as these have been called into question,<sup>201</sup> and in most cases NCRMD accused will not be promptly treated and “cured” but rather will stay in the Review Board system for extended periods,<sup>202</sup> the philosophy behind this unique disposition is one premised on treatment eventually eliminating a mentally disabled offender’s dangerousness and allowing her to return to society without punitive sanction.

For many mental disabilities that have partial but not overwhelming impacts on an offender’s decision-making, such as certain personality disorders, autism spectrum disorders, FASD, etc., treatment through therapy or medication will not result in a significant change to an individual’s mental health.<sup>203</sup> While rehabilitative programs may be highly beneficial for persons with such

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with mental disabilities that are “permanent but non-incapacitating” are not those for whom these provisions were designed.

<sup>198</sup> See *Swain*, *supra* note 39, where the SCC held this process to be unconstitutional.

<sup>199</sup> *Winko*, *supra* note 170.

<sup>200</sup> *Ibid* at paras 39-43, 93.

<sup>201</sup> See e.g. H Archibald Kaiser, “*Conway*: A Bittersweet Victory for Not Criminally Responsible Accused” (2010) 75 CR-ART 241, who notes that some accused face huge obstacles in obtaining the kind of treatment they desire (at 241).

<sup>202</sup> In Canada, “Review Board Systems”, *supra* note 169 it was noted that of the 360 individuals found NCRMD and admitted into the Review Board system in 1992/1993, 90.9% spent more than one year in the Review Board system, 60% spent more than five years in the system, and 35.1% spent more than 10 years (Table 22).

<sup>203</sup> Roach and Bailey, *supra* note 120, note that FASD, unlike addictions and some other mental health issues, cannot be cured (para 129). Asperger’s is a disorder on the autism spectrum that is connected to a lack of interpersonal skills and intense absorption in certain subjects. There has been found to be a fundamental relationship

mental disorders,<sup>204</sup> an attempt to “cure” them would be misguided and futile, with the potential result being a period of indefinite detention in mental health facilities for persons who may well have suffered a lesser restriction on their liberty had they been sentenced to a period of detention in a penitentiary.<sup>205</sup>

Given the above, it is clear that the NCRMD provisions are intended to apply to only a very narrow group of offenders, and expansion to offenders with mental disabilities in general is an unworkable and undesirable solution. Further, the NCRMD regime clearly has no application to offenders whose mental disabilities may not directly impact their reasoning or choice to commit a crime. Nevertheless, such individuals must also be understood as having a reduced ability to select a crime-free lifestyle in many circumstances, and as such they should not be held fully accountable when it is in fact broad, systemic issues that have resulted in them coming into contact with the criminal justice system. An appropriate disposition regime for these individuals will be discussed below.

I pause here to note that while the model I propose below should be adopted for the majority of offenders with mental health issues, including those with serious mental illnesses that severely

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between the deficits associated with Asperger’s and functional vulnerabilities in relation to criminal behaviour. Asperger’s is a life-long condition, though it may be responsive to some degree to psychotherapy as long as the therapist is closely familiar with the particular characteristics of those with the disorder (Freckelton & List, *supra* note 187 at 20, 24).

<sup>204</sup> See e.g. Verdun-Jones & Butler, *supra* note 28 at 504-505, who note that offenders with FASD can benefit from access to appropriate treatment and support services, and appropriate psychiatric assessment is necessary to identify coexisting conditions that may be identified and treated.

<sup>205</sup> See Richard D Schneider & David Nussbaum, “Can the Bad be Mad?” (2007) 53 Crim L Q 206 at 224-226, who argue that if the NCRMD provisions were expanded to include psychopaths this would not result in a significantly higher number of NCRMD claims, given that treatment is unlikely to have the effect of impacting these offenders or making them less dangerous to the public. As such, any finding of NCRMD would likely result in a far greater restriction on liberty than a prison sentence.

impacted their perception at the time of an offence, I believe there is still a place for NCRMD to work in concert with my proposed model. At least during the initial phases of implementation, NCRMD would still be necessary as a symbolic signifier that a person who commits a crime while suffering from delusions or psychosis must be entirely absolved of criminal responsibility for her actions, rather than a recognition that the factors that led to a person committing a crime are complex. While perhaps semantic, a distinction between those who are not responsible for their actions under the criminal law due to mental disability, and those whose responsibility for their actions are merely lessened due to their mental health concerns, is important to give the law legitimacy. While there are issues with the Review Board system, particularly with the new amendments to that regime that will likely have the result of people remaining under Review Board jurisdiction for longer periods, I believe its maintenance as a separate system for offenders with serious mental health issues that will be responsive to treatment is important.

## **Chapter 3: Problems with the Current Sentencing Regime**

### **3.1 Introduction**

As discussed in **Chapter 2**, there are sound theoretical bases for the criminal law to take offenders' mental disabilities into account when assessing their blameworthiness for their actions. While there is no explicit recognition of this principle in the *Criminal Code*, the common law has established that offenders' mental disabilities are to be given consideration when determining a fit sentence. Despite this general recognition, currently there are a number of difficulties and inconsistencies that arise in sentencing decisions regarding offenders with mental disabilities, including a lack of clarity regarding what constitutes a relevant mental disability and the impact that disability needs to have had on the offender's actions for it to be relevant to sentencing. These practical difficulties are exacerbated by increasing restrictions being placed on judges' discretion to order criminal sanctions other than terms of imprisonment, through Parliament's increasing implementation of "tough-on-crime" legislation. While many factors contribute to the overrepresentation of offenders with mental disabilities in the criminal justice system, the courts' current approach to sentencing these offenders is doing little to address this problem, and is an area in need of reform.

### **3.2 Sentencing Offenders with Mental Disabilities: The Current State of the Law**

While many sentencing decisions refer to offenders' mental disabilities, judges' understanding of the relevance of offenders' disabilities at sentencing vary widely.



Judges may consider an offender's mental disability at sentencing where the effect of imprisonment would be "disproportionately severe" because of that mental disability.<sup>206</sup> This principle is premised on the recognition that individuals with mental disabilities may be particularly vulnerable in the prison environment, as discussed in **Section 2.3**.<sup>207</sup> Indeed, Justice Karakatsanis recently described the circumstances for mentally ill offenders in the prison system as follows: "Mentally disordered patients do not typically fare well as inmates. They are frequently victims of intimidation and violence and are more likely than the general prison population to attempt suicide, self-harm, or self-destructive behaviour."<sup>208</sup> Therefore in some cases judges have imposed shorter sentences or sentences not requiring a term of imprisonment where the prison environment would have a particularly harmful impact on an offender with a mental disability.<sup>209</sup>

More frequently, however, mental disabilities are referred to in sentencing decisions as having bearing on an offender's moral blameworthiness for her actions. Section 718.1 of the *Criminal Code* contains the fundamental principle of sentencing: a sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.<sup>210</sup> The fundamental and overarching nature of this principle has been emphasized in a number of recent SCC decisions.<sup>211</sup> Whatever weight a judge may wish to accord to the various objectives and principles contained

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<sup>206</sup> *R v Ayorech*, 2012 ABCA 82 at para 13, 522 AR 306 [*Ayorech*].

<sup>207</sup> See *Ayorech*, *supra* note 206 at para 13, where expert evidence indicated the offender, who suffered from developmental disorder and schizophrenia, was "ill equipped to survive in the prison system."

<sup>208</sup> *Conception*, *supra* note 96 at para 77.

<sup>209</sup> See e.g. *R v Donnelly*, 2014 ONSC 6472, OJ No 5287 (QL) [*Donnelly*].

<sup>210</sup> *Criminal Code*, *supra* note 2 s 718.1.

<sup>211</sup> See: *R v Nasogaluak*, 2010 SCC 6, 1 SCR 206 [*Nasogaluak*]; *Ipeelee*, *supra* note 167 at para 37.

in the *Criminal Code*, the resulting sentence must respect the fundamental principle of proportionality.<sup>212</sup>

One purpose of the principle of proportionality is to ensure a sentence does not exceed what is appropriate given the moral blameworthiness of the offender.<sup>213</sup> As noted in *R v Nasogaluak*: “... the degree of censure required to express society’s condemnation of the offence is always limited by the principle that an offender’s sentence must be equivalent to his or her moral culpability, and not greater than it”.<sup>214</sup> A just sentence is therefore one that speaks out against the offence but does not punish the offender any more than is necessary.<sup>215</sup> Therefore, in cases where it is found that an offender’s degree of responsibility for an offence is reduced due to the presence of a mental disability, the mental disability should act as a mitigating factor and her overall sentence should be reduced accordingly.<sup>216</sup> Justice Lilles in *Charlie* 2012 noted that the serious difficulty that can arise in reconciling the two aspects of the proportionality principle, namely, the seriousness of the offence and the degree of responsibility of the offender, is “nowhere more true than in the case of offenders with significant intellectual deficits”.<sup>217</sup> While the serious nature of an offence may on its face warrant time in jail or prison, a proportionate sentence must take into account the fact individuals with mental disabilities may not be able to process and understand the world in the same way as the majority of the population.<sup>218</sup>

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<sup>212</sup> *Ipeelee*, *supra* note 167 at para. 37.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Nasogaluk*, *supra* note 211 at para 42.

<sup>215</sup> *Ibid*; *Charlie* 2012, *supra* note 143 at para 26.

<sup>216</sup> *Ayorech*, *supra* note 206 at para 10. See also: *Belcourt*, *supra* note 129; *Resler*, *supra* note 129.

<sup>217</sup> *Charlie* 2012, *supra* 143 at para 27.

<sup>218</sup> *Ibid* at para 27.

There is, in general, recognition by sentencing judges that offenders with mental disabilities may have reduced responsibility for their actions not meeting the level required for a finding of NCRMD, but which should nevertheless be taken into consideration at the sentencing stage.<sup>219</sup> The Alberta Court of Appeal described the interaction between mental illness and sentencing in *R v Tremblay*.<sup>220</sup> “where an offender is found to be criminally responsible, but suffering from a serious mental disorder, a more lenient disposition reflective of the offender’s diminished responsibility is called for”.<sup>221</sup> While the court in *Tremblay* referred to a “serious mental illness” as potentially reducing responsibility, lesser impairments and disabilities will also be relevant at sentencing. In *R v Soosay*,<sup>222</sup> the judge noted: “where an offender’s criminal actions are the result of a cognitive impairment not of his or her own making through a lack of maturity, mental illness or brain injury, the offender’s responsibility will generally be diminished.”<sup>223</sup> Further, as noted in *Adamo*.<sup>224</sup>

Hand-in-hand with the mitigating aspect of mental illness in sentencing is the reduced moral culpability of offenders who are mentally ill... Punishment must be proportionate to the moral blameworthiness of the offender. An offender impelled to commit a crime by mental illness is not a free actor; his or her moral blameworthiness is necessarily lesser than that of a person who freely chooses to commit a crime.<sup>225</sup>

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<sup>219</sup> For a more fulsome discussion of the theoretical basis for why offenders with mental disabilities should be considered as having reduced blameworthiness, see **Chapter 2**, above.

<sup>220</sup> *R v Tremblay*, 2006 ABCA 252, 401 AR 9 [*Tremblay*].

<sup>221</sup> *Tremblay*, *supra* note 216 at para 7. See also *Ayorech*, *supra* note 206 at para 12; *Resler*, *supra* note 129 at para 16.

<sup>222</sup> *R v Soosay*, 2012 ABPC 220, 546 AR 155 [*Soosay*].

<sup>223</sup> See e.g. *Soosay*, *supra* note 222.

<sup>224</sup> *Adamo*, *supra* note 4.

<sup>225</sup> *Ibid* at para 34.

The concepts of reduced responsibility and reduced moral blameworthiness are inextricably intertwined. Where an offender's mental disability may have prevented her from exercising unfettered free will in deciding to commit a crime, her responsibility for that action and degree of moral blameworthiness are necessarily reduced, and this finding should be reflected in a proportionate sentence.

Mental disability will generally have a mitigating impact on an offender's sentence. Judges describe the interaction between mental disability and sentence mitigation in a variety of ways. A finding that an offender suffers from a mental disability may impact the importance placed on the various sentencing objectives set out in section 718 of the *Criminal Code*. These sentencing objectives include: denunciation, deterrence, separation from society, rehabilitation, providing reparations, and promoting a sense of responsibility in the offender. In general, where an offender with a disability commits a crime, the relative importance of the sentencing principles of deterrence and denunciation will be attenuated in crafting an appropriate sentence.<sup>226</sup> Courts have hypothesized that general deterrence (the deterrence of like-minded individuals from committing similar crimes) is inappropriate in these cases as people whose criminal behaviour is related to their mental disability will not normally be deterred by the punishment of others.<sup>227</sup>

Recent appellate-level decisions have also noted that when offenders are to be considered less morally blameworthy for their actions as a result of mental disorder, the usefulness and

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<sup>226</sup> *Ayorech*, *supra* note 206 at para 11; *Edmunds*, *supra* note 129 at para 22.

<sup>227</sup> *Schneider*, *supra* note 87 at 705. See also *Valiquette*, *supra* note 131; *R v Lundrigan*, 2012 NLCA 43, 324 Nfld & PEIR 270 [*Lundrigan*]; *Edmunds*, *supra* note 129; *R v Peters*, 2000 NFCA 55, 194 Nfld & PEIR 184 [*Peters*].

appropriateness of specific deterrence is to be reduced.<sup>228</sup> While these assumptions will not apply in every case where an individual with a mental disability commits a crime, they indicate recognition by the judiciary that some offenders may not have a full understanding or appreciation of their criminal actions, and as such deterrence will not have its intended effect and should in general be given less weight.

Similarly, denunciation may be of reduced importance as a sentencing objective in cases where an offender suffers from a mental disability.<sup>229</sup> Denunciation represents communication of society's collective condemnation of the offender's conduct and sentiment that this conduct should be punished as encroaching on society's basic values.<sup>230</sup> Given that offenders with mental disabilities may not be fully responsible and therefore blameworthy for their actions, condemnation and punishment of persons with mental disabilities may be disproportionate to their degree of responsibility.<sup>231</sup> As noted by Barrett & Shandler, denunciation will not be a significant objective in sentencing a mentally disabled offender "because he or she is not an appropriate person for making an example to others and because rehabilitation and protection of the public are more typically considered the relevant sentencing objectives".<sup>232</sup> However, there is also recognition that mental disability will not, in every case, necessarily reduce an offender's blameworthiness for her actions. Psychopathy, for example, while often considered to be a

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<sup>228</sup> *Edmunds*, *supra* note 129 at para 22. See also *Peters*, *supra* note 227 at 18; *Lundrigan*, *supra* note 227 at 22. Put another way, deterrence fails to take into account the large number of offenders who may be considered irrational (suffering from mental impairment) given that it is based on the classical economic theory of rational choice which assumes would-be offenders are rational actors who weigh the costs and benefits of committing crimes (Victoria, *supra* note 31 at 7).

<sup>229</sup> See *Resler*, *supra* note 129 at para 14.

<sup>230</sup> *R v Proulx*, 2000 SCC 5 at para 102, 1 SCR 61 [*Proulx*]. See also: *R v M(CA)*, [1996] 1 SCR 500.

<sup>231</sup> See *Batisse*, *supra* note 129 at 38.

<sup>232</sup> Joan M Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law*, vol 1 (loose-leaf) (Toronto: Carswell, 2006-) at 6-15.

mental illness,<sup>233</sup> impacts individuals' choices and decision-making abilities in complex ways that may not appropriately be considered mitigating.<sup>234</sup> Further, conditions such as pedophilia are considered mental disabilities by some professionals, however a determination that an individual is not fully morally blameworthy for sexually assaulting a child due to this condition is clearly troublesome and likely not warranted. Any proposed model for sentencing reforms dealing with offenders with mental disabilities must leave room for a decision-maker to determine how and to what extent a mental disability reduces or negates an offender's blameworthiness.

In general, however, denunciation will not be a primary objective in sentencing offenders with mental disabilities, and there appears to be a general acceptance among sentencing judges that offenders with mental disabilities will often require treatment and supervision rather than punishment.<sup>235</sup> As such, rehabilitation may be given paramount consideration as a sentencing objective.<sup>236</sup> The Court in *Peters* summed up the focus on rehabilitation in this way:

[T]he mental illness of an offender will often be considered a mitigating factor in sentencing even though it is not of the sort that would establish a verdict of not criminally responsible on account of mental disorder at the time of the commission of the offence. The focus in sentencing

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<sup>233</sup> See Kent A Kiehl & Morris B Hoffman, "The Criminal Psychopath: History, Neuroscience, Treatment and Economics" (2011) 51 *Jurimetrics* 355 at 355-356; Nadelhoffer & Sinnott-Armstrong, *supra* note 12.

<sup>234</sup> See e.g. the discussion in Blair, *supra* note 120 at 328, which notes that psychopaths engage in instrumental aggression at a greater frequency than non-psychopaths. This type of aggression must be seen as a behavioural choice, undertaken to meet specific goals. However, these individuals engage in this behaviour more frequently than healthy individuals because they have deficient decision-making processes in that negative reinforcement is deficient due to dysfunction in neural regions that are crucial for this form of processing. Whether this type of behaviour can properly attract blame has been described by Blair as "philosophically and empirically impervious" (at 328).

<sup>235</sup> See e.g. *Valiquette*, *supra* note 131 at 331; *Edmunds*, *supra* note 129 at para 26; *Batisse*, *supra* note 129 at para 38.

<sup>236</sup> *R v Ellis*, 2013 ONCA 739 at para 117, 312 OAC 328, leave to appeal to SCC refused, 35649 (7 February 2014) [*Ellis*]. See also *Batisse*, *supra* note 129 at para 38; *Edmunds*, *supra* note 129 at para 22.

such offenders may properly therefore be placed on mechanisms that will promote rehabilitation and treatment, rather than on punishment. This is especially so where lengthy prison terms are often regarded as counterproductive, even in cases not involving the mentally afflicted.<sup>237</sup>

In addition to representing more appropriate sentencing goals in line with offenders' reduced moral blameworthiness, treatment and rehabilitation of offenders with mental disabilities may be the best means of ensuring the protection of the public and that the offending conduct is not repeated.<sup>238</sup> Even in those cases where there is little likelihood of a complete cure or rehabilitation for an offender with a mental disability, the principles of reduced emphasis on deterrence and denunciation apply.<sup>239</sup>

### **3.3 Inconsistency in Application of Sentencing Principles**

While there appears to be general agreement among judges on the overarching principles outlined above,<sup>240</sup> there is much less consensus regarding the circumstances in which these principles should apply and the impact they should have on individual offenders' sentences. Below, I will explore two primary points of confusion in this area: what constitutes a "mental disability" for the purposes of sentencing, and whether that disability must have caused or contributed to the offence in question to act as a mitigating factor. In general, there is no agreed-

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<sup>237</sup> *Peters*, *supra* note 227 at para 19. See also: *Lundrigan*, *supra* note 227 at para 22.

<sup>238</sup> *Batisse*, *supra* note 129 at para 38. See also: *Ayorech*, *supra* note 206 at para 11.

<sup>239</sup> *Ayorech*, *supra* note 206 at para 11. See also: *R v Hiltermann* (1993), 141 AR 223 (CA), AJ No 609 (QL).

<sup>240</sup> Namely, an offender's reduced responsibility and blameworthiness due to mental disability should be reflected through a decreased emphasis on deterrence and denunciation, an increased emphasis on treatment and/or rehabilitation, and mental disability in general should act as a mitigating factor in determining a proportionate sentence.

upon approach to either question; with the result that there is little consistency or predictability in terms of whether and to what extent an offender's mental disability will impact her sentence.<sup>241</sup>

### 3.3.1 What Constitutes a Relevant “Mental Disability”?

While there is general recognition that the presence of a mental disability may have a mitigating impact on an offender's sentence, the case law provides no clear guidance regarding what types of mental disabilities or levels of impairment will be sufficient to trigger this presumption. The Alberta Court of Appeal in *Ayorech*<sup>242</sup> articulated that “[i]mpaired reasoning, delusional disorders, and like mental conditions distinguish those afflicted from the ordinary offender who is fully accountable for his or her conduct”.<sup>243</sup> Unfortunately, this statement does not give much practical guidance regarding what types of mental disabilities will act as mitigating, as “impaired reasoning” could encompass a broad range of disabilities and impairments while “delusional disorders” likely refers to a narrower category.<sup>244</sup>

It does not appear that the presence of a mental illness, as opposed to some lesser degree of cognitive impairment, will always be necessary to have an impact on sentence. In the recent

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<sup>241</sup> The courts have acknowledged that in certain circumstances mental disability may serve to aggravate sentences rather than mitigate them. In dangerous or long-term offender applications, for example, it is common for conditions such as antisocial personality disorder or psychopathy to be seen as aggravating circumstances justifying indefinite detention. In *R v Bennight*, 2012 BCCA 461, 329 BCAC 250 the Court held that while in some cases mental disability will diminish moral culpability, it was “clearly open to the judge to find the appellant at a highest order of dangerousness” (at para 27). See also *R v Taylor*, 2014 BCCA 304 at para 21, BCJ No 2082 (QL).

<sup>242</sup> *Ayorech*, *supra* note 206.

<sup>243</sup> *Ayorech*, *supra* note 206 at para 12. See also *Belcourt*, *supra* note 129 at paras 7-8; *Resler*, *supra* note 129 at paras 9-10, 16.

<sup>244</sup> See e.g., *R v Peddle* (2013), 338 Nfld & PEIR 143 (NL Prov Ct) at para 32, NJ No 205 (QL) [*Peddle*], where the sentencing judge noted that the description given in *Ayorech* was too narrow, given that not all offenders with mental illnesses suffer from delusions or impaired reasoning.



decision *R v Frampton*,<sup>245</sup> the judge held that the offender's diagnoses of FASD, ADHD, and other disabilities did not reach the level of mental illness, but conceded that they might nevertheless have the same effect as a mental illness in attenuating moral blameworthiness and responsibility.<sup>246</sup> Similarly in *R v SJB*,<sup>247</sup> the Majority agreed with the Crown's assertion that the offender was "neither delusional nor out of touch with reality"<sup>248</sup> at the time of the offence, and the offender was not suffering from a major mental disorder of the psychotic kind when the offence was committed. Nevertheless, the Majority held that it would be a mistake to limit the types of mental disabilities relevant to sentencing to psychosis, and that the offender's "disordered personality structure" was a relevant sentencing consideration.<sup>249</sup>

The reasoning in *Frampton*, and the broad interpretation of what will constitute a relevant impairing condition followed in *SJB*, are reasonable given that what constitutes a "mental disability" is not a clear concept. The same diagnosis might result in differing opinions regarding an offender's blameworthiness depending on the expert evidence, the circumstances of the offence, and the judge hearing the case.<sup>250</sup> Indeed, certain diagnoses will result in disagreement as between psychiatrists and/or judges regarding whether the condition in fact constitutes a

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<sup>245</sup> *R v Frampton* (2014), 346 Nfld & PEIR 38 (NL Prov Ct), NJ No 8 (QL) [*Frampton*].

<sup>246</sup> *Frampton*, *supra* note 245 at para 20. Ultimately, in that decision, a lack of expert evidence regarding the nature and severity of the offender's impairments made it such that the judge found "the proper reflection of these factors in the sentence imposed an impossible task" (para 23).

<sup>247</sup> *R v SJB*, 2013 ABCA 153, 544 AR 342 [*SJB*].

<sup>248</sup> *SJB*, *supra* note 247 at para 29.

<sup>249</sup> *Ibid* at paras 27, 29-30.

<sup>250</sup> For example, while in *Frampton* the diagnoses of ADHD, Alcohol Related Neurodevelopmental Disorder, FASD, Oppositional Defiant Disorder, and Conduct Disorder characteristics were found not to constitute mental illnesses, many of these disabilities appear to have been considered mental illnesses in other decisions: see e.g. *R v Branton*, 2013 NLCA 61, 341 Nfld & PEIR 329 [*Branton*], *R v Decoteau*, 2013 ABPC 277, AJ No 1161 (QL); *FJN*, *supra* note 25; *R v Strickland-Murphy* (2012), 324 Nfld & PEIR 36 (NL Prov Ct), NJ No 208 (QL) [*Strickland-Murphy*], *R v Yuan*, 2013 ONSC 2855, OJ No 2691 (QL); *Manitowabi*, *supra* note 130; *Adamo*, *supra* note 4; *Charlie* 2012, *supra* note 143; *R v Dunne*, 2011 ABPC 103, AJ No 329 (QL); *R v Passmore*, 2014 SKPC 38, SJ No 50 (QL); *Ramsay*, *supra* note 130; *Soosay*, *supra* note 222.

mental illness or some other form of impairment or disability.<sup>251</sup> Personality disorders are a clear example of this, and they have spurred a great deal of academic debate regarding whether they constitute mental illnesses and if so what the consequences of such a finding should be for the criminal justice system.<sup>252</sup> Despite the lack of clarity in the psychological and theoretical literature regarding what impairments and conditions may constitute mental disabilities, in some cases judges have found that where an impairment does not reach the level of “mental disorder” or “mental illness”, it should not serve to mitigate an offender’s sentence.<sup>253</sup> Such an interpretation paints an artificially narrow picture of the types of impairments and disabilities that may have contributed to an individual committing an offence, and which should serve to lessen her moral blameworthiness.

In the vast majority of cases I reviewed, judges relied heavily on expert evidence from psychiatrists or psychologists in determining what impairments an offender was suffering at the time of an offence, regardless of whether the offender’s disability was ultimately considered to be a mental illness or whether this issue was even addressed. Where no psychiatric evidence was adduced to support a claim of mental disability, the disability would generally not be considered as a mitigating factor.<sup>254</sup> While judges are not required to accept such evidence, they may be

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<sup>251</sup> For an introduction to theories of mental illness, and what consequences can flow from labelling a condition a “mental disorder”, see Edwards, *supra* note 12; B Gert & C Culver, “Defining Mental Disorder” in J Raden, ed, *The Philosophy of Psychiatry: A Companion* (Oxford: Oxford University Press, 2004) 415; Nadelhoffer & Sinnott-Armstrong, *supra* note 12 at 235-248.

<sup>252</sup> See Nadelhoffer & Sinnott-Armstrong, *supra* note 12; Charland, *supra* note 12; Robert Kinscherff, “Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act” (2010) 38:4 JL Med & Ethics 745; Landy F Sparr, “Personality Disorders and Criminal Law: An International Perspective” (2009) 37 J Am Acad Psychiatry Law 168.

<sup>253</sup> See e.g. *R v Lausberg*, 2013 ABCA 72, 544 AR 56 at para 23.

<sup>254</sup> See e.g. *R v McLean*, 2014 BCSC 1293, BCJ No 1466 (QL), where there was no medical evidence establishing the presence of FASD, merely evidence from the offender’s mother that she suspected the disorder was present. The judge held this did not “meet the threshold necessary” to consider it FASD as a mitigating factor (para 45).

obligated to provide an explanation as to why they are discounting an expert psychiatric opinion or according it little weight.<sup>255</sup> It is unsurprising that judges rely heavily on expert evidence in determining whether an offender suffers from a mental disability and what direct impact that disability may have had on her behaviour at the time of the offence.<sup>256</sup> That being said, not every defendant will be able to adduce such evidence. This creates a serious problem for offenders with mental disabilities, as under the current state of the law this type of evidence may be essential for a successful claim of mitigation. As was recently addressed in the context of offenders with FASD in *R v Joamie*:<sup>257</sup>

Where the defence wishes to rely upon a FASD diagnosis in mitigation of the sentence that would otherwise be appropriate for a particular offence, there is an evidential burden upon the defence to put before the Court a forensic assessment that outlines the offender's specific cognitive deficits and their respective severity. This assessment should be performed by a qualified medical or forensic specialist with some expertise in the field and not by a general medical practitioner.<sup>258</sup>

Other recent cases involving FASD highlight the importance being placed by judges on the need for expert evidence in order to consider the disability to be mitigating at sentencing. FASD has been described as “an umbrella term used to encompass the range of outcomes caused by prenatal exposure to alcohol, including [full fetal alcohol syndrome], partial fetal alcohol

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<sup>255</sup> See *R v Dickson*, 2007 BCCA 561 at para 62, 248 BCAC 217 [*Dickson*].

<sup>256</sup> See *R v Laldin*, 2014 ONCJ 359 at para 22, OJ No 3559 [*Laldin*] where the judge noted that the expert psychiatric testimony “served as a reminder that as jurists, we are not experts in forensic psychiatry. Its terms, which are not necessarily fixed in stone, can be difficult for us to scrutinize.”

<sup>257</sup> *R v Joamie*, 2013 NUCJ 19, Nu J No 22 [*Joamie*].

<sup>258</sup> *Joamie*, *supra* note 257 at para 39.

syndrome... alcohol related neurodevelopmental disorder... and alcohol related birth defects”.<sup>259</sup>

The cognitive deficits associated with prenatal alcohol exposure are permanent and can result in a range of symptoms including poor memory, impulsiveness, an inability to appreciate fully the consequences of one’s actions, and susceptibility to being influenced by others.<sup>260</sup>

Given the broad range of impairments that FASD might cause - as its very name indicates, FASD covers a spectrum of cognitive and behavioural deficits - courts have noted that a consideration of whether the disorder should reduce the blameworthiness of an offender will depend on that specific offender’s condition as demonstrated through expert evidence, rather than assumptions regarding the disability in general.<sup>261</sup> In some cases, judges concluded that an offender’s diagnosis of FASD could not have any impact on sentence due to a lack of detailed expert evidence setting out the specific impacts the disorder had on the offender.<sup>262</sup>

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<sup>259</sup> Diane K Fast & Julianne Conry, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System” (2009) 15 *Developmental Disabilities* 250 at 250.

<sup>260</sup> Roach & Bailey, *supra* note 120 at 1. Previous authors have recognized that the deficits and impairments suffered by those with FASD, along with compounding issues such as additional mental health problems, social ineptness, substance use disorders, school and employment difficulties, and reduced ability to manage the basic requirements of daily living result in individuals FASD being generally more vulnerable to having trouble with the law (See e.g. Fast & Conry, *supra* note 259 at 250).

<sup>261</sup> Ramsay, *supra* note 130 at para 15; Joamie, *supra* note 257 at paras 29-30, 39. See also: *Manitowabi*, *supra* note 130 at paras 41-44, where the Court noted that FASD impacts “executive functioning”, an ambiguous term referring to a wide variety of cognitive disabilities and difficulties that may be brought about by a wide variety of causes. Difficulties in executive functioning are difficult to measure or attribute to any single cause, and as such the Court held that clinical tests may be necessary to provide insight into the impact of FASD on an individual offender.

<sup>262</sup> See *Manitowabi*, *supra* note 130, in which the appellant adduced fresh evidence that he likely suffered from FASD, and appealed his conviction and sentence. The appeal was dismissed based in part on the fact that clinical tests were not carried out, and the Court could not conclude what impacts the FASD had on the offender’s behaviour (paras 43-44). See also: *Frampton*, *supra* note 245 where no psychiatric assessment was carried out and the judge did not receive any expert evidence regarding the nature and severity of the impairments caused by the offender’s FASD. The judge found that the lack of such evidence “makes the proper reflection of these factors in the sentence imposed an impossible task”, and therefore did not consider the offender’s FASD as a mitigating circumstance (para 23).

This approach to assessing the relevance of FASD and other mental disabilities is troublesome given that not all offenders will have the means or proper assistance to be able to put such detailed medical information before the court. Further, an offender may lack insight into the fact that she suffers from a mental disability, and as such she or her counsel may not feel any necessity to raise this issue at sentencing. Finally, this approach focuses far too much attention on how the disability impacted the offender at the time of the specific offence, and does not explore the broader systemic barriers faced by those with mental disabilities that have bearing on their criminal behaviour. While external expert evidence will be important in determining a fit sentence, judges must consider any medical diagnosis in addition to an offender's broader circumstances in order to craft an individualized sentence that is proportionate to the offender's degree of responsibility.

While the presence of a mental disability that reduces an offender's moral blameworthiness will in theory be sufficient to justify mitigating her sentence, it appears from the case law that a judges' ultimate disposition will usually depend more on an assessment of expert evidence regarding the treatability of any mental disability and the risk the offender poses to the public in spite of, or in some cases because of, a mental disability. In a number of the cases I reviewed where an offender's risk to re-offend was considered to be low, and/or her prospects for treatment promising, that offender's mental disability was stated to be a mitigating factor in sentencing.<sup>263</sup> Where a mental disability does not appear to be amenable to treatment or increases

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<sup>263</sup> See e.g. *Batisse*, *supra* note 129 in where the testifying experts agreed the offender's risk of re-offending was minimal (at para 40). The Court found that the offender's mental health problems ("untreated major mental illness") played a central role in the commission of her abduction of a baby from a hospital, and that, in those circumstances, deterrence and punishment assume less importance. The Court found that in such cases the primary concern in sentencing shifts from deterrence to treatment as the best means of protecting the public (at para 38). The Court

the risk an offender will continue to pose a danger to society, it will often be disregarded or treated as an aggravating factor.<sup>264</sup>

Courts need to acknowledge and undertake a more fulsome analysis of mental disability when considering its impact on sentencing. Such consideration will often include a consideration of expert medical evidence, but it must also consider the broader impacts of mental disability on an offender's life. I believe the current approach to determining whether an offender suffered from a mental disability relevant to sentencing is overly reliant on an offender's ability to adduce quality expert evidence, and the end result does not necessarily reflect an acknowledgement of an offender's reduced responsibility and blameworthiness. In **Chapter 4** I will outline a proposal for comprehensive pre-sentence reports for offenders with mental disabilities that canvas not only their medical diagnoses, but also the broader impacts their disabilities have had on their quality of life.

### **3.3.2 Whether the Disability Contributed to the Offence**

There has been a history of disagreement and inconsistency in the case law regarding whether a mental disability needs to have contributed to the commission of an offence in order for it to be considered a mitigating factor.<sup>265</sup> The case law has developed such that there now appears to be a general consensus that the disability must have contributed in some way to the commission of

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allowed the appeal from the sentence of five years' imprisonment and sentenced the offender to a period of two and a half years less credit for time served (at para 42). See also *Laldin*, *supra* note 256 at para 28.

<sup>264</sup> The courts have noted that in some cases the presence of a mental disability may have the result of acting as an aggravating factor in sentencing. See e.g. *Adamo*, *supra* note 4 at para 29; *Bennight*, *supra* note 241.

<sup>265</sup> See: *R v Fraser*, 2007 SKCA 113, 302 Sask R 210 at para 36, where the Court noted that there was disagreement in the case law regarding whether a mental disability must be demonstrated to have contributed to the commission of an offence before evidence of that condition can be reflected in the sentence.

the offence for it to be considered mitigating, however there strength of connection required between the disability and the offending behaviour. Further, some recent trial-level decisions indicate that some judges are considering a mental disability to be a mitigating factor even where there is no evidence it directly contributed to the offending behaviour. Below I will outline the current jurisprudence in this area, and demonstrate why an approach that is not reliant on establishing a causal connection between the disability and the offence is desirable.

The current appellate jurisprudence holds that a diagnosis of a mental disability, on its own, will not absolve an offender of responsibility or automatically justify a lighter sentence.<sup>266</sup> A connection between the disability and the offending behaviour is required. However, “the evidence does not need to disclose that the illness was the direct cause of the offence or that it was carried out during a period of delusions, hallucinations, or such... It is sufficient that the mental illness contributed to the commission of the offence”.<sup>267</sup> The Ontario Court of Appeal has described the need for some degree of causal nexus between the disability and the offending behaviour as follows:

... (I)t is not enough to determine that the offender had a mental illness at the time of the offence. The trial judge must also determine the extent to which that illness contributed to the conduct in question and the impact of that finding on the appropriate sentence. The trial judge will consider whether there a [sic] casual connection between the offender’s mental illness and the commission of the offence and, if so, whether it diminished the offender’s culpability.<sup>268</sup>

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<sup>266</sup> *Branton*, *supra* note 250 at para 35.

<sup>267</sup> *Ayorech*, *supra* note 206 at para 10.

<sup>268</sup> *Ellis*, *supra* note 236 at para 116.

The need to establish a causal connection between a mental disability and offending behaviour is problematic primarily for two reasons. First, this approach takes no account of the broader impacts of mental illness or disability on criminal behaviour, including the legacy of discrimination in various areas faced by individuals with mental health issues, including the lack of funding for treatment and other supportive resources. These consequences of mental disability may have the result of contributing to criminal activity in as real and substantial a way as a disordered reasoning process.

Second, in addition to failing to take into account the broader systemic factors that result in individuals with mental disabilities having contact with the criminal justice system, any approach that attempts to determine whether a mental disability ‘caused’ a criminal act is inherently problematic. Buchanan & Zonana have considered the difficulty in attributing causation to mental disabilities in the context of criminal offences.<sup>269</sup> They note first that definitions of mental disabilities generally emphasize symptoms and signs, such that the criteria for diagnosing certain illnesses or other conditions may include behaviours the condition would otherwise be viewed as causing.<sup>270</sup> Given that such definitions do not explain the origins of the symptoms or mechanisms by which the disability impacts the way in which the affected person thinks and feels, it is difficult to see how such a description could assist in determining the cause of her behaviour. Further, legal and psychology theorists have questioned whether any excuse can properly be said to derive from an offender’s behaviour having been “caused” in a particular way, given that it is impossible to determine what an offender was thinking at the time she

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<sup>269</sup> Alec Buchanan & Howard Zonana, “Mental Disorder as the Cause of Crime” (2009) 32:3 Int’l JL & Psychiatry 142.

<sup>270</sup> Buchanan & Zonana, *supra* note 269 at 143.



committed a criminal act.<sup>271</sup> Rather, these authors argue, excuses should derive from the choice (including the freedom and ability to make the choice) to engage in criminal behaviour having been in some way defective.<sup>272</sup>

The case law in this area demonstrates some recognition of the impossibility of determining whether and to what extent a mental disability actually contributed to an offence.<sup>273</sup> For example in *R v Busch*,<sup>274</sup> expert evidence established that the offender's untreated major depressive disorder did not result in his being unable to know that his actions were legally or morally wrong, but "likely contributed in a non-specific fashion to his decision-making and the impulsive nature of his actions".<sup>275</sup> The expert also acknowledged there was some degree of speculation in trying to articulate the role the depression played in the commission of the index offences.<sup>276</sup> While in that case the judge went on to treat the disability as mitigating, in other cases a lack of expert evidence establishing a causal connection between the mental disability and offence has been

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<sup>271</sup> See e.g. Jeff Victoroff, "Aggression, Science, and Law: The Origins Framework" (2009) 32 Int'l JL & Psychiatry 189 at 193, who notes that exculpatory doctrines based on mental disabilities hinge on turning something inherently unknowable and immeasurable by either an expert or trier of fact – what an accused's perception of reality was at the time the act was committed – into a necessary prerequisite for an accused to avail herself of the defence. See also: Henry T Greely, "'Who Knows What Evil Lurks in the Hearts of Men?': Behavioral Genomics, Neuroscience, Criminal Law, and the Search for Hidden Knowledge" in Nita A Farahany, *The Impact of Behavioral Sciences on Criminal Law* (Oxford: Oxford Scholarship Online, 2009) 161 at 173 – 174, who notes that no technology currently exists that can examine an offender's brain, at the moment of committing an offence, to determine what processes are at play in the decision to undertake a certain course of action. As such, any rational model of criminal justice requires some degree of discretion and intuition on the parts of experts and judges in determining when a person likely acted in a certain way.

<sup>272</sup> Buchanan & Zonana, *supra* note 269 at 144.

<sup>273</sup> See e.g. *Strickland-Murphy*, *supra* note 250, where the expert testified that while the offender was not "out of touch with reality" at the time she committed a robbery "there was a relationship between her illness and that behaviour... while she probably carried out the offence because she wanted the money, the connection is likely more complex than that especially since she had no history of criminal behaviour" (at para 6).

<sup>274</sup> *R v Busch*, 2012 ONCJ 465, OJ No 3318 (QL) [*Busch*].

<sup>275</sup> *Busch*, *supra* note 274 at para 50.

<sup>276</sup> *Ibid* at para 50. The judge went on to consider the offender's major depressive disorder as a mitigating circumstance, along with the offender's history of sexual and physical abuse and substance abuse issues (at para 68). See also *Laldin*, *supra* note 256 at paras 19-25.

relied on to disregard its impact on moral blameworthiness.<sup>277</sup> In *Manitowabi*,<sup>278</sup> the Court acknowledged the impossibility of determining whether the offender's FASD had any impact on his knowledge of the likely consequences of his criminal actions,<sup>279</sup> but ultimately found that as the fresh psychiatric evidence did not permit a conclusion as to what impact the FASD had on the offender's behaviour it afforded no reason to vary the sentence imposed at trial.<sup>280</sup>

Other judges have acknowledged that offenders' mental disabilities impacted their capacity for reason or decision-making, but relied on notions such as the offender having made a 'conscious decision' to commit the crime in finding that the mental disability had little or no impact on her criminal behaviour.<sup>281</sup> For example in *R v AWS*,<sup>282</sup> the judge noted the offender would not have committed certain crimes of sexual touching had his Bipolar condition been under appropriate control, but ultimately concluded that the offender made a conscious decision to engage in the offending behaviour and as such he was to be considered fully responsible on sentencing.<sup>283</sup> Such findings not only ignore the pervasive systemic barriers faced by individuals with mental disabilities and the impact of those barriers on criminal behaviour, but they do not take into account the more subtle effects mental disabilities may have had on individuals' reasoning or impulse control underlying a specific decision to engage in criminal behaviour. For example, in

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<sup>277</sup> See e.g. *Branton*, *supra* note 250 at paras 15, 29; *Peddle*, *supra* note 244 at para 33; *Collier*, *supra* note 27.

<sup>278</sup> *Manitowabi*, *supra* note 130.

<sup>279</sup> *Ibid* at para 53, where the Court concluded the thrust of the expert evidence was that "no one could say whether FASD had any impact on the appellant's knowledge as to the likely consequences of his actions when he stabbed Mr. Roy", and at para 63, where the Court noted the offender's acceptance that the expert evidence did not and could not speak directly to the actual effect of FASD on the offender's state of mind at the time of the offence.

<sup>280</sup> *Ibid* at para 65.

<sup>281</sup> See e.g. *Collier*, *supra* note 27 in which the judge recognized the psychiatric evidence that the accused suffered from Bipolar disorder and went off his medications prior to the offence, but found the offences to be the result of "an inability by Mr. Collier to control his temper; a disregard for the property of others; and a disdain for court orders" (at paras 10, 12, 37).

<sup>282</sup> *R v AWS*, 2009 ABPC 225, 12 Alta LR (5th) 200 [*AWS*].

<sup>283</sup> *AWS*, *supra* note 282 at paras 40, 18.

*R v Lemoine*,<sup>284</sup> there was evidence before the court that the offender was suffering from undiagnosed paranoid schizophrenia at the time he committed sexual assault and unlawful confinement of a stranger running through a park. This violent attack was out of character for the young offender, and his first criminal offence. Testimony from the offender's parents indicated his mental health had been deteriorating prior to the offence, but had improved greatly with treatment.<sup>285</sup> Nevertheless, the judge found the offender's degree of moral blameworthiness was high as his "actions were certainly pre-meditated"<sup>286</sup> and the attack "was not a spur of the moment decision, but rather it was something that Mr. Lemoine had thought about that evening as he stalked the victim and ultimately attacked her".<sup>287</sup> While offenders with mental disabilities may have other, seemingly rational, motivations for their criminal actions (such as anger, jealousy, etc.), their mental disabilities may impact them in such a way that their ability to make good decisions about acting on these choices is significantly impaired.<sup>288</sup>

Attempting to establish a direct causal connection between specific criminal behaviours and mental disabilities is impossible, and premised on a flawed notion that mental disability only contributes to an offence where it has direct bearing on the offender's thought process in a specific instance of criminal behaviour. This approach ignores the broader impacts of mental disability on all areas of a person's life, including her motivations for engaging in criminal

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<sup>284</sup> *R v Lemoine*, 2014 NSPC 49, 345 NSR (2d) 19 [*Lemoine*].

<sup>285</sup> *Lemoine*, *supra* note 284 at paras 17-18.

<sup>286</sup> *Ibid* at para. 27.

<sup>287</sup> *Ibid* at para. 42. For recent judicial discussion of the artificiality of any distinction between impulsive and planned behaviour for offenders with mental disorders, see Justice Laskin's dissenting opinion in *Ellis*, *supra* note 236 at paras 167, 187.

<sup>288</sup> See Buchanan & Zonana, *supra* note 269 at 144-145. Another area where judges sometimes place emphasis in finding mental disability should not be mitigating is where offenders have a history of non-compliance with treatment or medication. In *Peters*, *supra* note 227, for example, the sentencing judge found that the offender was the "author of his own misfortune" given his failure to comply with a treatment program for his ADHD and bipolar disorder (at para 7).

behaviour. While the current state of the law still appears to require a clear connection between the mental disability and offending behaviour, some recent trial-level decisions indicate that judicial attitudes as to the necessity of this approach may be changing. As noted above, the Court in *Ayorech* held that a mental disability does not have to be a direct cause of an offence for it to be relevant in sentencing. Recent decisions have expanded on this notion and concluded that there need not be evidence that the disability contributed to the offence at all for the fact of an offender's mental disability to be relevant.<sup>289</sup> In *R v Patey*,<sup>290</sup> the judge held that an offender's mental disability "will always be a factor in sentencing", and found that while unable to say if the offender's mental disability was connected to the commission of the offence, this did not render the condition irrelevant:

The question of whether such a connection exists in a given case is not a question that often avails of a simple yes or no answer. Thus, a sophisticated approach to sentencing such offenders is necessary. The reality of an offender's psychiatric disorder must be recognized and such offender's (sic) sentenced with the disorder in mind. To ignore an offender's psychiatric disorder because a connection has not been established is to ignore the reality of the offender's life and the requirement for an individualized approach to sentencing.<sup>291</sup>

In *R v Cross*,<sup>292</sup> the sentencing judge took serious issue with the notion that there must be a direct or causal connection between a mental disability and an offence for the mental disability to be

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<sup>289</sup> See e.g. *R v Durnford* (2014), 345 Nfld & PEIR 330 (NL Prov Ct), NJ No 5 (QL) [*Durnford*] in which the judge noted that while there was no "clear bright line" between the offender's psychiatric difficulties and her offences, the offender's Bipolar disorder was still relevant to sentencing as it had had a devastating impact upon her life and "[t]o ignore it would be to ignore the reality of Ms. Durnford's present circumstances and the 'profoundly contextual' nature of the sentencing process" (at para 19).

<sup>290</sup> *R v Patey* (2012), 321 Nfld & PEIR 43 (NL Prov Ct), NJ No 113 [*Patey*].

<sup>291</sup> *Patey*, *supra* note 290 at para 39.

<sup>292</sup> *R v Cross* (2012), 328 Nfld & PEIR 41 (NL Prov Ct), NJ No 356 (QL) [*Cross*].

considered mitigating. The sentencing judge noted that if an offender has a mental disability, the principle of sentence individualization requires a consideration of that disability.<sup>293</sup> In that case, the offender suffered from an undetermined mental illness (likely schizophrenia). He lived at home with his parents, which caused difficulties and resulted in his father indicating he could not live at home if he refused to undergo counselling. On a car ride home from speaking with a counsellor, the offender argued with his father about where he was going to live, and became angry when his father indicated he would not be residing at home, smashing a window and striking his father. The judge in *Cross* found there was no direct link between the offences committed by the offender and his mental disability, given that those offences had arisen out of anger and frustration, but noted the following: “[T]he offences which Mr. Cross committed arose out of circumstances intimately connected to the impact of his mental illness has had upon his life. In many ways this case illustrates the futility of searching for a direct link and the absurdity of ignoring an offender’s real circumstances when that link is missing...”<sup>294</sup>

An approach such as that articulated in *Cross* would be more reflective of the reality of mental disability and more amenable to considering the broader impacts of mental disability on an offender’s day-to-day life and decisions to commit crimes. While current sentencing law reflects a basic understanding that mental disability will in many cases reduce an offender’s responsibility for her actions, it does so in a narrow context of allowing disability to be

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<sup>293</sup> *Cross*, *supra* note 292 at para 34. The judge in *Cross* adopted an “encompassing approach” which included the finding in *Edmunds*, *supra* note 129 that in general it is recognized that mentally disabled offenders require treatment rather than imprisonment, and the re-statement in *Lundrigan*, *supra* note 227 that mental disability is in general to be viewed as a mitigating factor rather than an element rationalizing imprisonment. See also *R v Knott*, 2012 SCC 42, 2 SCR 470 [*Knott*] in which the SCC recently reaffirmed the requirement for “an individualized approach to sentencing”.

<sup>294</sup> *Cross*, *supra* note 292 at para 3.

considered mitigating only where it directly impacts an offender's behaviour, and not where it contributes to offending behaviour in a less direct way resulting from the hardships faced by individuals with mental disabilities in their day-to-day lives.

The difficulty of an approach that attempts to discern whether mental disability caused an offender's criminal behaviour is compounded by the fact that even in those cases where judges attempt to give a more fulsome understanding to the impact of mental disability on offending behaviour, judges' ability to order anything other than a period of imprisonment is being greatly curtailed by present "tough on crime" legislation. Between a fundamental misunderstanding of how mental disability can contribute to individuals' involvement with the criminal justice system, and few options for judges once individuals with mental disabilities appear before them, the sentencing process currently does little to address the issue of over-incarceration of offenders with mental disabilities.

### **3.4 Lack of Available Alternatives to Prison Sentences**

Given that mental disabilities are in general considered to be mitigating factors in sentencing, and that rehabilitation should generally be given priority over denunciation and deterrence, these factors should have the result of ensuring few offenders with mental disabilities receive lengthy prison sentences. As discussed above in **Section 2.3**, however, this is clearly not the case. In addition to a lack of clear guidance for judges regarding how to sentence individuals with mental disabilities, and the lack of a nuanced consideration of the impact of mental disabilities on criminal behaviour in sentencing decisions, offenders with mental disabilities are likely being sent to prisons in greater numbers due to increasing restrictions on the availability of sentencing

alternatives. “Tough on crime” legislation such as the Bill C-10, the *Safe Streets and Communities Act* [Bill C-10]<sup>295</sup> and other amendments to the *Criminal Code* in recent years, place greater emphasis on sentencing principles of denunciation and deterrence,<sup>296</sup> precisely those factors that should be given less weight in cases of offenders with mental disabilities. These legislative changes represent a move away from an individualized approach to sentencing towards greater restrictions on judicial discretion.<sup>297</sup>

Below, I will explore the growing direct and indirect legislative restrictions on the use of conditional sentences, which would otherwise represent a significant opportunity for judges to avoid imprisoning offenders with mental disabilities. I will then consider the legislative trend of requiring mandatory minimums for certain offences and the detrimental impact this may have on offenders with mental disabilities.

### **3.4.1 Conditional Sentences**

In 1996, Bill C-41<sup>298</sup> introduced the conditional sentence order [CSO] as an alternative to a sentence of imprisonment. Under the current CSO provisions, when an individual is sentenced to a period of imprisonment of less than two years, a judge may order the offender serve the sentence in the community, subject to conditions, if satisfied certain criteria are met.<sup>299</sup>

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<sup>295</sup> *Safe Streets and Communities Act*, SC 2012 c 1. Received Royal Assent on March 13, 2012 [Bill C-10].

<sup>296</sup> Julian V Roberts & Howard H Bebbington, “Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-Based Policy” (2013) 17 Can Crim L Rev 327 at 333.

<sup>297</sup> Renee M Pomerance, “The New Approach to Sentencing in Canada: Reflections of a Trial Judge” (2013) 17 Can Crim L Rev 306 at 307.

<sup>298</sup> Bill C-41, *An act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995 c 22 [Bill C-41]

<sup>299</sup> *Criminal Code*, *supra* note 2 s 742.1.

Specifically, the judge must be satisfied a CSO would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing.<sup>300</sup> CSOs may only be ordered where the offence does not have a minimum term of imprisonment,<sup>301</sup> and the offence for which the offender is being sentenced may not be an excluded offence. Whether an offence is excluded depends on its maximum term of imprisonment, or its being specifically enumerated as an excluded offence in the *Criminal Code*.<sup>302</sup>

In a leading case on CSOs, *Proulx*,<sup>303</sup> the SCC noted that while CSOs serve as an alternative to sentences of incarceration, they are still punitive in nature:

The conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders. The offenders... will serve a sentence under strict surveillance in the

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<sup>300</sup> *Ibid* s 742.1(a).

<sup>301</sup> *Ibid* s 742.1

<sup>302</sup> Those offences for which CSOs may not be ordered are set out at *Ibid* s 742.1 as follows:

- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
  - (i) resulted in bodily harm,
  - (ii) involved the import, export, trafficking or production of drugs, or
  - (iii) involved the use of a weapon; and
- (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
  - (i) section 144 (prison breach),
  - (ii) section 264 (criminal harassment),
  - (iii) section 271 (sexual assault),
  - (iv) section 279 (kidnapping),
  - (v) section 279.02 (trafficking in persons — material benefit),
  - (vi) section 281 (abduction of person under fourteen),
  - (vii) section 333.1 (motor vehicle theft),
  - (viii) paragraph 334(a) (theft over \$5000),
  - (ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
  - (x) section 349 (being unlawfully in a dwelling-house), and
  - (xi) section 435 (arson for fraudulent purpose).

<sup>303</sup> *Proulx*, *supra* note 230.



community instead of going to prison. The offenders' liberty will be constrained by conditions to be attached to the sentence... The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence.<sup>304</sup>

In many ways, CSOs represent a fitting alternative for many offenders with mental disabilities. A primary purpose of CSOs is to promote rehabilitation, which is a key consideration in sentencing mentally disabled offenders.<sup>305</sup> However, given that the orders still contain a punitive element,<sup>306</sup> they can appropriately reflect an offender's reduced, but not fully absent, responsibility for her criminal actions.<sup>307</sup> In many cases an individual's mental disability will have had a significant direct or indirect impact on her decision to engage in criminal activity, however, as discussed above, this will likely not reach the level of impairment required for a finding of NCRMD. As such, her mental disability should not absolve her of all responsibility for her behaviour. CSOs provide a way for reduced culpability to be taken into account, while not discounting an individual's agency and responsibility for her actions. Further, CSOs give judges greater

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<sup>304</sup> *Ibid* at paras 21-22.

<sup>305</sup> See: *Edmunds*, *supra* note 129 at para. 21; *Lundrigan*, *supra* note 227 at para 22.

<sup>306</sup> See e.g. *Laldin*, *supra* note 256 in which the judge held that "neither form of incarceration" (being a prison term or CSO) was warranted in that case of a first offender with a mental disability who entered a guilty plea. The judge instead ordered a suspended sentence with conditions (para 35). While CSOs appear to be a more lenient sentencing option than a prison term, some authors have argued that a consideration of the severity of a punishment based on its duration alone is incomplete, and the conditions attached to a sentence will determine severity as much as duration. While it is impossible to say whether an individual offender will find the same period of time under a CSO as restrictive or punitive as a prison sentence, proportionality and penal equivalence are maintained by focusing on the goals of sentencing rather than the offender's own experience (G Paul Renwick, "Conditional Acceptance of the Conditional Sentence" (2008) 12:3 Can Crim L Rev 227 at 237-238).

<sup>307</sup> See Roberts & Verdun-Jones, *supra* note 5 at 12, who note that CSOs and the sentencing process generally must recognize an offender's diminished culpability, even if that falls short of exculpation.

flexibility in ordering treatment or other community-based rehabilitative programs as part of a sentence, which may have an actual beneficial impact on offenders with mental disabilities and stop the cycle of commitment and re-offence, thereby protecting public safety.

Conditional sentence orders may be of particular use for some offenders with mental disabilities given that the court may include as a condition an order that the offender attend a treatment program approved by the province,<sup>308</sup> and as such the “court may direct the accused to rehabilitative programs that may mitigate the risk he poses to the community”.<sup>309</sup>

Further, the SCC determined, in *R v Knoblauch*,<sup>310</sup> that a judge may order an offender carry out her CSO in a treatment facility, rather than under house arrest. In *Knoblauch*, the appellant had a long history of mental disability, including personality difficulties with features of obsessive compulsiveness and depression. The offender was potentially extremely dangerous to public safety, as he was preoccupied with explosives and violent fantasies.<sup>311</sup> The appellant had pleaded guilty to offences related to his possessing a weapon while prohibited from doing so, and the trial judge had imposed a CSO requiring the appellant to reside in a psychiatric treatment unit, followed by three years’ probation. The offender had not only consented to this measure, but had

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<sup>308</sup> *Criminal Code*, *supra* note 2 s 742.3(2)(e). While CSOs are generally considered to be the only mechanism through which judges can order treatment for offenders without their consent (Roberts & Verdun-Jones, *supra* note 5 at 18), some authors have noted that such treatment is more accurately considered optional as offenders have the prerogative of declining the conditional sentence (and as a result serving their sentence in jail) (Schneider, *supra* note 87 at 707).

<sup>309</sup> Schneider, *supra* note 87 at 707.

<sup>310</sup> *R v Knoblauch*, 2000 SCC 58, 2 SCR 780 [*Knoblauch*].

<sup>311</sup> *Knoblauch*, *supra* note 310 at para. 6.

requested it.<sup>312</sup> The Alberta Court of Appeal set aside the CSO and imposed a period of incarceration.

On appeal by the offender to the SCC, the Majority found that the CSO would more adequately protect society than the offender serving the same period in a prison facility, given that “[t]he dangerousness of the appellant is a product of the combined effect of his mental illness and his ability to acquire and make use of explosive materials and devices. Incarceration precludes the latter, but does little to address his mental illness.”<sup>313</sup> The Majority held that CSOs could be served in custodial psychiatric facilities and still be seen as a genuine alternative to incarceration.<sup>314</sup>

Subsequent to the SCC’s decision in *Knoblauch*, there was some initial optimism that CSOs would become a viable alternative sentence that would move mentally disabled offenders out of correctional facilities. Barrett & Shandler noted that CSOs were the only sentencing option in Canada designed to ensure individuals with mental health problems were sent to rehabilitation facilities rather than prisons.<sup>315</sup> Roberts & Verdun-Jones saw the decision in *Knoblauch* as potentially enlarging the range of offenders who may be granted a CSO “by empowering judges to consider various residential (secure or otherwise) treatment facilities as potential locations to which offenders on a conditional sentence order may be sent”.<sup>316</sup> The authors were optimistic

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<sup>312</sup> *Ibid* at para 34.

<sup>313</sup> *Ibid* at para 30.

<sup>314</sup> The Majority held that the alternative regime envisioned by Parliament was “not to a particular place or building, but to a regime of detention, program and release, governed by legislation such as the *Corrections and Conditional Release Act*” (*Ibid* at para 37).

<sup>315</sup> Barrett & Shandler, *supra* note 232 at 6-20.

<sup>316</sup> Roberts & Verdun-Jones, *supra* note 5 at para 18.

that *Knoblauch* could reduce the congestion of mentally disabled offenders in the prison system by sending more people to mental health facilities.<sup>317</sup>

Since the decision in *Knoblauch*, there have been no reported decisions in which an offender with mental disabilities was ordered to serve her CSO in a psychiatric facility.<sup>318</sup> Nevertheless, this remains an option open to sentencing judges, in addition to terms requiring compliance with treatment and rehabilitative programs as a condition of a CSO. Indeed CSOs have been imposed as alternatives to periods of incarceration in a number of cases involving offenders suffering from mental disabilities,<sup>319</sup> and many CSOs contain conditions that the offender is to undertake psychiatric treatment or other rehabilitative efforts.

Sentences aimed at psychiatric treatment attract criticism in the context of NCRMD dispositions, given that offenders will in many cases spend longer periods under the jurisdiction of a Review Board than they would have spent incarcerated had they been sentenced to a term of imprisonment.<sup>320</sup> Conditional sentence orders, unlike NCRMD dispositions, are of a limited duration, and are based on traditional sentencing principles such as denunciation, deterrence, and rehabilitation. These orders are, as a result, a better fit for individuals living with mental disabilities who commit crimes. Conditional sentence orders express society's condemnation of criminal actions for which the offender is at least partially responsible, but do not unduly restrict

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<sup>317</sup> *Ibid* at para 19.

<sup>318</sup> To determine this I reviewed all decisions citing *Knoblauch*, apart from those in Quebec.

<sup>319</sup> See e.g. *Dickson*, *supra* note 255; *Lundrigan*, *supra* note 227; *R v Kohuch*, 2011 ONCJ 620, OJ No 5447 (QL). See also the examples listed in *R v Bagnulo*, 2012 ONCJ 815 at para 40, OJ No 6328 [*Bagnulo*]; *Fayemi*, *supra* note 26 at 28; *R v Paterson*, 2013 BCPC 5 at 184, BCJ No 71 (QL).

<sup>320</sup> See e.g. *Schneider & Nussbaum*, *supra* note 205; Canada, "Review Board Systems", *supra* note 169.

these individuals' liberty as a result of their having a mental disability and a need for rehabilitation and treatment.

Conditional sentence orders may also serve as ideal alternatives to incarceration for those offenders whose mental disabilities render them particularly vulnerable in a prison environment. As discussed above, offenders with mental disabilities often face specific and undue hardships in the prison environment not experienced by those without such disabilities. In *Donnelly*,<sup>321</sup> the judge noted explicitly that he would be satisfied sentencing the offender to a prison sentence were it not for his mental health issues. The offender in that case had a number of mental disabilities including obsessive-compulsive disorder and post-traumatic stress disorder [PTSD], and he was marked by psychiatrists as a high risk for suicide. The judge noted that if the offender were incarcerated:

... he will be subject to verbal and physical abuse both by other inmates and, as well, by some correctional officers... One consequence of that reality is that Mr. Donnelly may find himself in protective custody for much, if not all, of his sentence. It is also well-known that time spent in protective custody, or segregation, is even more difficult time. The other is that, if Mr. Donnelly is incarcerated, there is a very high risk he will attempt suicide, and there is a very significant prospect that he can be successful in that effort.”<sup>322</sup>

The judge imposed a CSO in order to avoid the risk of the offender attempting suicide in a prison setting.

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<sup>321</sup> *Donnelly*, *supra* note 209.

<sup>322</sup> *Ibid* at para 99.

### The Waning Availability and Use of CSOs

Since their enactment, the *Criminal Code* provisions governing CSOs have required that they be ordered only where the offence does not have a minimum term of imprisonment, the court imposes a sentence of imprisonment of less than two years, the sentence would not endanger the safety of the community, and such an order would be consistent with the fundamental purpose and principles of sentencing.<sup>323</sup> However, since 1996, all of the additional restrictions discussed in the introductory paragraph to this section were introduced, greatly limiting the number of offences for which CSOs may be ordered.<sup>324</sup> As such CSOs may not be ordered for offences that carry a mandatory minimum sentence, and a number of other offences are specifically excluded. Justice Pomerance argues that these multiple revisions to the CSO regime make it such that CSOs will no longer be available “for any offence against the person, and most offences against property, at least where prosecuted by indictment. Only shreds of the regime remain.”<sup>325</sup> Further, as will be discussed below, the number of offences that carry with them a minimum sentence of imprisonment has also increased during this time period, further increasing the number of offences for which a CSO may not be ordered.<sup>326</sup>

While from 1999-2005 there was a significant rise in the imposition of CSOs, from 2005-2007 the use of these sentences decreased.<sup>327</sup> The number of CSOs rose slightly in 2008-2010,

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<sup>323</sup> *Criminal Code*, *supra* note 2 s 742.1.

<sup>324</sup> *Ibid* s 742.1.

<sup>325</sup> Pomerance, *supra* note 297 at 310.

<sup>326</sup> *Criminal Code*, *supra* note 2 s 742.1(b) sets out that CSOs are unavailable if the offence is punishable by a minimum term of imprisonment.

<sup>327</sup> Canada, Public Safety Canada, *Corrections and Conditional Release Statistical Overview* (Annual Report) (Ottawa: Public Works and Government Services Canada, 2012) [Canada, “Corrections Statistical Overview”]. See

however since that time they have been steadily decreasing, with the numbers currently down 7% from those recorded in 2008/2009.<sup>328</sup>

The restriction on the use of CSOs has been a dominant trend in sentencing over the past several years, with Bill C-10 resulting in the sentencing alternative's "functional demise".<sup>329</sup> Further, as Justice Pomerance notes, jail is becoming the primary and in many cases only sentencing option for many criminal offences.<sup>330</sup>

Judges have commented on the increasing restrictions on their ability to impose CSOs in some recent reported decisions.<sup>331</sup> In *Bagnulo*,<sup>332</sup> the judge considered a CSO for an offender with a mental disability,<sup>333</sup> but noted that a conditional sentence was no longer permitted for the offender's assault charge as a result of recent amendments to the *Criminal Code*. The judge noted: "Parliament has directed that any sentence for this offence on these facts must either be jail or probation. The middle ground of a conditional sentence of imprisonment is no longer an option".<sup>334</sup> In *R v Morton*,<sup>335</sup> the judge noted it was unfortunate a CSO was statutorily unavailable for an offence under section 255(2.1) of the *Criminal Code* (an indictable offence

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also Myles Frederick McLellan, "The Prospective Devitalization of Conditional Sentences" (2011) 57 Crim LQ 265 at 270.

<sup>328</sup> Canada, "Corrections Statistical Overview"; Canada, Statistics Canada, "Adult correctional services, average counts of offenders, by province, territory, and federal programs (Provinces and territories)", *Statistics Canada* (12 May 2014) (website), online: <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal31b-eng.htm>>.

<sup>329</sup> Pomerance, *supra* note 297 at 306.

<sup>330</sup> *Ibid* at 308.

<sup>331</sup> See e.g. *R v Sheppard* (2013), 344 Nfld & PEIR 173 (NL Prov Ct), NJ No 435 (QL) [*Sheppard*] where the offender was suffering from PTSD at the time of the offence, but a CSO was not available for the offence of break and enter (an indictable offence with a maximum term of life imprisonment), and as such a period of incarceration was imposed (paras 14-15).

<sup>332</sup> *Bagnulo*, *supra* note 319.

<sup>333</sup> *Ibid* at paras 42-43.

<sup>334</sup> *Ibid* at para 44.

<sup>335</sup> *R v Morton* (2013), 345 Nfld & PEIR 256 (NL Prov Ct), NJ No 405 (QL) [*Morton*].

which carried a maximum sentence of 10 years), given that the offender suffered from PTSD and other mitigating factors.<sup>336</sup>

In many cases judges will wish to impose CSOs in order to take account of offenders' mental disabilities but will be limited by *Criminal Code* restrictions on the sentencing alternative's use. In *Ye*,<sup>337</sup> the judge had to take a very creative approach to ensure an offender with schizophrenia served at least part of his sentence under a CSO. There the offender was convicted of three counts of robbery, two counts of using an imitation firearm, and assault with a weapon. The pre-sentence report indicated that he had been responding well to treatment since his trial and his mental health would worsen if he were to be incarcerated.<sup>338</sup> The robberies carried no mandatory minimum sentence,<sup>339</sup> however the use of an imitation firearm carried with it a mandatory minimum period of imprisonment of one year. Given that CSOs are only available for offences with a total global sentence of less than two years, and cannot carry a mandatory minimum sentence, the most lenient sentence the judge could impose was a CSO of one year less a day (for the robberies) followed by period of incarceration of one year (for the imitation firearm offence).<sup>340</sup> The judge considered the offender's mental health issues, the fact he had been responsive to treatment, and that his situation could worsen if he were taken away from his

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<sup>336</sup> These other factors included: the fact that that the offence was on the low end of the spectrum given the offender's relatively low alcohol reading, a lesser degree of seriousness of the injury to the victim, and the offender's good antecedents. The judge found that the objectives of sentencing would not be properly satisfied through the imposition of a fine, and imposed a 90-day period of imprisonment to be served intermittently with a period of probation in force (*Morton*, *supra* note 335 at para 25).

<sup>337</sup> *Ye*, *supra* note 25.

<sup>338</sup> *Ibid* at para 5.

<sup>339</sup> Shortly after the offender committed the robberies, amendments came into force that prevented the use of CSOs for "serious personal injury offences". As the robberies were committed prior to the coming into force of these provisions, however, the judge still had available the option of ordering a CSO with respect to those offences.

<sup>340</sup> *Ye*, *supra* note 25 at para 73.



treatment program, and found a CSO was merited to rehabilitate the offender and prevent him from re-offending.<sup>341</sup>

As the cases above demonstrate, the restrictions on the use of CSOs resulting from Bill C-10 and other amending legislation has meant that judges have been denied the opportunity to craft individualized and proportionate sentences for mentally disabled offenders. These are offenders for whom the use of CSOs may be highly beneficial, as they represent a less punitive sentence (though not without serious punitive elements), an avenue for judges to order treatment and rehabilitation where necessary, and a way to lessen the impact of the significant problem of mentally disabled offenders in prisons discussed in **Chapter 2**.

### **3.4.2 Mandatory Minimums**

Recent legislative changes to the CSO regime have resulted in an increasing number of offences becoming explicitly excluded. In addition, the increasing numbers of offences with mandatory minimum sentences<sup>342</sup> have resulted in each of those offences also being indirectly excluded. Bill C-10 introduced a number of new mandatory minimum sentences for a variety of offences, including sexual offences involving victims under the age of 16 and drug offences.<sup>343</sup>

In addition to limiting the use of CSOs, which in many cases may constitute a viable alternative to incarceration for offenders with mental disabilities, mandatory minimum sentences mean that

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<sup>341</sup> *Ibid* at paras 94-96.

<sup>342</sup> As of February 2013, 57 offences under the *Criminal Code*, *supra* note 2 attracted mandatory minimum sentences of incarceration (Uniform Law Conference of Canada Criminal Section, *supra* note 9 at para 5). Further, the *Controlled Drugs and Substances Act*, SC 1996, c 19 specifies a further nine offences for which mandatory minimum penalties must be imposed.

<sup>343</sup> Bill C-10, *supra* note 295, Part 2, “Sentencing”, ss 10-38. See also Pomerance, *supra* note 297 at 311.

a judge cannot order a conditional discharge,<sup>344</sup> nor can she order the suspended passing of a sentence with the offender released on a probation order.<sup>345</sup> Further, if the mandatory minimum directs a sentence of more than two years, this will also remove the ability for an offender to be placed on probation subsequent to release from prison.<sup>346</sup> These options represent useful alternatives to incarceration in addition to CSOs,<sup>347</sup> and can include orders related to treatment and rehabilitative programs.<sup>348</sup> Mandatory minimums preclude the use of any such alternatives, and dictate sending offenders to prison regardless of significantly mitigating circumstances such as mental disability, or the particularly harmful impact incarceration might have on offenders with mental disabilities.

While there are far-reaching negative implications that stem from the proliferation of mandatory minimum sentences,<sup>349</sup> this issue is particularly concerning when one considers the unique sentencing objectives that are to be considered for offenders with mental disabilities. Justice Suche has described the objectives of mandatory minimums as being: “to remove judicial discretion from the sentencing process for those offenders who would otherwise have received

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<sup>344</sup> *Criminal Code*, *supra* note 2 s 730(1).

<sup>345</sup> *Ibid* s 731(1)(a).

<sup>346</sup> *Ibid* s 731(1)(b).

<sup>347</sup> Probation orders are generally seen as rehabilitative rather than punitive, and as such CSOs still may represent a better fit for many offenders with mental disabilities as they are consistent with the notion of reduced (but not absent) criminal responsibility. See *Knott*, *supra* note 293 at paras 9-10, 42-43. See also: *Proulx*, *supra* note 230 at para 32.

<sup>348</sup> While probation orders do not allow judges to order mandatory treatment as a term (see: *R v Rogers* (1990), 61 CCC (3d) 481 (BCCA), 2 CR (4th) 192), they may direct offenders to rehabilitative programs if they agree to such treatment and subject to the program director’s acceptance of the offender (*Criminal Code*, *supra* note 2 s 731.1(3)(g)).

<sup>349</sup> See e.g. Pomerance, *supra* note 297 at 312, who cites economic costs due to skyrocketing prison populations, increased numbers of trials (as offenders will lose the incentive to plead guilty), or, alternatively, an increased tendency of offenders to plead guilty to a lesser offence which does *not* have a mandatory minimum, which may lead to wrongful convictions.

less than the minimum. It is a ‘one size fits all’ punishment, and precludes any consideration of the moral blameworthiness of the offender.”<sup>350</sup>

Critics have noted that the imposition of mandatory minimums removes a significant amount of judicial discretion for those offences, and has serious implications for the fundamental principle of proportionality in sentencing.<sup>351</sup> Mandatory minimums create an anomaly given that proportionality is the central precept of sentencing and mandatory minimums will often offend this principle.<sup>352</sup> Justice Healy notes: “If Parliament has thus determined a proportionate sentence, it is a remarkable feat in the administration of justice – not least because it has managed to do so without regard for the gravity of the offence or the degree of responsibility of the offender.”<sup>353</sup>

Justice Pomerance notes further that the removal of judicial discretion through mandatory minimums will make it difficult if not impossible for sentencing judges to give meaningful consideration to the principle articulated in subsection 718.2(e) of the *Criminal Code*, as mandatory minimums do not accommodate restorative justice alternatives.<sup>354</sup> Subsection 718.2(e) requires that in imposing a sentence “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular

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<sup>350</sup> Adamo, *supra* note 4 at para 100.

<sup>351</sup> See e.g.: Pomerance, *supra* note 297; Peter Sankoff, “The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case” 2013 22 Constitutional Forum 1; Uniform Law Conference of Canada Criminal Section, *supra* note 9; Victoria, *supra* note 31; Patrick Healy, “Sentencing from There to Here and from Then to Now” (2013) 17 Can Crim L Rev 291.

<sup>352</sup> Pomerance, *supra* note 297 at 318.

<sup>353</sup> Healy, *supra* note 351 at 299.

<sup>354</sup> Pomerance, *supra* note 297 at 314.

attention to the circumstances of aboriginal offenders”.<sup>355</sup> I will discuss the relevance of this provision and the possibility of an equivalent provision highlighting the circumstances of offenders with mental disabilities below in **Section 4.3**. For now, it is sufficient to note that similar concerns that exist for aboriginal offenders are evident for offenders with mental disabilities, and in many of the cases described in the previous sections judges have specifically noted that the fundamental principle of proportionality and the need for individualization in sentencing will require consideration of an offender’s mental disability. Mandatory minimums remove this possibility.

While the problems with mandatory minimum sentences are clear to many commentators, and the perspective taken in this Thesis is that they will often represent a poor fit for sentencing offenders with mental disabilities, it must still be recognized that sentencing in Canada is the primary responsibility of Parliament. Parliament must be able to pass laws fettering judicial discretion to some degree, and raising the floor for sentencing, when the Canadian public is of the opinion that the sentences being imposed for certain crimes are too low. In my discussion of proposed amendments to the *Criminal Code* limiting the use of mandatory minimums, which I will explore further below, I will consider alternative means by which Parliament could address what it views as overly lenient sentences as a result of these amendments.

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<sup>355</sup> This section applies to all offenders, requiring only that *particular* attention be given to the circumstances of aboriginal offenders. However, those SCC and appellate-level decisions that have considered this provision in detail have tended to do so when focusing on its application to aboriginal offenders (See e.g. *Batisse*, *supra* note 129; *Gladue*, *supra* note 167; *Ipeelee*, *supra* note 167; *R v Standingwater*, 2013 SKCA 78, 417 Sask R 158). Where the first part of s 718.2(e) has been interpreted in situations not involving aboriginal offenders, it has been treated primarily as a re-statement of s 718.2(d) which requires that “an offender should not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances (See e.g. *R v Evans-Renaud*, 2012 PECA 21, at para 27, 328 Nfld & PEIR 33; *R v Reynolds*, 2013 ABCA 382 at para 16, 561 AR 335; *R v Tasew*, 2011 ABCA 241 at para 13, 513 AR 154; *R v Hurley*, 2008 BCCA 461 at para 29, 237 CCC (3d) 135),

### Charter Challenges to Mandatory Minimum Sentences

While the imposition of a mandatory minimum sentence for a particular offence is just that – mandatory – a judge may impose a lesser sentence where she finds that the mandatory minimum sentence offends the *Charter* in a particular case. Since the spate of new mandatory minimum sentences came into effect, commentators predicted there would be numerous *Charter* challenges of these provisions under section 7 (the right to life, liberty and security of the person), section 12 (the right to be free from cruel and unusual punishment), and subsection 15(1) (the right to equal benefit of the law without discrimination).<sup>356</sup> Peter Sankoff referred to the combination of the government’s mandate to get “tough on crime” through the creation of more mandatory minimum sentences, the extremely stringent approach of courts to section 12 *Charter* claims, and the SCC’s judgment in *R v Ferguson*<sup>357</sup> eliminating the use of constitutional exemptions with respect to mandatory minimums, as a “perfect storm”.<sup>358</sup>

Recently, in *R v Nur*,<sup>359</sup> the Ontario Court of Appeal struck down the mandatory minimum under section 95 of the *Criminal Code* (prohibited and restricted firearms offences) after finding it constituted “cruel and unusual punishment” under section 12 of the *Charter*.<sup>360</sup> The minimum sentence under section 95 of the *Criminal Code* had increased in May 2008 to three years for a

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<sup>356</sup> Pomerance, *supra* note 297 at 319.

<sup>357</sup> *R v Ferguson*, 2008 SCC 6, 1 SCR 96 [*Ferguson*],

<sup>358</sup> Sankoff, *supra* note 351 at 3. Constitutional exemptions had previously been used to strike down legislation that had an unconstitutional impact in rare circumstances on a case-by-case basis, rather than striking down provisions in their entirety. As such, post-*Ferguson*, a successful section 12 challenge had to have the result of striking down a provision that had the potential to offend the *Charter*, *supra* note 3 in its entirety.

<sup>359</sup> *R v Nur*, 2013 ONCA 677, 117 OR (3d) 401, leave to appeal to SCC granted, [2014] SCCA No 17 (QL) [*Nur*].

<sup>360</sup> *Nur*, *supra* note 359.

first offence, and five years for a subsequent offence, if the Crown proceeded by indictment.<sup>361</sup>

The Court noted the stringent test under section 12 of the *Charter*, which requires “a punishment that is so beyond what would be proper or proportionate punishment as to be grossly disproportionate”, “so excessive as to outrage standards of decency” and disproportionate to the extent that Canadians would “find the punishment abhorrent or intolerable”.<sup>362</sup>

The Court in *Nur* ultimately found the mandatory minimum provisions met the high threshold required for a successful challenge under section 12. It considered a reasonable hypothetical breach of the provisions, in which an accused person possessed an unloaded restricted or prohibited firearm, with usable ammunition nearby, in a scenario unconnected to any unlawful or dangerous purpose or activity.<sup>363</sup> The Court found that a three-year prison term for such an offence was well beyond any punishment that could be considered proportionate to that hypothetical offence, and as such the provision was struck down as unconstitutional.

The SCC heard an appeal of the Ontario Court of Appeal’s decision in *Nur* in November 2014. As at the date of publication of this Thesis, the judgment is on reserve. The SCC’s upcoming decision in *Nur* has been recognized by commentators as an opportunity for the SCC to open the door to ways courts can respect the principle of proportionality in the face of mandatory minimums, potentially through loosening the standards for the reasonable hypothetical analysis or abandoning the “gross disproportionality” requirement altogether.<sup>364</sup> However, as noted by

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<sup>361</sup> *Ibid* at para 44.

<sup>362</sup> *Ibid* at paras 64, 66. Citing from *R v Miller*, [1977] 2 SCR 680; *Ferguson*, *supra* note 357.

<sup>363</sup> *Nur*, *supra* note 359 at para 150.

<sup>364</sup> Palma Paciocco, “Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing” (2014) 18 Can Crim L Rev 241 at 266-267.

Paciocco, the SCC's track record of showing considerable deference to Parliament in matters of sentencing does not bode well for those who hope the affront to proportionality occasioned through mandatory minimums will be remedied through the courts rather than the legislature.<sup>365</sup>

Cases such as *Nur* make it apparent that while the threshold under section 12 for having mandatory minimums struck down as unconstitutional is very high, where a punishment is clearly and significantly disproportionate based on the seriousness of the crime and degree of responsibility of the offender (which includes an assessment of an offender's moral blameworthiness), that minimum sentence may be declared unconstitutional.<sup>366</sup> Another recent trial-level decision from Manitoba dealt specifically with the issue of whether a mandatory minimum sentence may be found unconstitutional as a result of its impact on offenders with mental disabilities.<sup>367</sup> In *Adamo*, the offender was convicted of a series of firearms-related offences, which carried a mandatory minimum of three-years' imprisonment under subsection 95(2). At the time of the offence, the offender was unemployable after suffering severe head trauma that resulted in significant impairment in function, memory, impulse control and judgment.<sup>368</sup> He also developed paranoid ideation and experienced delusions consistent with psychosis.<sup>369</sup> Expert evidence indicated that the offender was responsive to antipsychotic medication, he required support in the community, and that he was suitable for a community placement.<sup>370</sup>

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<sup>365</sup> Paciocco, *supra* note 364 at 266.

<sup>366</sup> See *Nur*, *supra* note 359 at para 83.

<sup>367</sup> *Adamo*, *supra* note 4.

<sup>368</sup> *Ibid* at para 9.

<sup>369</sup> *Ibid* at para 12.

<sup>370</sup> *Ibid* at paras 12-14.

Justice Suche noted that mental disability is generally treated as a mitigating factor in sentencing, the role of deterrence is to be reduced in such cases, and the principle of proportionality required an assessment of the lessened moral blameworthiness of an offender due to mental disability.<sup>371</sup> She further found that in the case before her the offender's mental disability was directly connected to his commission of the offence, and there would be little assistance available to him at the only federal penitentiary in Manitoba.<sup>372</sup> Justice Suche found that treatment (including medication and life skills and other programming) had and would likely continue to improve the offender's condition and ability to manage his life, and that rehabilitation was the primary sentencing objective in the case.<sup>373</sup> But for the mandatory minimum provisions, she would have imposed a sentence of six months' imprisonment.<sup>374</sup>

The judge in *Adamo* considered the offender's arguments that the mandatory minimum provisions infringed sections 7, 12, and subsection 15(1) of the *Charter*. After reviewing earlier section 12 challenges to mandatory minimum sentences, Justice Suche found that a three-year sentence was grossly disproportionate to what was appropriate for the offender, would be clearly detrimental to the offender's rehabilitation, and was an inappropriate means to communicate general deterrence.<sup>375</sup> The judge held that the mandatory minimum violated section 12 of the *Charter*. She similarly found that the provision infringed section 7 and subsection 15(1).<sup>376</sup>

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<sup>371</sup> *Ibid* at paras 31-34.

<sup>372</sup> *Ibid* at paras 42, 48, 53.

<sup>373</sup> *Ibid* at paras 62, 68.

<sup>374</sup> *Ibid* at para 70.

<sup>375</sup> *Ibid* at paras 87-89.

<sup>376</sup> In considering s 7 of the *Charter*, *supra* note 3, Justice Suche noted that proportionality in sentencing is accepted as fundamental to our penal system, and found that it was a principle of fundamental justice protected by s 7 both in criminalizing conduct and in determining punishment for an offence. She found the mandatory minimum provisions



In considering subsection 15(1), the judge framed the question as whether the mandatory minimum provision had the effect of perpetuating and worsening the disadvantage of mentally disabled persons who, while criminally responsible for their actions, have a lesser degree of moral blameworthiness due to their mental disability.<sup>377</sup> She concluded the provisions had a much greater impact on mentally disabled persons because they did not allow judges to take into account these offenders' reduced moral blameworthiness, and punishment applied equally to all offenders without regard to the offenders' actual circumstances.<sup>378</sup> She held that the mandatory minimum provisions did not allow the offender "to be sentenced in a manner that recognizes his mental disability and its role in the commission of these offences. It does not take into account the impact on this already disadvantaged class of persons".<sup>379</sup> After declaring the mandatory minimum provision to be of no force and effect, Justice Suche imposed a sentence of 6 months' imprisonment and a period of three years' supervised probation.<sup>380</sup>

*Adamo*, like *Nur*, is currently under appeal.<sup>381</sup> If upheld, *Adamo* has the potential to serve as precedent for striking down numerous other mandatory minimum provisions in the case of mentally disabled offenders. That being said, *Charter* challenges must occur on a case-by-case basis. While reasonable hypothetical scenarios may be used to ground a finding of

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necessarily precluded consideration of the reduced moral blameworthiness of a mentally disabled offender and imposed a grossly disproportionate sentence that violated s 7 (*Ibid* at paras 113-115).

<sup>377</sup> *Ibid* at para 137.

<sup>378</sup> *Ibid* at paras 139, 141.

<sup>379</sup> *Ibid* at para 147.

<sup>380</sup> *Ibid* at paras 161, 162, 165.

<sup>381</sup> James Turner, "Prosecutors appeal ruling rejecting mandatory minimums", *Winnipeg Free Press* (24 October 2013) online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/Prosecutors-appeal-ruling-rejecting-mandatory-minimums-229112221.html>>.

unconstitutionality, each individual mandatory minimum provision must be found to offend or potentially offend the provisions of the *Charter*, and as such striking down every single mandatory minimum provision that could impact offenders with mental disabilities would be a lengthy and piecemeal process.

Further, the decision of the Ontario Court of Appeal in *Nur* indicates that characteristics of individual offenders, such as mental disability, may not be appropriate elements for courts to consider in the case of a reasonable hypothetical scenario to determine if a mandatory minimum sentence offends the *Charter*:

... neither hypothetical [used in previous successful *Charter* challenges] referred to any factors particular to the individual offender, such as longstanding abuse, extreme youth, ill health, or intellectual impairment that might mitigate penalty... It seems to me that if the hypothetical offender is to be endowed with individual characteristics that can mitigate the penalty, then, regardless of the offence, one could describe an offender for whom a mandatory minimum punishment would be grossly disproportionate.<sup>382</sup>

If the SCC upholds the above reasoning, reasonable hypothetical scenarios for the purpose of *Charter* challenges will not be able to involve hypothetical offenders with mental disabilities. As such, having a particular mandatory minimum sentence struck down on the basis that it constitutes a grossly disproportionate sentence given an offender's mental disability, will require an offender with a mental disability mounting a successful *Charter* challenge. Such challenges can only be successful where a mentally disabled offender, who may already experience greater

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<sup>382</sup> *Nur*, *supra* note 359 at paras 135-137.

burdens and barriers to participation in the criminal justice process than an average offender, has the ability and resources to mount a successful challenge and respond to the inevitable appeals of any positive decisions.

In addition to the difficulties posed by the *Charter* challenge process having to necessarily occur on a piecemeal basis, some authors argue that it is not necessarily desirable that every single mandatory minimum provision be struck down where it would be unconstitutional in a particular given case.<sup>383</sup> I will outline a more coherent solution than case-by-case *Charter* challenges to the problem of mandatory minimums' unfair impact on offenders with mental disabilities in **Chapter 4**, below.

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<sup>383</sup> See Sankoff, *supra* note 351 at 12.

## Chapter 4: Proposals for Sentencing Offenders with Mental Disabilities

### 4.1 Introduction

In previous chapters, I have explored the issue of the over-representation of people with mental disabilities in the Canadian criminal justice system, and attempted to explain why this is a serious and pressing problem. While the factors that contribute to this issue are multi-faceted and cannot be remedied by any one change, I decided to focus on Canada's current criminal sentencing regime as a potential area of reform. Sentencing is a process whereby judges can directly determine whether an individual with a mental disability will be subject to a period of incarceration, and if so of what duration. With the proper legislative framework, judges can ensure individuals whose mental disabilities reduce their moral blameworthiness for their actions, or render them particularly vulnerable in a prison environment, will not be incarcerated unless absolutely necessary. In **Chapter 3**, I explored the ways the current sentencing regime is failing offenders with mental disabilities: while there is an acknowledgement in the case law that offenders' mental disabilities should serve to mitigate sentences and emphasize rehabilitation over denunciation and deterrence, a review of sentencing decisions in this area demonstrates these principles are being applied inconsistently. Any such consideration tends not to take into account the broader systemic issues facing individuals with mental disabilities and contributing to their involvement with the criminal justice system. Further, even where judges may wish to impose reduced prison terms or alternatives to incarceration, such as CSOs, for offenders with mental disabilities, amendments to the *Criminal Code* in recent years have significantly limited their ability to do so.

In this final comprehensive chapter of my Thesis, I propose amendments to the *Criminal Code* that I believe will have the impact of reducing the number of offenders with mental disabilities in the Canadian prison population. These amendments require judges to consider offenders' mental disabilities and the unique sentencing objectives they trigger when imposing a sentence, and to consider all reasonable available alternatives to incarceration for offenders with mental disabilities. I will go on to propose a statutory exemption to mandatory minimum sentences for offenders with mental disabilities, so that the increased consideration of mental disabilities on sentencing can be given practical effect, as well as amendments that will extend the availability of CSOs for offenders with mental disabilities.

As noted previously in this Thesis, currently there are no provisions in the *Criminal Code* dealing directly with how mental disability should be accounted for during the sentencing phase of criminal proceedings. I argue that a process for sentencing offenders with mental disabilities should be laid out in the *Criminal Code* rather than developed through the evolution of the common law. As was recently noted by the Ontario Court of Appeal in *Nur*, Canadian sentencing policy is "first and foremost Parliament's responsibility".<sup>384</sup> Judges across the country need to focus greater attention on the impact of mental disability and the barriers and discrimination faced by individuals with disabilities when determining what is truly a fit sentence. While such a change in focus could arguably come about through increased education of judges regarding

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<sup>384</sup> *Nur*, supra note 359 at para 69. In that decision the Court explored how s 12 of the *Charter*, supra note 3 (which stipulates that everyone has the right not to be subjected to any cruel and unusual treatment or punishment) is intended to fix the outer boundary of Parliament's authority over sentencing in criminal matters. It is not intended to constitutionalize any particular penological policy or theory, or prohibit legislation that the court might see as unreasonable. At para 71: "Properly restrained judicial constitutional review accepts the primary law-making responsibility of legislatures by acknowledging the wide ambit of legislative choices available to elected officials".

these issues and judicial policy regarding treatment of offenders with mental disabilities,<sup>385</sup> I believe a legislated requirement will be more effective.

I pause here to reiterate what I noted in the **Introduction**: for the proposed changes to the sentencing regime to function and have a real impact on the way in which offenders with mental disabilities are treated in the criminal justice system, a significant increase in funding to and availability of mental health resources, facilities and community treatment programs is necessary. The revisions to the *Criminal Code* proposed below are premised on a notion that, to be effective, mental healthcare and other community resources to assist individuals with mental disabilities in addressing the socioeconomic factors that contribute to criminality will need to be made more readily available. It is beyond the scope of this Thesis to outline the exact mechanisms by which these proposals may be given effect across the country. Rather, my goal is to set out potential *Criminal Code* revisions that would necessitate a greater attention to, and investment in, mental health resources by the federal and provincial governments.

## 4.2 “Mental Disability” for the Purposes of Sentencing

As noted in the **Introduction**, I have been using the term “mental disability” throughout this Thesis to refer to a broad range of mental health issues. In later sections, I will propose legislative amendments that, if implemented, I believe would result in reducing the number of offenders with mental disabilities in federal and provincial prisons. A necessary component of both of these amendments will be the presence of mental disability in the offender.

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<sup>385</sup> In Canada, the National Judicial Institute provides judicial education and resources to judges across the country. See National Judicial Institute, “Judicial Education in Canada”, *National Judicial Institute* (website), online: <<https://nji-inm.ca/nji/inm/progs-res/resources-resources.cfm?lang=en&>>.

The *Criminal Code* does not specifically refer to the concept of mental disability. The NCRMD provisions refer to “mental disorder”, which, as explained above, is defined in section 1 of the *Criminal Code* as being a “disease of the mind”.<sup>386</sup> While the term “mental disorder” for the purpose of NCRMD provisions has been interpreted broadly by the courts as “any illness, disorder or abnormal condition which impairs the human mind and its functioning...”<sup>387</sup> the NCRMD provisions are intended to address a distinct set of issues, as discussed in **Section 2.5**, and do not take into consideration the systemic inequality experienced by persons with mental disabilities. Indeed, while “mental disorder” has been described by the SCC as “flexible enough to apply to any mental condition that, according to medical science in its current or future state, is indicative of a disorder that impairs the human mind or its functioning”,<sup>388</sup> the categorization of a mental health issues as a “mental disorder” must be “compatible with the policy considerations that underlie the defence provided for in s. 16 *Cr. C.*”<sup>389</sup>

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<sup>386</sup> The concept of “mental disorder” is relevant for those *Criminal Code*, *supra* note 2, provisions dealing with fitness to stand trial (s 672.22) and findings of NCRMD (s 16; Part XX.1).

<sup>387</sup> *Cooper*, *supra* note 175 at 1159. Justice Dickson, writing for the Majority in that case, considered previous appellate-level jurisprudence and held that there was no need to give this definition a narrow or limited interpretation, and that personality disorders could fall within this category (at 1155-1158. See also *R v Simpson* (1977), 35 CCC (2d) 337 (ONCA), 16 OR (2d) 129 at p 349-350; *R v Rabey* (1977), 17 OR (2d) 1 (CA), 79 DLR (3d) 414 [*Rabey*].

<sup>388</sup> *Bouchard-Lebrun*, *supra* note 120 at para 60.

<sup>389</sup> *Ibid* at para 60.

Given the distinct policy considerations of the NCRMD provisions as compared to the sentencing provisions I will propose below, which have a much greater focus on discrimination and equality considerations, I believe a distinct definition for the purposes of sentencing is appropriate. I propose the following:

#### Definitions

**716.** In this Part,

...

“mental disability” includes intellectual disabilities, developmental disorders, neurological disorders, dementia, mental illnesses, brain injuries, or any other condition or combination of conditions of some permanence that impair an individual’s mental functioning.<sup>390</sup>

Like the NCRMD definition, the definition proposed above is broad and is not tied to any specific psychiatric diagnosis or diagnoses under an external classification scheme, such as the DSM-5. Mental disability for the purpose of sentencing, like the definition of “mental disorder” under the NCRMD provisions, should be understood as “a legal and not a medical concept, the purpose of which is normative, not diagnostic”.<sup>391</sup> While a recognized and diagnosed mental illness will be present in many cases, other conditions such as the presence of a brain injury or intellectual disability similarly meet the broad definition of “mental disability”, and would be sufficient to allow the person to potentially benefit from the proposed sentencing provisions.

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<sup>390</sup> This definition is adapted from the Australian *Crimes Act 1900* (NSW) s 25A(10), which allows for exemptions from certain mandatory minimums based on the presence of a cognitive impairment.

<sup>391</sup> *R v Leudecke*, 2008 ONCA 716 at para 60, 93 OR (3d) 89. See also: *R v Parks*, [1992] 2 SCR 871 at 898-899, 95 DLR (4th) 27 [*Parks*] relying on the reasons of Justice Martin in *Rabey*, *supra* note 387.



What types of disabilities and/or impairments will fall within the broad category of “mental disability” outlined above will ultimately need to be determined by courts interpreting the legislation on a case-by-case basis. The determination that an offender has a mental disability pursuant to the proposed section 716 definition will not occur in a vacuum, but rather will be made to give effect to the provisions I will detail below. These provisions outline the need to consider the particular circumstances of offenders with mental disabilities, and to consider sentencing alternatives for offenders with mental disabilities in a wider variety of cases than are currently available. Therefore, any determination an offender has a mental disability should be made with these objectives in mind, and take into account factors including the systemic barriers faced by individuals with mental disabilities and other, less obvious, impacts of mental disability.

There will, of course, be certain circumstances where an offender’s mental disability will not be relevant to the determination of a fit sentence. Take, for example, an individual with dyslexia who commits an assault. While dyslexia meets the broad definition above of “mental disability”, if an offender with dyslexia commits an offence that has nothing whatsoever to do with any of the cognitive impacts of the disability (generally difficulties in reading, writing, and oral language),<sup>392</sup> and her disability has not been associated with socioeconomic barriers related to criminality, its presence should have no impact on her sentence. However, rather than excluding such an offender from the proposed provisions automatically as a result of a narrow definition of mental disability, judges will still be required to turn their minds to the impact of that mental disability in determining whether the offender should benefit from the provisions proposed

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<sup>392</sup> International Dyslexia Association Ontario Branch, “What is Dyslexia”, *ONBICA* (website), online: <<http://idaontario.com/About-Us/What-is-Dyslexia.html>>.

below. If a judge determines a mental disability is completely unrelated to the commission of the offence, as would likely be the determination in the example outlined above, she may state this in her reasons and will not be required to give the disability any further consideration in crafting an appropriate sentence, and the amendments detailed below in **Sections 4.4 & 4.5** will not apply.

#### **4.2.1 Pre-Sentence Reports**

In order for a judge to properly consider the issue of whether an offender has a mental disability, and what impact, if any, this disability should have on her sentence, she will need to have before her information about that offender's experience with disability. The definition proposed above is broad, and the presence of a mental disability will need to be determined on a case-by-case basis by the sentencing judge. In some cases, such as where a psychiatric diagnosis of Bipolar Disorder or FASD is present, a judge should not have difficulty determining the proposed definition has been met. In other cases, however, the determination may be less clear-cut, such as where an individual suffers from a personality disorder. Whether such a person could benefit from the sentencing provisions proposed below due to having a "mental disability" would be a legal question for determination on the facts of the case.<sup>393</sup>

An expert psychiatric report may appear to be an ideal way for a judge to access this information. However, psychiatric assessments alone may not present a fulsome account of the offender's

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<sup>393</sup> See note 12 *supra* for a discussion of the controversies surrounding whether personality disorders can be properly considered to be mental illnesses. Clearly practical issues arise from the inclusion of personality disorders such as antisocial personality disorder in definitions of mental disabilities that can act as mitigating factors at sentencing, given that this disorder is highly prevalent among offender populations (See Kober & Lau, *supra* note 12 at 681; Joel Paris, *The Intelligent Clinician's Guide to the DSM-V* (New York: Oxford University Press, 2013 at 164; Laurence Miller, *Criminal Psychology – Nature, Nurture, Culture* (Springfield, IL: Charles C Thomas, 2012) at 255), and antisocial personality disorder is commonly relied on as an aggravating factor in long-term and dangerous offender designations, given its resistance to treatment and correlation with violent and impulsive behaviour.

experience with disability, and a diagnosis of a condition by an expert should not be determinative of how that offender should be treated at sentencing. The model proposed below is based on the recognition that mental disability has impacts on an offender's life beyond specific symptoms and direct behavioural manifestations of the disability. Further, psychiatry is not an exact science, and while neuroimaging and other techniques are improving constantly and of great assistance in demonstrating the physical evidence of how a diagnosed mental disability may impact a person's functioning,<sup>394</sup> at the present time there is still a great deal of room for subjectivity in many psychiatric diagnoses, and experts may provide differing or even conflicting descriptions or diagnoses for the same offender.<sup>395</sup>

Given the potential for contrasting or conflicting opinions, the presence or absence of a specific psychiatric diagnosis should not be a determining factor in considering whether a legally-defined "mental disability" should have an impact on sentence. Further, recognizing certain mental disabilities as exculpatory and not others will in many cases be an impossible distinction given the high rates of comorbidity between mental disabilities.<sup>396</sup> The high likelihood of an offender

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<sup>394</sup> See e.g. Blair, *supra* note 120; Sarah Gregory et al, "The Antisocial Brain: Psychopathy Matters" (2012) 69:9 Arch Gen Psychiatry 962; Emily R Murphy, "Paved with Good Intentions: Sentencing Alternatives from Neuroscience and the Policy of Problem-Solving Courts" (2013) 37 Law & Psychol Rev 88; Stephanie R Penney, Andrew Morgan & Alexander IF Simpson, "Motivational Influences in Persons Found Not Criminally Responsible on Account of Mental Disorder: A Review of Legislation and Research" (2013) 31 Behav Sci & L 494.

<sup>395</sup> See e.g. *R v Frank*, 2012 NSPC 5, 312 NSR (2d) 328, aff'd 2013 NSCA 148, NSJ No 681 (QL), in which a pre-sentence report indicated the offender had a serious mental health problem, however psychological tests carried out "did not immediately suggest the existence of a psychotic condition" and the assessing psychiatrist concluded the offender's borderline delusional ideas were "most appropriately attributed to personality issues" (para 19). Another psychiatrist found the offender's accounts of the criminal incidents *were* indicative of mental disorder, but the offender's behaviour in denying the offences, externalizing responsibility and crafting other explanations was remarkable and unique in her professional experience (para 21). See also: *Parks*, *supra* note 391 at para 45; *Cooper*, *supra* note 175 at 1154.

<sup>396</sup> Laura Burdon & Geoff Dickens, "Asperger Syndrome and Offending Behaviour" (2009) 12:9 Learning Disability Practice 14 at 17-18; Petra Jonas Vidovic, "Neuro-Cognitive Impairments and the Criminal Justice System: A Case Analysis of the Impact of Diagnoses of FASD and ADHD on the Sentencing of Offenders in the

having multiple disabilities, in addition to exacerbating issues such as addiction issues, would make it difficult, if not impossible, to attribute an individual's potential for criminal behaviour to any specific diagnosis. A broad definition of mental disability allows judges to consider how multiple conditions may have worked together to impact the offender's life or impair her functioning in a relevant way, rather than focusing on the impact of each diagnosis in isolation.

Judges will have the ultimate say in whether a condition is to be considered a “mental disability” for the purposes of sentencing, taking into account expert evidence, evidence about the individual offender's circumstances, and policy considerations.<sup>397</sup> Therefore, an independent report that details both medical evidence and the circumstances of the offender's day-to-day experience of mental disability would be most helpful for judges in crafting appropriate sentences for this category of offenders.

The effective implementation of the sentencing provisions proposed below will in many cases require the preparation of a pre-sentence report [PSR] with a particular focus on the offender's mental disability (or disabilities) and its impact on her everyday life. Currently, PSRs are prepared by probation officers at the request of a judge following a conviction. PSRs contain life history information about offenders and occasionally about victims,<sup>398</sup> and judges use information and recommendations from PSRs to determine the suitability of community

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Courts of Three Canadian Provinces” (PhD Thesis)(Burnaby, BC: Simon Fraser University, 2012) at 20-22, 46-50; Kiehl & Hoffman, *supra* note 233 at 367.

<sup>397</sup> This is similar to the approach taken in determining whether a relevant mental disorder exists for the purpose of a finding of NCRMD. In those circumstances judges are not bound by medical evidence, given that medical experts generally do not take account of the policy analysis required by s 16 of the *Criminal Code*, *supra* note 2, and the unique NCRMD regime (*Bouchard-Lebrun*, *supra* note 120 at paras 62, 75).

<sup>398</sup> Kelly Hannah-Moffat & Paula Maurutto, “Re-contextualizing Pre-Sentence Reports: Risk and Race” (2010) 12 Punishment & Society 262 at 266.

supervision and develop conditions for supervision.<sup>399</sup> There is a high concordance rate between recommendations by probation officers and sentences imposed by judges, and PSRs play a central interpretive role in sentencing and among criminal justice professionals.<sup>400</sup>

The potential of PSRs to assist judges in sentencing offenders with mental disabilities was recently recognized in *Buck*.<sup>401</sup> In that decision, the Court noted that at the time of the sentencing hearing the offender had been involved with professionals who could assist him in managing his mental illness and get him off the streets, involvement which terminated when the offender was incarcerated. The Court held that in these particular circumstances:

...(T)he sentencing judge should have ordered a pre-sentence report to address the impact of Mr. Buck's mental illness on his offending and to identify what resources might be available to manage his illness in the community and prevent him from reoffending. Such a report could have included input from his psychiatrist, as well as community and familial supports, and would have been of assistance in crafting a meaningful sentence directed at protecting the public and rehabilitating Mr. Buck.<sup>402</sup>

Indeed, PSRs that incorporate information from psychiatrists, mental health and social assistance professionals, family and friends of the offender, and other individuals with an understanding of the offender's mental health concerns, would be invaluable tools for judges to utilize in sentencing offenders with mental disabilities. Such reports could in many ways mirror Gladue

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<sup>399</sup> Hannah-Moffat & Maurutto, *supra* note 398 at 266.

<sup>400</sup> *Ibid* at 264.

<sup>401</sup> *Buck*, *supra* note 92.

<sup>402</sup> *Ibid* at para 18.

Reports, which are currently utilized in cases where judges must determine a fit sentence for aboriginal offenders. Gladue Reports arose out of the SCC's decision in *Gladue*,<sup>403</sup> in which it was recognized that the particular circumstances of aboriginal offenders must to be taken into account in each and every sentencing decision involving an aboriginal offender. Gladue Reports have been characterized as “court-mandated reports that provide comprehensive information about an Aboriginal offender’s background and his or her community, and present options for sentencing or bail that offer realistic and viable alternatives to prison”.<sup>404</sup> The primary focus of Gladue Reports is to “explore how racial histories and wider systemic factors impact the offence history and current circumstances of an Aboriginal accused”.<sup>405</sup> Further, and relevant for our purposes, Gladue Reports are written with a particular non-custodial emphasis, and as such are intended to provide the courts information about relevant alternatives to incarceration.<sup>406</sup>

Specialized PSRs for offenders with mental disabilities should contain information both on how the mental disability may have directly led to the particular crime for which the offender is being sentenced, as well as how disability has impacted her life and ability to avoid criminality more generally. Further, these reports should outline an offender’s prospects for treatment and/or rehabilitation, the opportunities for community-based treatments and services available to the offender, and her ability to cope with incarceration given her mental disability.

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<sup>403</sup> *Gladue*, *supra* note 167.

<sup>404</sup> Legal Services Society of BC, *Gladue Report Disbursement: Final Evaluation Report* (Vancouver: LSS, 2013), covering letter to report.

<sup>405</sup> Hannah-Moffat & Maurutto, *supra* note 398 at 281, footnote 3.

<sup>406</sup> *Ibid* at 274.

With respect to how an offender's disability played a role in a particular crime, any evidence contained in a PSR (from a psychiatrist or other mental health professional) on this point should not focus on whether the mental disability actually caused the offending behaviour. Instead, assessing psychologists or psychiatrists should strive to articulate the extent to which the offender's mental disability may have contributed to her vulnerability to act a certain way. Such an analysis would "leave open the possibility that the offender *could* have acted differently, while nevertheless acknowledging a reduced degree of blameworthiness based on the offender's mental impairment".<sup>407</sup> This type of focus, rather than an attempt to establish a causal connection between mental disability and criminal behaviour, recognizes that individuals have the choice to act or avoid acting in a criminal manner, but that restrictions on the ability to exercise this choice may exist in varying degrees.<sup>408</sup> I follow the suggestion by Morse that the legal focus when determining what role a mental disability played in the commission of an offence needs to be on an offender's lack of capacity for rationality in context, and not whether the disability played a causal role *simpliciter* in the commission of the crime.<sup>409</sup>

An expert opinion that an offender's mental disability contributed to her vulnerability to engaging in criminal activity would not warrant absolving an offender of responsibility for her actions, but should indicate the offender has reduced her moral blameworthiness for her actions.

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<sup>407</sup> Verdun-Jones & Butler, *supra* note 28 at 505. The authors note the serious difficulties that requiring a causal connection to be established between a disorder and an offence may cause, particularly because the majority of neurocognitively impaired offenders present with co-occurring diagnoses and multiple problems.

<sup>408</sup> Given our current understanding of the human mind and the values protected by criminal sentencing, any theoretical account of responsibility for one's criminal actions must recognize the existence of such choice. Recognition of this ability as being inherent in all individuals is necessary for our current understanding of responsibility at criminal law, regardless of whether this is in fact reflective of some greater absolute truth of human behaviour. As noted by Blair, *supra* note 120, determining whether a person at the time of committing an offence acted according to her "free will" or merely as a result of a confluence of brain chemistry, upbringing, etc., is currently "philosophically and empirically impervious" (at 328).

<sup>409</sup> Morse, *supra* note 125 at 297-298.

In *AWS*, the Court found that in cases where mental illness “simply provides an explanation as to why the accused was more vulnerable than others to commit the offence”, rather than effectively compelling the accused to engage in criminal activity, an offender will not be completely absolved of criminal accountability but her degree of responsibility will be reduced.<sup>410</sup>

This focus on an individual’s mental disability reducing her lack of capacity for rationality in context should allow judges to take into consideration the subtler, but nonetheless significant, impacts of mental illnesses and disabilities on offenders’ criminal behaviour. By way of example, imagine an individual with PTSD who, in response to a relatively minor verbal threat in an argument, commits an assault on an acquaintance. This offender functions well in his daily life, holding down a job and maintaining a number of close relationships. At first glance, the individual’s general capacity for rationality and high level of intellectual functioning may make it appear that he should be sentenced in the same manner as any other offender. However, a specialized pre-sentence report that includes expert evidence regarding the nature of PTSD would allow a judge to consider the fact that PTSD increases one’s risk for reactive aggression (i.e. aggression in response to a frustrating or threatening event),<sup>411</sup> even where an individual suffering from PTSD may not demonstrate cognitive impairments related to decision-making generally. On that basis, given that the offence is one that involved reactive aggression, the judge

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<sup>410</sup> *AWS*, *supra* note 282 at para 39.

<sup>411</sup> Blair, *supra* note 120 at 325. This response may relate to the fact that the prior trauma experienced by these individuals has elevated their basic response to threats by changing the baseline responsiveness of the basic neural and neuro-chemical threat systems.



should find that the offender's PTSD reduces his moral blameworthiness for the purposes of sentencing.<sup>412</sup>

What impact an offender's mental disability had or may have had on her thinking at the time of commission of the crime is just one aspect of the information relevant to sentencing that I believe should be contained in the specialized PSRs. The additional focus, more in line with the purposes of Gladue Reports, must be on the impacts the mental disability has had on an individual's life as a whole, including recognition of the systemic barriers faced by individuals with mental disabilities and historical discrimination against this group. These reports, like Gladue Reports, should allow judges to gain a multi-dimensional understanding of the offender's life and history to allow them to understand the complexities of the circumstances that may have contributed to offender's behaviour, and will have bearing on both an assessment of blameworthiness and potential treatment options.<sup>413</sup>

A good example of the type of information that should properly be contained in a PSR for an individual with a mental disability can be found in the *Charlie* 2012, referred to earlier in this Thesis. At sentencing, Chief Justice Lilles had before him a Gladue Report, a comprehensive

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<sup>412</sup> Currently, PTSD is generally not considered by judges to be as serious as "severe mental disorders", and is not usually treated as a mitigating factor. Rather, sentencing principles of denunciation and specific and general deterrence are commonly emphasized in sentencing cases involving offenders with PTSD. For further discussion see: Verdun-Jones & Butler, *supra* note 28 at 500-502; Howard, *supra* note 110.

<sup>413</sup> See Legal Services Society of BC, *supra* note 404 at 39-40. Respondents noted that the main benefit of Gladue Reports over PSRs was the additional information writers could offer about resources in rural and remote communities that made it possible for the courts to develop individualized sentences tailored to the needs of each person. Psychiatrists and other report writers can also comment on how realistic and reasonable conditions and sentencing options are for a particular offender given both their mental health issues and the individual circumstances of their lifestyle.

FASD evaluation, and a current PSR in relation to the offender.<sup>414</sup> The Gladue Report contained information about Charlie's parents' experience with the residential school system, which had a profoundly traumatic impact on each of them. This trauma was passed down to their children in a number of ways, including directly causing the alcohol abuse that resulted in Charlie's FASD. The FASD evaluation described the specific ways FASD impacted Charlie's life. These included severe behavioural and learning impacts (including a low IQ and illiteracy), frustration when Charlie was unable to understand certain situations, and a vulnerability to victimization and bullying by others, including through being convinced to engage in criminal activity. The FASD evaluation outlined Charlie's serious problems with substance abuse and the need for treatment of those issues for there to be any hope that he could avoid criminal activity, as well as the need for a structured and supervised treatment program on his release from prison.<sup>415</sup>

It is not clear from the written reasons in *Charlie* 2012 what information was contained in the PSR. However, the combined information from the Gladue Report and medical assessment allowed the sentencing judge to gain a clear understanding of Charlie's circumstances related to his disability and his aboriginal heritage, and take these factors into account in sentencing him to an effective total sentence of two years and nine months incarceration (having already served 27 months of pre-trial custody calculated at a rate of 1.5), and stating his expectation that a transition plan would be put in place for Charlie at the end of that sentence.

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<sup>414</sup> *Charlie* 2012, *supra* note 143 at para 5.

<sup>415</sup> *Ibid* at para 13.

It is beyond the scope of this Thesis to detail the exact form a specialized PSR for offenders with mental disabilities should take. Ideally, they would incorporate elements of Gladue Reports and psychiatric assessments. There are some difficulties with the current PSR process that may limit their effectiveness as tools for judges to make determinations regarding an offender's mental disability and its impact on sentence. First, given that PSRs are currently prepared by probation officers, these officers' workloads and training may make it difficult to adequately or accurately canvass information about an offender's mental disabilities and relay that information in a meaningful way.<sup>416</sup> Further, the limited data available indicates PSRs are provided in a relatively small number of cases.<sup>417</sup> Given the number of offenders who deal with mental disabilities, it is not clear whether there is capacity for a greatly expanded use of PSRs for this category of offenders. Finally, in recent years, there has been an increased focus on risk through standardized actuarial risk assessment in PSRs in many Canadian jurisdictions.<sup>418</sup> Hannah-Moffat and Maurutto have considered this increased focus on risk in PSRs and the utility of these reports in the context of aboriginal offenders. The authors note that the risk-based focus of PSRs "provides a decontextualized and limited understanding of the impact of racial histories on offending, sentencing, and treatment options", all of which are to be taken into account on sentencing aboriginal offenders.<sup>419</sup> While the concerns relevant for offenders with mental disabilities are distinct from those that must be considered for aboriginal offenders, I believe similar concerns

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<sup>416</sup> See Legal Services Society of BC, *supra* note 404 at 36-37. The authors record a judge's observation that probation officers may not have the time and skill set necessary for preparing the type of information contained in a Gladue Report. Other individuals properly trained in the purposes of a pre-sentence report for offenders with mental disabilities would likely be in a better position and have access to better resources to provide the court with adequate information for the judge to properly take into account the unique sentencing principles for offenders with mental disabilities.

<sup>417</sup> See Hannah-Moffat & Maurutto, *supra* note 398 at 266.

<sup>418</sup> *Ibid.* The authors rely on data from Ontario that indicated in 2006-2007 PSRs were completed in approximately 10% of cases in adult criminal court.

<sup>419</sup> *Ibid* at 264.

about the use of PSRs in their current form for this category of offenders apply. Regardless of the statistical reliability of risk assessments, even those that factor in offenders' mental disabilities, they have the potential to over-emphasize offender risk and isolate this from the unique position offenders with mental disabilities should hold in the criminal law. Hannah-Moffat and Maurutto argue that PSRs in their current form reflect a shift from rehabilitation to risk of re-offending and risk-informed rehabilitation.<sup>420</sup>

Regardless of what form the information ultimately takes, be it a comprehensive and expanded PSR, or some form of Gladue-like report specific to offenders with mental disabilities, there needs to be a streamlined way for judges to receive the necessary medical, social, and rehabilitative information necessary to determine how an offender's mental disability has impacted her life and contributed to her criminality, as well as determining the most appropriate disposition for each individual offender.

### **4.3 Requirement Judges Consider All Available Alternatives**

#### **4.3.1 Introduction**

Above I have set out a definition of mental disability that will enable a broad spectrum of individuals with mental health issues to potentially benefit from the provisions I propose below. The purpose these proposed revisions is to ensure that offenders' relevant mental disabilities are given serious consideration at sentencing in every case, and that judges have real options available to them with respect to alternatives to periods of incarceration for these offenders.

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<sup>420</sup> *Ibid* at 272. The authors note that risk-informed rehabilitation does not take into account non-criminogenic factors including an offender's physical and emotional health, as these are considered difficult to target in treatment.

The revisions to the *Criminal Code* proposed below are premised on the assumption that in many cases an offender's mental disability will reduce her moral blameworthiness for her actions, sometimes in ways that may not be immediately apparent. I reiterate again, however, that offenders with mental disabilities, other than those who can satisfy the strict criteria necessary for a finding of NCRMD, should still be viewed as having some criminal responsibility and accountability for their actions. A limited analogy can be made to young offenders, whom the criminal justice system treats as “decidedly but differently accountable” for their criminal actions.<sup>421</sup> The sentencing provisions proposed below are aimed at ensuring the direct and systemic impacts of mental disability are reflected at sentencing, as required pursuant to the principles of sentence individualization and proportionality, not to excuse all offenders with mental disabilities from responsibility for their actions.

I also note again that changes to the current sentencing regime alone will remedy the problem of the criminalization of mental illness, nor the high proportion of offenders with mental disabilities in the criminal justice system.<sup>422</sup> Rather, changes to the sentencing regime are useful in that sentencing judges have the power to influence the treatment of these offenders in the justice system, and determine most directly whether an offender will go to jail or whether alternative

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<sup>421</sup> *R v DB*, 2008 SCC 25, 2 SCR 3 at para 1. Of course, the way in which offenders with mental disabilities are differently accountable and the sentencing objectives to be considered with them are distinct from those considered when sentencing youth.

<sup>422</sup> As outlined in the **Introduction**, intervention and change in a wide variety of areas will be required for the trend of incarceration of offenders with mental disorders to cease.

sentencing options are most appropriate in a given case.<sup>423</sup> In *Ipeelee*,<sup>424</sup> the SCC found that sentencing judges could assist in reducing crime rates by imposing sentences that effectively deter criminality and rehabilitate offenders; to the extent current sentencing provisions do not further these objectives, they must be changed.<sup>425</sup>

Prison sentences are not effectively deterring criminality and rehabilitating offenders with mental disabilities, as we have seen above.<sup>426</sup> Given that the current practice of sentencing offenders with mental disabilities to terms of incarceration does not assist in their rehabilitation and in general will worsen their circumstances,<sup>427</sup> that practice needs to change.

#### **4.3.2 Subsection 718.2(e)**

Section 718.2 of the *Criminal Code* came into force in September 1996 as part of the Bill C-41 sentencing revisions.<sup>428</sup> A number of the provisions included under Bill C-41 have already been discussed in previous sections, including the various legislated sentencing objectives (subsections 718(a)-(f)) and the fundamental principle of sentencing: proportionality (section 718.1). The wording of subsection 718.2(e) has remained unchanged since it was enacted: “all

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<sup>423</sup> See *Gladue*, *supra* note 167 at para 65. There, the SCC was considering how sentencing amendments could provide a partial solution to the issue of over-incarceration of aboriginal offenders, which is also problem with many complex contributing factors.

<sup>424</sup> *Ipeelee*, *supra* note 167.

<sup>425</sup> *Ibid* at para 66.

<sup>426</sup> Deterrence has been recognized as not being a valid sentencing objective in the case of many offenders with mental disabilities (See *Ramsay*, *supra* note 130; *Robinson*, *supra* note 130; *Manitowabi*, *supra* note 130). Further, rehabilitation for offenders with mental disabilities will often involve treatment and reintegration into society, goals that are not currently being achieved by imposing prison sentences on these individuals (*Ellis*, *supra* note 236; *Batisse*, *supra* note 129; *Edmunds*, *supra* note 129).

<sup>427</sup> See **Section 2.3**; *Schneider*, *supra* note 87 at 705.

<sup>428</sup> In *Proulx*, *supra* note 230, the SCC noted that by passing this legislation “Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison” (para 1). In *Gladue*, *supra* note 167, the revisions were described as the “first codification and significant reform of sentencing principles in the history of Canadian criminal law” (para 39).

available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”

Much has been written on subsection 718.2(e),<sup>429</sup> and my intent is not to give a detailed interpretative history of this provision. Rather, I will look at how judges in this country have interpreted Parliament’s signalling the need for courts to pay “particular attention” to the circumstances of aboriginal offenders, and consider the utility of similarly singling-out offenders with relevant mental disabilities as worthy of particular consideration.

### 4.3.3 Why Specific Wording is Necessary

Subsection 718.2(e) is already applicable to offenders with mental disabilities, in that all available sanctions other than imprisonment are explicitly to be considered “for all offenders”. The SCC has held that subsection 718.2(e) applies to all offenders, as “imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender”.<sup>430</sup> Indeed, in a number of the decisions I reviewed for the purpose of **Chapter 3**, judges made reference to subsection 718.2(e) when sentencing non-aboriginal offenders who suffered from mental disabilities.<sup>431</sup> However, as

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<sup>429</sup> See e.g. Renee Pelletier, “The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons” (2001) 39:2-3 Osgoode Hall LJ 469; Isobel M Findlay, “Discourse, Difference and Confining Circumstances: The Case of *R v Gladue* and the ‘Proper Interpretation and Application’ of s 718.2(e) of the *Criminal Code*” (2001) 10:2 Griffith L Rev 225.

<sup>430</sup> *Gladue*, *supra* 167 note at para 36.

<sup>431</sup> See e.g. *Bagnulo*, *supra* note 319; *Collier*, *supra* note 27; *Cross*, *supra* note 292; *Dickson*, *supra* note 255; *Durnford*, *supra* note 289; *Fayemi*, *supra* note 26; *FJN*, *supra* note 25; *Lemoine*, *supra* note 284; *Lundrigan*, *supra* note 227; *Patey*, *supra* note 290; *Sheppard*, *supra* note 331; *Strickland-Murphy*, *supra* note 250; *R v Taylor* (2012), 326 Nfld & PEIR 134 (NL Prov Ct), NJ No 251 (QL) [*Taylor*]; *Ye*, *supra* note 25.

detailed in that section, an analysis of those cases did not indicate consistent consideration or treatment of offenders' mental disabilities in sentencing decisions. Further, subsection 718.2(e) was typically mentioned in those cases as a passing reference, usually in conjunction with subsection 718.2(d) and other sentencing provisions, and the particular importance of subsection 718.2(e) was not discussed in any detail.<sup>432</sup>

While I do not argue that judges faced with sentencing offenders with mental disabilities do not actively consider alternatives to incarceration, as they are required to do under subsection 718.2(e), such alternatives are nevertheless not being ordered frequently enough, as demonstrated by the high presence of offenders with mental disabilities in the criminal justice system. It is not clear whether this is due to an insufficient consideration of the impact of mental disabilities at sentencing, a lack of alternatives to incarceration being available, or a combination of both. A provision explicitly imposing a duty on judges to consider offenders' mental disabilities on sentencing would ideally have the result of increased sentence mitigation and expanded use of alternatives to sentencing for these offenders.

While the "particular attention" portion of subsection 718.2(e) was enacted with the unique circumstances of aboriginal offenders in mind, and while those circumstances cannot be wholly analogized to those of any other group of offenders in Canada, I believe much of the rationale articulated by Parliament and the courts for this particular emphasis on aboriginal offenders

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<sup>432</sup> See e.g. *Taylor*, *supra* note 431 at para 19; *Strickland-Murphy*, *supra* note 250 at para 17; *Sheppard*, *supra* note 331 at para 23; *Patey*, *supra* note 290 at paras 18-19; *Lemoine*, *supra* note 284 at para 30; *FJN*, *supra* note 25 at para 26; *Fayemi*, *supra* note 26 at para 19; *Durnford*, *supra* note 289 at para 25; *Cross*, *supra* note 292 at para 19; *Collier*, *supra* note 27 at para 24; *Bagnulo*, *supra* note 319 at para 33. Partial exceptions are *Lundrigan*, *supra* note 227 at paras 18-21 and *Dickson*, *supra* note 255, where the appellate courts criticized the sentencing judges' failure to give real consideration to alternatives to a period of incarceration.



could also inform a decision to enact similar wording pertaining to offenders with mental disabilities. I propose that such an amendment to the *Criminal Code* could take the following form:

**718.2**

...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

(e.1) in considering all available sanctions other than imprisonment, particular attention should be paid to the circumstances of offenders with mental disabilities.

A specific reference to offenders with mental disabilities in a provision similar to subsection 718.2(e) should lead to alternatives to incarceration being considered on a more consistent basis, given the SCC's interpretation of subsection 718.2(e) as it applies to aboriginal offenders. In determining that the phrase "with particular attention to the circumstances of aboriginal offenders" was not just a codification of existing jurisprudence, the SCC noted there also existed sentencing jurisprudence that a court must consider the circumstances of "offenders who are battered spouses, or who are mentally disabled", but that these principles are not specifically referenced in Part XXIII of the *Criminal Code*.<sup>433</sup> If subsection 718.2(e) "were indeed a codification of principles regarding the appropriate method of sentencing different categories of offenders, one would expect to find such references".<sup>434</sup> Rather, the provisions directed that

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<sup>433</sup> *Gladue*, *supra* note 167 at para 44.

<sup>434</sup> *Ibid.* A similar observation was made by Justice L'Heureux-Dubé in her dissenting reasons in *Knoblauch*, *supra* note 310 at paras 106-107, where she noted that while offenders with mental disabilities were "sadly over-

specific and unique consideration must be given to aboriginal offenders. Below I will consider how a provision such as the proposed subsection 718.2(e.1) might be interpreted and applied by the courts, based on how those courts have interpreted subsection 718.2(e) as it relates to aboriginal offenders.<sup>435</sup>

#### **4.3.4 Particular Attention to the Circumstances of offenders with Mental Disabilities**

The SCC first explored what is meant by the phrases “particular attention” and “the circumstances of aboriginal offenders” in *Gladue*.<sup>436</sup> There, the Court held that subsection 718.2(e) directed judges to “undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case”.<sup>437</sup> The Court noted that the Bill C-41 sentencing provisions “changed the range of available penal sanctions in a significant way”, citing the availability of the CSO as altering the sentencing landscape “in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances”.<sup>438</sup> The SCC in *Gladue* noted that through subsection 718.2(e), and other

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represented in the prison population”, there was no similar provision to s 718.2(3) in force with respect to them, and if treatment of these offenders was to be a paramount consideration under the CSO regime, there would have been mention of this in the *Code*, *supra* note 2.

<sup>435</sup> I note here, as I will reiterate later in this paper, that my proposal that offenders with mental disabilities should be given particular consideration at sentencing in a similar manner to aboriginal offenders is not an attempt to equate these two categories. As will be explored below, while both populations are greatly over-represented in Canadian prisons, the reasons for this over-representation are in many ways distinct, as are the types of considerations at sentencing and alternatives to incarceration that should be considered. The model adopted by Parliament with respect to sentencing aboriginal offenders has been given serious consideration by the SCC and resulted in an enunciation of principles and guidelines for sentencing judges. I believe similar legislation of offenders with mental disorders should yield similar recognition.

<sup>436</sup> *Gladue*, *supra* note 167 at para 29.

<sup>437</sup> *Ibid* at para 33.

<sup>438</sup> *Ibid* at para 40. In the subsequent SCC decision in *Proulx*, *supra* note 230, it was confirmed that “imprisonment” in subsection 718.2(e) referred to the way in which the sentence was to be served (i.e. in a prison facility), rather than the nature of the sentence (under which interpretation a conditional sentence could be seen as “imprisonment”) (paras 91-100). See also: *R v Middleton*, 2009 SCC 21 at paras 86-89, 1 SCR 674.

sentencing reforms introduced through Bill C-41, “Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples”.<sup>439</sup>

The Court in *Gladue* noted that the provision left judges no discretion as to whether they would consider the unique situation of aboriginal offenders but “the only discretion concerns the determination of a just and appropriate sentence”.<sup>440</sup> However, consideration of the circumstances of aboriginal offenders pursuant to subsection 718.2(e) does not require an automatic reduction of a sentence or remission of a warranted period of incarceration, but rather requires judges consider certain unique circumstances as part of their task in weighing the multitude of factors which must be taken into account in striving to impose a fit sentence.<sup>441</sup>

Based on this law, the proposed subsection 718.2(e.1) should similarly direct judges to consider in every case the unique systemic barriers faced by individuals with mental disabilities, and give serious thought to sentencing an offender with a mental disability to a period of incarceration. While the form this “particular attention” will take may be the same in respect of both aboriginal and mentally disabled offenders, the unique circumstances faced by both groups are worthy of separate consideration. Indeed, subsection 718.2(e) requires sentencing judges attend to the circumstances of aboriginal offenders “because those circumstances are unique, and different

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<sup>439</sup> *Gladue*, *supra* note 167 at para 77.

<sup>440</sup> *Ibid* at para 82.

<sup>441</sup> *Ibid* at para 88.

from those of non-aboriginal offenders”.<sup>442</sup> In *Gladue* the SCC discussed why aboriginal offenders, as opposed to other groups, were singled out as deserving of special attention in subsection 718.2(e). Below, I will examine the reasons why aboriginal offenders were seen as requiring particular attention on sentencing, and explore the extent to which these reasons could also inform a decision to enact legislation requiring judges pay particular attention to the circumstances of offenders with mental disabilities.

### Over-representation in the Criminal Justice System

Aboriginal offenders’ over-representation in the criminal justice system was a primary reason this group was selected by Parliament for attention in subsection 718.2(e).<sup>443</sup> After reviewing the extent of this problem, the SCC found it could fairly be termed a “crisis” and represented a “sad and pressing social problem”.<sup>444</sup> The SCC noted that subsection 718.2(e)’s singling out of aboriginal offenders was an attempt to redress the problem of over-incarceration of aboriginal offenders and direct judges “to inquire into the causes of the problem and endeavour to remedy it, to the extent that a remedy is possible through the sentencing process”.<sup>445</sup>

As explored above in **Section 2.3**, offenders with mental disabilities are also greatly over-represented in the criminal justice system. This fact has been highlighted in recent years by

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<sup>442</sup> *Ibid* at para 37. The SCC noted that the provision neither requires judges to consider the circumstances of aboriginal offenders just as they would non-aboriginal offenders, nor pay “more” attention to aboriginal offenders, as sentencing judges are not to prefer certain categories of offenders over others.

<sup>443</sup> *Ibid* at para 37, citing Minister of Justice Allan Rock testimony before the House of Commons Standing Committee on Justice and Legal Affairs (Minutes of Proceedings and Evidence, Issue No 62, November 17, 1994, at p 62:15). More recently, the SCC reiterated in *Ipeelee*, *supra* note 167, that the impetus for the specific reference to aboriginal people in s 718.2(e) was their over-representation in the criminal justice system (at para 58).

<sup>444</sup> *Gladue*, *supra* note 167 at para 64.

<sup>445</sup> *Ibid* 64.

academics, policymakers, and judges as an area of serious concern.<sup>446</sup> Further, the CBA has specifically asked Parliament to consider sentencing reforms for offenders with mental illnesses.<sup>447</sup> In my view, an appropriate way to address these concerns is for Parliament to legislate that particular attention be paid to offenders with mental disabilities on sentencing.

In *Ipeelee*, the SCC noted “[j]ust sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.”<sup>448</sup> While there are, of course, a multitude of factors that result in offenders with mental disabilities coming into contact with the criminal justice system, current sentencing policies can be seen as having a discriminatory impact on offenders with mental disabilities. The direct and indirect discrimination experienced by individuals with mental disabilities includes: a lack of funding for mental health programs and treatment; discrimination in the areas of employment and housing that can lead to poverty and increase risk for involvement with the criminal justice system; and differential treatment within this system through longer terms spent in prison and the disproportionately harsh impact of incarceration on this population of offenders.

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<sup>446</sup> See e.g. Roberts & Verdun-Jones, *supra* note 5; Centre for Addiction and Mental Health, *supra* note 8; Canada, “Mental Health and Criminal Justice”, *supra* note 62; *Knoblauch*, *supra* note 310 (Justice L’Heureux Dubé dissent); McLachlin, *supra* note 36.

<sup>447</sup> Canadian Bar Association, “Resolution”, *supra* note 6.

<sup>448</sup> *Ipeelee*, *supra* note 167 at para 68. The SCC further held, at para 75: “*Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process”.

In many ways, the situation faced by offenders with mental disabilities mirrors that faced by aboriginal offenders. Aboriginal offenders also face discrimination in employment, housing, education, and other crucial areas, which decrease their ability to avoid criminal activity.<sup>449</sup>

While of course not completely analogous, given that the circumstances of aboriginal offenders must be understood in the context of colonialism and racism,<sup>450</sup> these two groups offer many parallels that should not be ignored. The courts have highlighted that people with mental disabilities have traditionally been discriminated against,<sup>451</sup> and mental disability is a prohibited ground of discrimination under section 15 of the *Charter*.<sup>452</sup> Government funding decisions that result in a lack of community mental health programming and support will often contribute significantly to the involvement of mentally disabled offenders with the criminal justice system.<sup>453</sup> Further, the prevalence of mental disability in the criminal justice system is much higher than in the general population,<sup>454</sup> and, once sentenced to prison, offenders with mental disabilities fare far worse than those without such disabilities.<sup>455</sup>

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<sup>449</sup> For further reading on these issues see: Manitoba, Public Inquiry into the Administration of Justice and Aboriginal people, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: The Inquiry, 1991); Canada, Royal Commission on Aboriginal Peoples, *Bridging the Culture Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996); Akwasi Owusu-Bempah et al, “Years of Life Lost to Incarceration: Inequities between Aboriginal and Non-Aboriginal Canadians” (2014) 14 *BMC Public Health* 585.

<sup>450</sup> In contrast, in many cases offenders’ mental disabilities will not be readily apparent to law enforcement personnel, or in some cases to offenders themselves, and as such they may not be “sought out” for selective targeting and punishment in the way aboriginal persons are.

<sup>451</sup> *Swain*, *supra* note 39 at para 39. See also McLachlin, *supra* note 36 at 14-15.

<sup>452</sup> Section 15 of the *Charter*, *supra* note 3, sets out that individuals have the right not to be discriminated against based on mental disability.

<sup>453</sup> American Psychiatric Association, “Mental Illness”, *supra* note 23 at 1; Centre for Addiction and Mental Health, *supra* note 8; MacPhail & Verdun-Jones, *supra* note 58 at 6-7.

<sup>454</sup> Stewart, Wilson & Cousineau, *supra* note 57 at 1. In this way, the current criminal justice system has a discriminatory impact on offenders with mental disabilities, regardless of whether they are in fact “targeted” for arrest and imprisonment. See also Braun, *supra* note 90 at 120.

<sup>455</sup> Canada, “OCI Annual Report”, *supra* note 8; Stewart, Wilson & Cousineau, *supra* note 57.

The current approach by the Canadian judicial system of incarcerating individuals with mental disabilities at exceptionally high rates, rather than providing them with opportunities for treatment or rehabilitation, has a discriminatory impact on offenders with mental disabilities and cries out for a legislative response similar to that put in place nearly twenty years ago for aboriginal offenders.

The “unique systemic or background factors”

The SCC in *Gladue* referred to the serious systemic and historical issues contributing to the over-representation of aboriginal people in the criminal justice system.<sup>456</sup> While noting that background factors will be relevant to explaining behaviour for non-aboriginal offenders as well, the SCC found that circumstances for aboriginal offenders differ due to systemic and direct discrimination, the legacy of dislocation, and poor social and economic conditions.<sup>457</sup> The SCC noted that critics who argue that the singling out of aboriginal offenders under subsection 718.2(e) was unfair given that similarly-situated non-aboriginal offenders do not receive the benefit of the provision “ignores the distinct history of Aboriginal peoples in Canada”, in that current levels of aboriginal criminality are “intimately tied to the legacy of colonialism”.<sup>458</sup>

As discussed in the previous section, the situation facing aboriginal offenders in this country, including the systemic issues contributing to their involvement with the criminal justice system, is unique to that of offenders with mental disabilities. However, parallels can be found that

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<sup>456</sup> *Gladue*, *supra* note 167 at para 67. These include years of dislocation and economic development which has translated into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation for many aboriginal peoples.

<sup>457</sup> *Ibid* at para 68.

<sup>458</sup> *Ipeelee*, *supra* note 167 at para 77.

indicate a similar legislative response is necessary for the latter group. An additional recognition of the circumstances of offenders with mental disabilities in the *Criminal Code*'s sentencing provisions should not take away from the importance of subsection 718.2(e) as it applies to aboriginal offenders. Judges should take different approaches to considering the availability of alternatives to incarceration in a unique manner for both groups of offenders, focusing on the particular factors that lead to involvement in the criminal justice system in each case.

The circumstances of aboriginal offenders are to be considered in every sentencing decision, whether or not there is a direct causal link between those circumstances and the offending behaviour,<sup>459</sup> though they will only be considered as mitigating an offender's conduct "to the extent that they shed light on his or her level of moral blameworthiness".<sup>460</sup> The SCC in *Ipeelee* discussed the relationship between aboriginal offenders' unique circumstances and sentence mitigation:

... Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her

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<sup>459</sup> *Ibid* at paras 81-83 where the SCC considered how s 718.2(e) had been applied subsequent to *Gladue*, and noted that some courts had required offenders show a causal connection between the systemic factors and the commission of the offence. The SCC found this to be a mistaken approach, as it displayed an inadequate understanding of the devastating intergenerational effects of collective experiences on aboriginal offenders, it imposed an unintended evidentiary burden, and it would be extremely difficult for an aboriginal offender to establish a direct causal link between her circumstances and offending behaviour. See also *R v Poucette*, 1999 ABCA 305 at para 14, 250 AR 55.

<sup>460</sup> *Ipeelee*, *supra* note 167 at para 73. The SCC went on to note that many aboriginal offenders are in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this will almost never attain a level where one could say their actions were not voluntary and not deserving of criminal sanction, their "constrained circumstances may diminish their moral culpability".



culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.<sup>461</sup>

This approach to considering the unique circumstances of aboriginal offenders on sentencing bears similarity to that I propose for offenders with mental disabilities. While no causal relationship needs to be established between the disability and the offending behaviour (nor, indeed, could such causation be established), the offender's mental disability is to be considered in terms of what impact it has had on the individual offender's life and criminal behaviour, in a broader sense than simply whether it impaired an offender's decision-making in a particular circumstance.

#### Expanding the use of Restorative Justice Principles

In addition to addressing the over-incarceration of aboriginal offenders, Parliament included the wording in subsection 718.2(e) to emphasize initiatives in aboriginal communities to achieve community justice and look to alternatives to prison where it is consistent with protection of the public.<sup>462</sup> The SCC in *Gladue* noted that subsection 718.2(e) codified the principle of restraint in sentencing, and is to be informed by the reorientation towards restorative justice goals in the Bill C-41 revisions to the *Criminal Code*.<sup>463</sup> In *Gladue*, the SCC described "Restorative Justice" as "an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt

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<sup>461</sup> *Ibid* at para 83.

<sup>462</sup> *Gladue*, *supra* note 167 at para 47, citing the testimony of Allan Rock.

<sup>463</sup> *Ibid* at para 43.

should exist”.<sup>464</sup> In *Proulx*,<sup>465</sup> the Court described restorative justice as seeking to remedy “the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and to the community”.<sup>466</sup>

The principle of restraint must be emphasized for offenders with mental disabilities given that they, like aboriginal offenders, are more adversely affected by incarceration than the general prison population, and less likely to be “rehabilitated” thereby.<sup>467</sup> Further, the focus of sentencing offenders with mental disabilities falling short of the requirements for NCRMD is to be on “mechanisms that will promote rehabilitation and treatment”, particularly where lengthy prison terms are viewed as counterproductive.<sup>468</sup> As such, these aspects of restorative justice are a good fit for offenders with mental disabilities as well as aboriginal offenders.

Other aspects of restorative justice, as that concept has been interpreted by the SCC, do not readily lend themselves to sentencing dispositions for some offenders with mental disabilities. Taking responsibility for one’s actions and providing reparations to the community may not be appropriate where an offender’s mental disability severely limited her ability to make a rational choice about committing the offence. Rather, such sentencing decisions should focus on treatment and/or rehabilitation, after which an offender may be able to take responsibility for her

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<sup>464</sup> *Ibid* at para 71.

<sup>465</sup> *Proulx*, *supra* note 230.

<sup>466</sup> *Ibid* at para 18.

<sup>467</sup> *Gladue*, *supra* note 167 at para 68. See also Stewart, Wilson & Cousineau, *supra* note 57 at 28.

<sup>468</sup> *Peters*, *supra* note 227 at para 19.

actions through awareness of her mental disability and its impact on her behaviour in ways she could not have without access to appropriate treatment or rehabilitative programs.

#### **4.3.5 Duties Triggered by Subsection 718.2(e)**

The above revision to section 718.2 would also trigger substantive duties of judges and other participants in the sentencing process in relation to offenders with mental disabilities. As previously noted, subsection 718.2(e) requires sentencing judges to consider the unique situation of aboriginal offenders in every case.<sup>469</sup> The failure to give adequate weight to an offender's aboriginal status in accordance with subsection 718.2(e) and *Gladue* amounts to an error of law.<sup>470</sup> However, subsection 718.2(e) also imposes obligations on the Crown and defence attorney, as the SCC has held that it is expected that counsel on both sides will assist the sentencing judge by adducing relevant evidence on this issue, unless waived by the offender.<sup>471</sup> Where they do not, or the offender is unrepresented, the sentencing judge is required to attempt to acquire such information.<sup>472</sup> The SCC found that bringing such information to the attention of the sentencing judge in a comprehensive and timely manner is helpful to all parties and the information is “indispensable to a judge fulfilling his duties under s. 718.2(e)”.<sup>473</sup> My hope is that the proposed subsection 718.2(e.1), as well as the proposals contained above in **Section 4.2.1** regarding specialized PSRs for offenders with mental disabilities, would have the result of

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<sup>469</sup> *Gladue*, *supra* note 167 at para 82. An exception may be made where a particular offender does not want evidence adduced regarding systemic or background factors contributing to the offence (para 83).

<sup>470</sup> *R v Brizard* (2006), 68 WCB (2d) 556 (ONCA), OJ No 729 (QL).; *R v Kakekagamick* (2006), 81 OR (3d) 664 (CA) at para 31, 211 CCC (3d) 289, leave to appeal to SCC refused, 31826 (22 January 2007) [*Kakekagamick*].

<sup>471</sup> *Gladue*, *supra* note 167 at para 84; *Ipeelee*, *supra* note 167 at para 60. See also: *Kakekagamick*, *supra* note 470 at paras 44-46.

<sup>472</sup> *Gladue*, *supra* note 167 at para 84. See also *Kakekagamick*, *supra* note 470 at paras 44-46.

<sup>473</sup> *Ipeelee*, *supra* note 167 at para 60.

ensuring detailed information regarding the offender's mental disability and its impact on the offender's life and criminal involvement is considered in every sentencing decision.

#### **4.3.6 Issues with the Effectiveness of the Proposed Provisions**

As noted in the **Introduction** and other points in this Thesis, changes to the sentencing provisions of the *Criminal Code* alone will likely do little to stop the trend of over-incarceration of offenders with mental disabilities. Without access to treatment and community resources, many offenders will likely find themselves in conflict with the law again despite shorter periods of incarceration or CSOs.<sup>474</sup> While my hope is that a revision to section 718.2 would go beyond theoretical recognition of the need for sentencing alternatives for offenders with mental disabilities and translate into fewer people with mental disabilities actually being incarcerated, there is no guarantee that this would in fact occur. Indeed, as recently noted by the SCC in *Ipeelee*, subsection 718.2(e) has not had this intended effect with respect to aboriginal offenders.<sup>475</sup> Aboriginal admissions to custody increased in stark contrast to the trend of incarceration of non-aboriginal offenders from 1996-2006.<sup>476</sup> The SCC found that the lack of impact by subsection 718.2(e) could be attributed “to some extent to a fundamental misunderstanding and misapplication” of that provision as interpreted by *Gladue*. To the extent that is the case, the decision in *Ipeelee* may combat this problem as it gives clarification that aboriginal offenders' circumstances are to be considered in each and every sentencing decision, including for serious and violent offences.<sup>477</sup>

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<sup>474</sup> American Psychiatric Association, *supra* note 23; Centre for Addiction and Mental Health, *supra* note 8.

<sup>475</sup> *Ipeelee*, *supra* note 167 at para 62.

<sup>476</sup> *Ibid* at paras 61-62. See also *Gladue*, *supra* note 167 at para 65.

<sup>477</sup> *Ipeelee*, *supra* note 167 at para 84.

It is also noteworthy that subsection 718.2(e) and the subsequent interpretations of this provision by the courts cannot be seen as only having utility to the extent they are related to a quantifiable reduction in incarceration of aboriginal offenders. While this is obviously an important goal of these provisions, and one that judges should be striving to pursue, subsection 718.2(e) also plays an important symbolic function. Its codification as part of Canada's criminal law crystallizes the seriousness of the legacy of colonization and discrimination, and Canadian society's failure to remedy this legacy in any meaningful way. Further it requires judges to carefully and thoughtfully consider the status of aboriginal offenders in every case. While this may not always result in a reduced prison sentence, this requirement of consideration ensures that judges take note of the historical impacts of residential schools and other aspects of the disadvantaged position aboriginal peoples have in this country. This consideration and reasoning has been recorded in numerous sentencing decisions, which form part of the public record, and will hopefully impact future judicial decisions as well as the broader social conversation around the situation of aboriginals in this country. A similar provision dealing with offenders with mental disabilities would similarly recognize their disadvantaged position in Canadian society and the need for a remedy to this situation both within and outside the criminal justice system.

It must also be kept in mind that in order for the proposed subsection 718.2(e.1) to have a concrete impact in terms of reducing the number of mentally disabled offenders in Canadian prisons, judges need to have the ability to craft proportionate sentences that do not necessarily involve incarceration. The proliferation of mandatory minimum sentences and restrictions on CSOs in recent years will have left judges with fewer sentencing options when faced with

aboriginal offenders as they are when faced with offenders with mental disabilities.<sup>478</sup> Below, I will outline a second crucial revision to the sentencing provisions in the *Criminal Code* that would allow judges not only to consider available sentencing alternatives, but also order such alternatives in a greater number of cases.

#### **4.4 Exemption from Mandatory Minimum Sentences**

One way judges can give effect to a requirement that they must consider the particular circumstances of offenders with mental disabilities is by sentencing these offenders to shorter periods of incarceration, or imposing alternatives to prison sentences, where such options represent a disposition proportionate to the seriousness of the offence and the offender's degree of moral blameworthiness. In cases where an offence carries a mandatory minimum sentence, however, no such reduced sentence or sentencing alternative will be available, and a judge must impose a minimum term of imprisonment regardless of the impact a mental disability may have had on an offender's life or criminal behaviour.

The increase in mandatory minimum sentences in recent years has resulted in fewer and fewer ways for judges to take into account the "correctional imperative of sentence individualization" emphasized in *Knott*,<sup>479</sup> or the fundamental principle of proportionality in sentencing. Beyond simply requiring lengthier sentences than would otherwise be imposed for certain offences,

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<sup>478</sup> Canada, "OCI Annual Report", *supra* note 8 notes that between 2003-2013 the incarcerated population has grown by 16.5%. Between March 2010 and March 2013 alone, the federal in-custody population increased by 8.4% (at 22). However, the aboriginal incarcerated population has increased overall by 46.4% (at 3). While restrictions on sentencing options are likely contributing to the growing prison population generally, clearly there additional pressing systemic factors that are resulting in more and more aboriginal offenders behind bars despite the direction in s 718.2(e).

<sup>479</sup> *Knott*, *supra* note 293.

mandatory minimums restrict judges' ability to give serious consideration to non-carceral sentencing alternatives, despite being required to do so under the *Criminal Code*.<sup>480</sup>

As discussed above in **Section 3.4.2**, the only way a person convicted of a crime carrying a mandatory minimum sentence can currently avoid that sentence is through a successful *Charter* challenge. While successful *Charter* challenges will have the effect of striking down any offending legislation, since the SCC decision in *Ferguson* individual exemptions in cases where a mandatory minimum infringes the *Charter* in very limited or specific circumstances are explicitly no longer available.<sup>481</sup> Further, while the use of a “reasonable hypothetical” in theory avoids the necessity of a mandatory minimum actually representing a grossly disproportionate sentence for the offender mounting the *Charter* challenge, exactly what types of characteristics may be ascribed to such an offender is unclear. Importantly for offenders with mental disabilities, “reasonable hypothetical” offenders might not be allowed to possess individual characteristics such as an intellectual impairment.<sup>482</sup> As such, unless this restriction on what constitutes a “reasonable hypothetical” offender expressed in *Nur* is overturned by the SCC, a successful *Charter* challenge on the basis that a sentence is grossly disproportionate due to an offender's mental disability will require an actual offender with a mental disability mounting a successful challenge, as was the case in *Adamo*.

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<sup>480</sup> See *Code*, *supra* note 2 ss. 718.2(d), 718.2(e).

<sup>481</sup> *Ferguson*, *supra* note 357 at paras 49-57. While there is some debate on this point, the SCC concluded that a requirement that any offending mandatory minimum must be struck down in its entirety was less intrusive into the legislative role of Parliament.

<sup>482</sup> Currently, *Nur*, *supra* note 359 indicates that a reasonable hypothetical offender cannot be imbued with personal characteristics such as mental disability (para 142). See also John McIntyre, “*R v Nur*: The Need for the Supreme Court to Clarify *Charter* Standards for Mandatory Minimum Sentences” (2014) 7 CR-ART 132 (Carswell) at 2 – 3.

Given the current state of the law, certain classes of persons, such as those with mental disabilities, may only be exempted from mandatory minimums through legislative revision. Changes to the sentencing provisions in the *Criminal Code* are necessary to ensure that the criminal justice system stops discriminating against offenders with mental disabilities by imposing sentences that are particularly disproportionate for this category of offenders. As noted by the SCC in *Knott*: “[t]he sentencing objectives set out by Parliament in ss. 718 to 718.2 of the *Criminal Code* are best achieved by preserving – not curtailing – a sentencing court’s arsenal of non-custodial sentencing options.”<sup>483</sup> Below, I will propose a legislative exemption to mandatory minimum sentences that would allow individuals with mental disabilities to potentially avoid mandatory prison sentences and receive sentences reflective of their degree of moral blameworthiness, taking into account the broad impacts of mental disability.

#### **4.4.1 The Form of a Potential Exemption**

In a recent survey, Yvon Dandurand canvassed a number of mandatory minimum exemption provisions from various countries including the United States, New Zealand, England, Wales and Australia.<sup>484</sup> He broadly characterized the types of exemptions into nine (often overlapping) categories. Categorizations that could have relevance for offenders with mental disabilities include: exemptions where mitigating circumstances exist; exemptions in “exceptional or compelling circumstances”; exemptions in the interest of justice or to avoid an “unjust” sentence; exemptions to allow for the treatment of the offender; and exemptions as a way of making the

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<sup>483</sup> *Knott*, *supra* note 293 at para 43.

<sup>484</sup> Yvon Dandurand, *Exemptions from Mandatory Minimum Penalties* (Report prepared for the Uniform Law Conference of Canada Working Group on Mandatory Minimum Penalties) (Barrhaven, Ont: ULCC, 2012).



“mandatory” penalty presumptive.<sup>485</sup> In one example of the “mitigating circumstances” category of exemptions, Dandurand referred to section 17 of South Australia’s *Criminal Law (Sentencing Act)* (SA) 1988, which sets out that a minimum penalty may be reduced where a judge is of the opinion that good reason exists having regard to the “physical or mental condition of the defendant” or other criteria.<sup>486</sup> Further in Montana, the *Montana Code (Title 46 – Criminal Procedure)* allows a judge to vary a mandatory minimum where “the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution”.<sup>487</sup>

It appears that these other jurisdictions have considered the potential unfairness of a mandatory minimum being applied to an offender suffering from a mental disability to be sufficiently serious to warrant an exemption from otherwise mandatory sentencing provisions. Indeed, the Law Institute of Victoria in Australia, in response to proposed mandatory minimum sentences, advised the Attorney General that mandatory minimums lead to “harsh and unjust sentences which disproportionately affect youth, indigenous offenders, those with mental illness or intellectual disabilities, and other marginalised groups”.<sup>488</sup>

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<sup>485</sup> Dandurand, *supra* note 484 at 10-11. The other categories of relief from mandatory minimums included: for juveniles; to encourage guilty pleas; to encourage defendants to offer substantial assistance to the prosecution; and after the fact as part of a sentence review process.

<sup>486</sup> *Criminal Law (Sentencing Act)* (SA) 1988, s 17. The other circumstances the court may consider are the character, antecedents, or age of the defendant; the fact that the offence was trifling; or “any other extenuating circumstances”.

<sup>487</sup> *Montana Code*, MCA §46-18-222 (2) (2014).

<sup>488</sup> Victoria, *supra* note 31 at 5.

There is a substantial volume of literature detailing the risks and pitfalls of mandatory sentencing regimes.<sup>489</sup> Some primary criticisms were articulated by the Law Institute of Victoria in 2011, based on evidence that mandatory sentencing does not reduce crime, leads to inconsistent sentencing results (primarily through the creation of disproportionate sentences and judicial responses thereto), is a costly response to crime both socially and economically, and, when educated about mandatory sentencing, public support for it drops.<sup>490</sup> Critics of mandatory minimum sentences, such as the Law Institute of Victoria, would likely argue that where mandatory minimums must exist, exemption schemes should be broad and inclusive to ensure unjust sentences are never imposed. While Canada remains a jurisdiction that views mandatory minimums as necessary to adequately punish and deter specific offences, however, it is my opinion and that of the mandatory minimum working group established by the Uniform Law Conference, which I will discuss below, that there must be ways for judges to avoid imposing these sentences where they would lead to an unjust result, short of the extremely high threshold required for section 12 of the *Charter*, and the extraordinary remedy of striking down the offending provision in its entirety.

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<sup>489</sup> See e.g. *Ibid* at 9-17; Dandurand, *supra* note 484 at 53-54; Athar K Malik, "Mandatory Minimum Sentences: Shackling Judicial Discretion for Justice or Political Expediency" (2008) 53 Crim LQ 236; Stephan Terblanche & Geraldine Mackenzie, "Mandatory Sentences in South Africa: Lessons for Australia?" (2008) 41:3 Aust NZ J Criminol 402 at 410-414.

<sup>490</sup> See Victoria, *supra* note 31.

Regardless of one's ultimate stance on the issue of whether mandatory minimum sentences should exist at all, the exemption that will be set out below is grounded in position the taken by Parliament in recent years that mandatory minimums are necessary to effectively punish and deter certain criminal offences. As noted by Terblanche and Mackenzie:

Mandatory sentencing schemes are at their most 'acceptable' (if this term can indeed be used in this context) when they fit rationally with the rest of the jurisdiction's sentencing scheme and its basic penal philosophy; and when they anticipate potential injustices by allowing for departures in exceptional cases.<sup>491</sup>

In order for a statutory exemption to mandatory minimums to accord with Canada's sentencing regime as it currently exists, the exemption must not be widely available.<sup>492</sup> Indeed, any mandatory minimum exemption in Canada would likely need to operate narrowly to have any hope of being adopted by Parliament, whose mandate in recent years has been expanding the number mandatory minimum sentences, not restricting them.<sup>493</sup>

In 2011, a working group was created by the Uniform Law Conference to examine the question of what types of statutory exemptions to mandatory minimums exist elsewhere, and if any of those models would be effective in Canada.<sup>494</sup> The resulting report, published in 2013, entitled

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<sup>491</sup> Terblanche & Mackenzie, *supra* note 489 at 414.

<sup>492</sup> See Uniform Law Conference of Canada Criminal Section, *supra* note 9; Dandurand, *supra* note 484; both of which note that in jurisdictions with exemptions, mandatory minimums should still apply in the vast majority of cases.

<sup>493</sup> See Bill C-10, *supra* note 295, Part 2, "Sentencing", ss 10-38; Uniform Law Conference of Canada Criminal Section, *supra* note 9 at para 11.

<sup>494</sup> Uniform Law Conference of Canada Criminal Section, *supra* note 9 at para 1. The CBA introduced a resolution seeking the creation of a working group to examine the issue of statutory exemptions to mandatory minimum penalties, which was passed by the Criminal Section of the Uniform Law Conference of Canada with broad support.

“Statutory Exemptions to Mandatory Minimum Penalties: Final Report” [Working Group Report] reviewed the previous work done by Dandurand and noted that Canada was the only jurisdiction examined in his report that did not have a comprehensive statutory exemption provision.<sup>495</sup> A key issue considered in the Working Group Report was the threshold at which an exemption could be triggered in Canada.<sup>496</sup> The Working Group Report noted that a broad and inclusive mandatory minimum exemption would pose a unique problem in Canada, given the Constitutional context, as a widely available exemption would effectively preclude section 12 of the *Charter* striking down mandatory minimums that are “grossly disproportionate” or “so excessive as to outrage the standards of decency”. This would undermine the constitutional role of the courts, and frustrate their ability to provide clear guidance regarding the permissible limits of a mandatory minimum penalty.<sup>497</sup> On this basis, the Working Group Report rejected exemptions that apply in “the interests of justice” or where there are “good reasons for reducing the minimum penalty”.<sup>498</sup>

A broadly applicable exemption would also undermine the role of Parliament in having primary determination of sentencing policy, given that it would take what has been legislated as a mandatory outcome and transform it into a mere presumption.<sup>499</sup> The Working Group Report noted that a legislative exemption, properly drafted, could preserve the authority of Parliament in articulating a sentencing regime through ensuring the minimum applied in the majority of cases,

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<sup>495</sup> *Ibid* at para 5.

<sup>496</sup> *Ibid* at para 15.

<sup>497</sup> *Ibid* at para 16.

<sup>498</sup> *Ibid* at para 16.

<sup>499</sup> *Nur*, *supra* note 359 at para 69.

but allow for exemptions to address exceptional cases.<sup>500</sup> The Working Group Report also noted that if exemptions were crafted not as a constitutional remedy, but rather as an ordinary part of the sentencing process, this would have no impact on the remedial nature of *Charter* remedies, and would not impair the ability of the courts to give clear guidance regarding the constitutional boundaries of a mandatory minimum sentence.<sup>501</sup>

Ultimately, the Working Group Report concluded that the most appropriate model in Canada would be a statutory exemption that required “substantial and compelling circumstances” to depart from the minimum sentence.<sup>502</sup> Dandurand canvassed a number of jurisdictions that allow for exemptions from mandatory minimums in “exceptional circumstances”<sup>503</sup> or “substantial and compelling circumstances”.<sup>504</sup> These types of exemptions are meant to reflect an understanding that courts should apply the mandatory penalties in the vast majority of cases, and deviate from those minimums only in truly exceptional cases.<sup>505</sup> This threshold was found by the Working Group Report to be higher than the usual “demonstrably unfit” threshold required for appellate review of sentence on appeal, but lower than that required for a remedy under section 12 of the *Charter*.<sup>506</sup> As such, the authors argued, this would preserve the traditional roles of sentencing

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<sup>500</sup> Uniform Law Conference of Canada Criminal Section, *supra* note 9 at paras 11-12.

<sup>501</sup> *Ibid* at para 12.

<sup>502</sup> *Ibid* at paras 24-25.

<sup>503</sup> Dandurand, *supra* note 484 at 24-32. Northern Territories, Australia, and the United Kingdom have enacted such exceptions.

<sup>504</sup> See e.g. South Africa’s *Criminal Law Amendment Act*, 1997, (S Afr) n° 105 of 1997 as amended by Criminal Law (Sentencing) Amendment Act, n° 38 of 2007) [*Criminal Law Amendment Act*] ss 51, 53.

<sup>505</sup> Dandurand, *supra* note 484 at 24.

<sup>506</sup> Uniform Law Conference of Canada Criminal Section, *supra* note 9 at para 17.

and appellate courts, while retaining a constitutional remedy to strike down the provision in all cases where this response is necessary.<sup>507</sup>

The Working Group Report proposed a non-exhaustive list of factors to be considered by trial courts to ensure a uniform approach regarding the applicability of the exemption provisions, but noted that no one factor would act as an exclusionary or disqualifying factor.<sup>508</sup> The necessary “substantial and compelling circumstances” to depart from the mandatory minimum could be based on a single striking factor from the list provided, or a constellation of relevant circumstances.<sup>509</sup> One of the factors listed by the Working Group Report was:

Whether the offender’s mental capacity at the time of the commission of the offence was impaired due to a mental illness diagnosed or otherwise identified. This would include a consideration of whether the offender suffers from a brain injury or cognitive deficiency, including but not limited to FASD. It would not include impairment caused by a voluntarily induced state of intoxication due to the consumption of alcohol or other drug.<sup>510</sup>

In many ways this description mirrors the broad definition of mental disability I proposed earlier in this Thesis.

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<sup>507</sup> *Ibid* at para 17. For another opinion on a potentially appropriate sentencing regime see: Morris J Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28:1 Oxford J Legal Stud 57 at 71, where former SCC Justice Fish noted the discrepancy between the increase in mandatory minimums and the fundamental principle of proportionality, and found that presumptive sentences such as those prescribed in England and Wales could potentially meet this concern by maintaining the benefits of mandatory minimum sentences without forsaking the principle of proportionality.

<sup>508</sup> Uniform Law Conference of Canada Criminal Section, *supra* note 9 at paras 23-24.

<sup>509</sup> *Ibid* at para 25.

<sup>510</sup> *Ibid* at para 24.

Ultimately, the model for statutory exemption proposed by the Working Group is the most likely to be adopted in Canada, and can highlight a broad spectrum of mental disabilities as potentially comprising “substantial and compelling” circumstances to justify departure from mandatory minimum sentences. Revisions to the *Criminal Code* based on the Working Group Report model could include the following provisions relevant to offenders with mental disabilities:

### 718.3

...

Exemption from mandatory minimum penalties

(2.1) Where the court finds that substantial and compelling circumstances exist to justify a departure from a minimum punishment in an enactment, that minimum punishment will not apply.

(2.2) In determining whether a case involves substantial and compelling circumstances for the purpose of subsection (2.1), the court may consider any of the following factors:

(a) Whether the offender suffers from a mental disability;

[... additional factors to be determined by Parliament]<sup>511</sup>

(x) Any other factor or constellation of factors that might give rise to “substantial and compelling circumstances” to justify a downward departure from a minimum punishment.

(2.3.) In cases where a minimum punishment does not apply pursuant to subsection (2.1), the punishment to be imposed is in the discretion of the court that convicts a person who commits the offence, subject to the other provisions contained in this Part.

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<sup>511</sup> It is beyond the scope of this paper to articulate additional factors that might constitute the foundation for “substantial and compelling circumstances” justifying a departure from a mandatory minimum sentence. Other factors proposed by the Uniform Law Conference of Canada Criminal Section, *supra* note 9, included: the offender’s age and health; whether the offender has a prior criminal record, and the extent to which the record is related or serious; whether the offence resulted in death or serious bodily injury to any person; whether the offender used violence or threats of violence in connection with the offence; whether a firearm or other dangerous weapon was used in the commission of the offence; and whether the offender played a minor or peripheral role in the offence. This would include a consideration of whether the offence was principally the conduct of another person or persons, e.g., whether the offender was an accomplice (para 24).

Minimum penalty for murder

(2.4) Subsection (2.1) does not apply with respect to the mandatory sentence of imprisonment for life for murder in section (235(2)).<sup>512</sup>

Whether or not the proposed revisions would be effective at reducing rates of incarceration for offenders with relevant mental disabilities depends on the courts' interpretation of what will constitute "substantial and compelling" circumstances. The way the proposed provisions are worded could allow for a broad interpretation, with the presence of a mental disability constituting a "substantial and compelling" circumstance in most cases, a narrow interpretation, in which only those mental disabilities that have had an overwhelming impact on an offender's life and criminal behaviour will be considered "substantial and compelling", or anywhere in between. Ultimately, my hope is that regardless of the breadth of the interpretation adopted by the courts, this provision will lead to fewer offenders with mental disabilities being incarcerated where incarceration is clearly disproportionate to their moral blameworthiness and will not assist in their rehabilitation.

A jurisdiction that has exemption provisions applying the "substantial and compelling" threshold and which has received some academic and judicial attention to this phrase is South Africa. In South Africa, an exception to mandatory sentences is provided where "substantial and

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<sup>512</sup> I have excluded the mandatory minimum sentence for murder from those for which an exemption may be justified. See: Uniform Law Conference of Canada Criminal Section, *supra* note 9 at para 32. The authors of the report were unanimous that mandatory minimum exemptions should not be available for the offence of murder, as those minimums "have a well settled provenance, and are related to the abolition of the death penalty". See also: *R v Luxton*, [1990] 2 SCR 711, 58 CCC (3d) 449, in which the SCC held that first-degree murder is "a crime that carries with it the most serious level of moral blameworthiness" (at 725-725).



compelling circumstances exist which justify the imposition of a lesser sentence”.<sup>513</sup> The prescribed minimums are not to be departed from lightly and should ordinarily be imposed.<sup>514</sup> In determining whether a departure is necessary, the court is to weigh the considerations that would normally be relevant in sentencing with regard to “its sense of unease with the prescribed sentence”.<sup>515</sup> When that unease is such that the judge is convinced that the minimum sentence would amount to an injustice, an alternative sentence is to be imposed.<sup>516</sup> Mackenzie and Terblanche note that this finding requires an exercise of discretion by the judge, and, as with all exercises of judicial discretion, the decision is “heavily influenced by the values and worldview of the presiding officer”.<sup>517</sup> While “substantial and compelling” has been described by the South African courts as a composite test (in that the circumstances must be both substantial *and* compelling), they have specifically decided against further defining the phrase.<sup>518</sup> Some recent appellate-level decisions indicate that factors that may be considered in determining whether “substantial and compelling circumstances” exist are the offender’s young age,<sup>519</sup> time spent in pre-sentence custody,<sup>520</sup> social problems,<sup>521</sup> remorse,<sup>522</sup> and diminished responsibility based on mental disorder.<sup>523</sup>

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<sup>513</sup> *Criminal Law Amendment Act*, *supra* note 500 s 51(3)(a).

<sup>514</sup> *S v Malgas*, [2001] ZASCA 30 at paras 8 & 25.B, 3 All SA 220 (A) [*Malgas*].

<sup>515</sup> Terblanche & Mackenzie, *supra* note 489 at 409.

<sup>516</sup> *Malgas*, *supra* note 514 at para 22. See also *Ibid*.

<sup>517</sup> Terblanche & Mackenzie, *supra* note 489 at 412.

<sup>518</sup> See *Ibid* at 409; *Malgas*, *supra* note 514 at para 19; *S v Kgafela*, [2003] ZASCA 53 at 213-214.

<sup>519</sup> See *S v Nkunkuma & others* (101/13) [2013] ZASCA 122 at 14, 18; *Thinashaka v State* (65/2013) [2013] ZASCA 127 [*Thinashaka*] at para 9.

<sup>520</sup> See *DPP v Gcwala* (295/13) ZASCA 44 (31 March 2014) at paras 16-19, 28.

<sup>521</sup> *Thinashaka*, *supra* note 519 at para 9. In that case “social problems” included a finding in a psychiatric report that the offender had a “maladjusted personality with antisocial traits” (para 7).

<sup>522</sup> *Ibid* at para 9.

<sup>523</sup> *Van der Westhuizen v S* (266/10) [2011] ZASCA 36 at paras 41, 60, 78-79.

While this Thesis is primarily critical of mandatory minimum sentences, it is understandable that those who see utility in mandatory minimum sentences would be concerned by the broad definition of mental disability adopted in this Thesis that could ground an exemption from a mandatory minimum sentence. Indeed, given the high percentage of people involved in the criminal justice system who deal with mental health issues, providing an exemption from mandatory minimums based on mental disability could result in what are intended to be exceptional circumstances becoming the norm. Whether this comes about will, as noted earlier, be dependent on the courts' interpretation of the proposed exemption provisions. However, I note that if the exemption provisions result in judges imposing sentences that are seen as too lenient by Parliament, and the Canadian public, the provisions could be modified to enumerate factors that will not constitute substantial and compelling circumstances, or clarify those aspects of mental disability that are irrelevant for determining whether substantial and compelling circumstances exist.

An exemption from mandatory sentences would be extremely useful to ensure offenders with mental disabilities receive proportionate sentences. In *Adamo*, for example, the judge had to strike down the mandatory minimum provisions in their entirety in order to give appropriate consideration to the offender's multiple mental health issues, the failure of the justice system to appropriately deal with his mental health problems, and the particularly negative impact imprisonment would have on this offender. An exemption provision would have allowed the judge to take all of these factors into account and arrive at a proportionate sentence, without the need to strike down subsection 95(2)(a)(i) of the *Criminal Code* in its entirety. Critics of the current approach to section 12 *Charter* challenges have noted that this mandatory striking-down

of provisions that offend the *Charter* lends uncertainty to the law, and requires Parliament to re-draft legislation that may only offend the *Charter* in a single, unusual circumstance.<sup>524</sup> Had an exemption been available in *Adamo*, the judge could have imposed the ultimate sentence of six months' imprisonment (essentially time served) and three years' probation without challenging the constitutionality of the provision generally. While the terms of the offender's probation order were not addressed in the decision,<sup>525</sup> given the judge's determination that the offender's mental health issues could be safely dealt with in the community, they likely dealt with this suitable alternative to prison. A fair and proportionate sentence that did not place public safety at risk could have been crafted without the need for a *Charter* challenge, the striking-down of the mandatory minimum in its entirety, or the uncertainty caused by the ongoing appeals process.

The potential for offenders with mental disabilities to be exempted from mandatory minimum sentences would allow judges to give effect to the mandate set out in the proposed subsection 718.2(e.1), in furtherance of the fundamental sentencing principle of proportionality, by allowing them to craft sentences that accurately reflect the impact of mental disabilities on offenders' moral blameworthiness, and focus on rehabilitation rather than punishment and deterrence.

#### **4.5 Conditional Sentence Orders**

While the ability of judges to exercise discretion not to apply mandatory minimums in cases where a mental disability is present will allow them to consider alternative measures to prison sentences more often, further amendments to the *Criminal Code* are needed to ensure CSOs may

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<sup>524</sup> Sankoff, *supra* note 351 at 11.

<sup>525</sup> *Adamo*, *supra* note 4 at para 165.

be ordered where necessary. As noted above, CSOs have great potential for responding to the unique needs of offenders with mental disabilities.

Given that CSOs are not available where an offence carries a mandatory minimum sentence,<sup>526</sup> the current wording of the CSO provisions would prevent a CSO from being ordered even where a judge has decided to exempt an offender with a mental disability from the mandatory minimum sentence for an offence. Further, there are a number of offences listed under section 742.1 for which CSOs may not be ordered, even where no mandatory minimum sentence is present. I propose the following revisions to the *Criminal Code* in order to address these issues:

#### Imposing of conditional sentence

**742.1** If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

....

#### Presence of Mental Disability

**742.2** (1) Where an offender has a mental disability, subsections 742.1(b) – (f) do not apply.

(2) For greater certainty, where an offender has a mental disability and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the

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<sup>526</sup> *Criminal Code*, *supra* note 2 s 742.1(b).

community, subject to the conditions imposed under section 742.3, if the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2.

While this amendment would still preclude a judge from ordering a CSO in any case where the offender is sentenced to a period of imprisonment of more than two years, this should not result in any injustice to offenders with mental disabilities, provided the judge has taken their particular circumstances into consideration on sentencing. If a judge imposes a sentence of greater than two years, after having considered the direct and indirect impacts of an offender's mental disability on her offending behaviour, this indicates that an offender likely had a high degree of moral blameworthiness despite her mental disability. Alternatively, this could indicate the offence committed was of such gravity a non-custodial sentence could be warranted, even in light of the offender's mental health issues.

The proposed amendments allow judges to consider CSOs in all circumstances where it is found that an offender with a mental disability is not deserving of a prison term of greater than two years. They would also prevent CSOs from being automatically excluded from consideration for offenders with mental disabilities based solely on the type of crime that was committed, or the fact the offence carries a mandatory minimum sentence.

Some recent court decisions make it clear that judges in this country are looking for ways to impose CSOs for offenders with mental disabilities, in situations where they may currently be

barred from doing so by the *Criminal Code*.<sup>527</sup> In the recent decision of *Donnelly*, referred to above, the offender had pleaded guilty to one count of making child pornography for the purposes of publication. Despite the serious nature of this crime, the circumstances of the offence were somewhat unique in that the offender did not know that the films he was assisting in editing constituted child pornography (they were branded “naturalist” films and consisted of images of naked teenaged and pre-teenaged boys swimming, wrestling, exercising and playing), and he had been assured by his employer that the films were legal. The offender suffered from obsessive-compulsive disorder at the time the offence was committed. While the offender’s mental disability does not appear to have been related to his commission of the crime, his condition worsened considerably after his arrest, and he further developed PTSD, social anxiety disorder, panic disorder, depression and specific phobias as a result of his arrest.<sup>528</sup>

The offender in *Donnelly* was in jail for a period of five days after his arrest, three of those days as a result of the prosecutor putting forward reasons for his continued detention that were fundamentally flawed and based on erroneous information.<sup>529</sup> The offender suffered physical and verbal abuse during this time by other inmates and court officers, and did not receive his medication, aggravating his mental health issues and his fear of returning to custody.<sup>530</sup> In a stay proceeding, the judge found that the offender suffered harm after his arrest arising from violations of his rights under sections 7 and 9 of the *Charter*, but that harm did not rise to the

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<sup>527</sup> See e.g. *Bagnulo*, *supra* note 319; *Sheppard*, *supra* note 331; *Morton*, *supra* note 335. See also **Section 3.4.1**.

<sup>528</sup> *Donnelly*, *supra* note 209 at para 83.

<sup>529</sup> *Ibid* at para 85.

<sup>530</sup> *Ibid* at para 86.

very high level of seriousness required to obtain a stay of proceedings.<sup>531</sup> Rather, the conduct of state actors would be taken into account on sentencing.

The offence of making child pornography for the purpose of publication requires a one -year mandatory minimum sentence. The offender did not seek to have the minimum declared constitutionally invalid, but rather argued that the special circumstances of the case permitted a reduction in sentence as a remedy under subsection 24(1) of the *Charter*, which permits individuals whose *Charter* rights have been infringed or denied to apply to a court to obtain a remedy.<sup>532</sup> In determining this could be done, the judge relied in *R v Nasogaluak*, where the SCC noted a possibility that “in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence or the offender.”<sup>533</sup> The judge found that the case before him was an exceptional one that warranted the remedy contemplated in *Nasogaluak*, given the offender’s mental state:

Were it not for the unique circumstances that Mr. Donnelly’s situation reveals, I would have no hesitation in sentencing Mr. Donnelly to the mandatory minimum of one year, as reflecting an appropriate reduction for the *Charter* violations. To do that, however, is to ignore, or turn a blind eye to, the reality of Mr. Donnelly’s mental health. In fact, this case brings into sharp focus the question as to how serious courts will treat mental health issues...<sup>534</sup>

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<sup>531</sup> *Ibid* at para 71.

<sup>532</sup> *Charter*, *supra* note 3 s 24(1).

<sup>533</sup> *Nasogaluak*, *supra* note 211 at para 64, in *Donnelly*, *supra* note 209 at para 68.

<sup>534</sup> *Donnelly*, *supra* note 209 at para 98.

The judge noted, given the offender's potential vulnerabilities in prison and the risk he would attempt suicide, it would not be effective to reduce the length of his period of incarceration. Instead, the judge used subsection 24(1) of the *Charter* to impose a conditional sentence of imprisonment of 21 months to be served in the community, instead of a period of incarceration.<sup>535</sup>

In my view, this decision is vulnerable to appeal given that the judge's use of subsection 24(1) of the *Charter* to override the mandatory minimum sentence appears to be based entirely on the offender's mental state, rather than the conduct of state actors in violating his *Charter* rights. Nevertheless, this case demonstrates the problems that mandatory minimum sentences create where unique situational factors related to an offender's mental disability render a minimum sentence particularly unfair. Were it not for the judge's finding that state agents' treatment of the offender in *Donnelly* breached the *Charter*, the only way the judge could have avoided imposing a period of incarceration for this vulnerable offender would be through a constitutional challenge of the mandatory minimum itself. If the provisions proposed in this and the previous section were in place, however, the judge could have exempted the offender from the mandatory minimum sentence and ordered a CSO even if the offender's *Charter* rights had not been violated when he was arrested.

Conditional sentence orders allow for treatment in the community, sentences to be served within treatment facilities, and an alternative to incarceration where an offender has reduced moral blameworthiness for her actions or would be particularly vulnerable in a prison environment. All

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<sup>535</sup> *Ibid* at para 101.



of these elements are highly significant for offenders with mental disabilities, and the expanded availability of CSOs for this category of offenders would, in many cases, ensure proportionality in sentencing for offenders with mental disabilities.

## Chapter 5: Conclusion

The current over-representation of individuals with mental disabilities in the criminal justice system may properly be termed a crisis, and one that many commentators have identified as in need of immediate remedial action.<sup>536</sup> No single solution can hope to fully address the multitude of factors that contribute to individuals with mental disabilities ending up in the prison population. Many of the factors that contribute to this crisis, such as high rates of unemployment and homelessness among individuals with mental disabilities, and the lack of funding for mental health supports and treatment, are rooted in pervasive and systemic discrimination against this group.

While all of the complex issues that contribute to the involvement of individuals with mental disabilities in the criminal justice system require further attention and research, the magnitude of this problem should not discourage incremental steps from being taken. This Thesis represents one such step, focusing on the narrow area of criminal sentencing as a means towards ensuring offenders with mental disabilities do not continue to be discriminated against, and unduly punished, by the criminal justice system. While significant investment by provincial and federal governments in mental health programs will be required so that sentencing alternatives such as CSOs can fulfil their potential for rehabilitating offenders with mental disabilities, the legislative changes to the current sentencing regime proposed in this Thesis would ideally serve as an impetus to increase such funding and make these alternatives available.

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<sup>536</sup> Fast & Conry, *supra* note 259; Raina et al, *supra* note 166; Roach & Bailey, *supra* note 120; Roberts & Verdun-Jones, *supra* note 5; Verdun-Jones & Butler, *supra* note 28; American Psychiatric Association, “Mental Illness”, *supra* note 23; Canada, “OCI Annual Report”, *supra* note 8; Canada, “Mental Health and Criminal Justice”, *supra* note 62; Canada, “Risky Business”, *supra* note 8; Canadian Bar Association, “Resolution”, *supra* note 6; Centre for Addiction and Mental Health, *supra* note 8; MacPhail & Verdun-Jones, *supra* note 58; Mental Health Commission of Canada, *supra* note 8; Senate, “Out of the Shadows”, *supra* note 22; Service, *supra* note 8.

Sentence proportionality is highlighted in the *Criminal Code* as the fundamental principle of sentencing in this country.<sup>537</sup> The SCC has, in a number of recent decisions, reiterated the absolute necessity of proportionate and individualized sentences in every case, in order to ensure a fair justice system.<sup>538</sup> Offenders with mental disabilities are currently being incarcerated at extremely high rates, despite the recognition by judges that in many cases the presence of a mental disability will reduce an offender's moral blameworthiness for her actions. A legislated requirement that sentencing judges consider the unique circumstances of offenders with mental disabilities in every case would serve to highlight the necessity of a proportionate sentence for these offenders, and the indirect ways in which offenders' mental disabilities may reduce their moral blameworthiness for their actions. Even if, as has been the case with aboriginal offenders, such a requirement does not immediately result in a reduction of the number of offenders with mental disabilities who are incarcerated, such a provision would serve an important symbolic function. Legislated recognition of the unique circumstances faced by offenders with mental disabilities, who are a historically discriminated-against group, should increase recognition of the hardships faced by this group of offenders both within the judiciary and by the public in general. Such recognition would, hopefully, assist in incrementally shifting social attitudes towards this vulnerable group of offenders, and ultimately decreasing the number of persons with mental disabilities serving prison sentences.

The goal of the criminal justice system on encountering offenders with mental disabilities must be focused on treatment and rehabilitation, rather than denunciation and deterrence. Ensuring

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<sup>537</sup> *Criminal Code*, *supra* note 2 s 718.1.

<sup>538</sup> See e.g. *Knott*, *supra* note 293 at para 1; *Ipeelee*, *supra* note 167 at para 73.

offenders with mental disabilities are able to access adequate supports within the community, either as a term of a CSO or on release from any period of incarceration, is necessary to help these offenders avoid coming into further contact with the criminal justice system. Such supports would thus serve the sentencing goal of protection of the public, in addition to rehabilitation. Unfortunately, at present, federal prisons are in some cases seen as being better equipped to offer mental health treatment and supports than provincial correctional facilities or an offender's community, due in part to the pervasive underfeeding of mental health programs and resources in many parts of this country.<sup>539</sup> This is not to say that sentencing offenders with mental disabilities to terms of imprisonment so that they can receive mental health treatment is an acceptable *status quo*. As demonstrated in **Chapter 2** of this Thesis, Corrections Canada is generally ill-equipped to deal with this population of offenders, and inmates with mental disabilities are particularly at risk for victimization, harsh disciplinary measures, and longer sentences when compared to the rest of the offender population.

While correctional facilities must ensure they have the facilities and programming to effectively deal with those individuals with mental health issues who must ultimately be incarcerated, funding of community-based mental health resources and programs must be undertaken as an urgent priority in order to give judges real options when sentencing offenders with mental disabilities.

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<sup>539</sup> See e.g. *R v Powderface*, 2014 ABPC 193 at paras 9, 24, AJ No 1037 (QL); *Charlie* 2008, *supra* note 141 at para 15 where the judge sentenced Charlie to two years plus one day in part so he could gain access to the programming available in a federal institution. In *Charlie* 2012, *supra* note 143 at para 40 the judge noted that prison is not a rehabilitative environment for Charlie as the programs there did not recognize and build on his strengths, and as such he would re-offend almost immediately on his release.

A weakness of this Thesis is the fact that the legislative amendments proposed herein are unlikely to be passed by the current government. Parliament's criminal justice mandate in recent years has been to get "tough on crime", and it has passed a significant amount of legislation that limits judicial discretion at sentencing, through imposing mandatory minimums and placing limits on CSOs. This philosophy runs directly counter to the type of individualized and proportionate sentencing required for offenders with mental disabilities. I chose to focus on legislative remedies to the ways in which the current sentencing regime is failing offenders with mental disabilities. Future research could focus instead on potential developments in the common law to address these same issues. The SCC jurisprudence regarding *Charter* challenges to mandatory minimum sentences has been evolving in recent years, and will likely be further re-defined when the SCC issues reasons in *Nur*. If the SCC overturns the finding in *Nur* that individual characteristics, such as intellectual impairments, may not be ascribed to reasonable hypothetical offenders, or the door to allowing constitutional exemptions that was closed in *Ferguson* is re-opened, *Charter* challenges may potentially be a more fruitful avenue by which to ensure mandatory minimums do not result in unjust sentences for offenders with mental disabilities, given the current political climate. That being said, legislative exemptions to mandatory minimums are available in a number of comparable jurisdictions,<sup>540</sup> and Canada lags behind in terms of only allowing redress from unjust mandatory minimums where they are "grossly disproportionate".

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<sup>540</sup> See Dandurand, *supra* note 484. These jurisdictions include the United States, New Zealand, England, Wales and Australia.

Additional future research could also examine the ways judges could ensure proportionate sentences for offenders with mental disabilities through sentencing alternatives other than CSOs and mandatory minimum exemptions, including probation orders, suspended sentences, or diversion through programs such as community mental health courts.

The intent of this Thesis has been to highlight the issues currently facing individuals with mental disabilities in the criminal sentencing process, and propose limited legislative reforms to address these shortcomings. The amount of research that needs to be undertaken in multiple fields to fully address this issue is immense, given the deep-seated discrimination against this group in a number of areas of social life and participation. This Thesis is intended to constitute one potential step in the direction of remedying the problem of over-incarceration of individuals with mental disabilities from a criminal justice perspective. Legislative sentencing revisions are an important part of the solution to this issue, and would serve important symbolic and practical functions in addressing the many wrongs imposed upon this vulnerable group by the criminal justice system in this country.

## **Bibliography**

### LEGISLATION

#### **Legislation: Canada**

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule

B to the *Canada Act 1982* (UK), 1982, c 11.

*Controlled Drugs and Substances Act*, SC 1996, c 19.

*Criminal Code*, RSC 1985, c C-46.

*Mental Health Act*, RSA 2000, c M-13.

*Mental Health Act*, RSBC 1996, c 288.

Bill C-14, *Not Criminally Responsible Reform Act*, 2nd Sess, 41st Parl, 2013 (assented to 11 April 2014) SC 2014, c 6.

Bill C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parl, 2011 (assented to 13 March 2012) SC 2012, c 1.

#### **Legislation: Foreign**

*Crimes Act 1900* (NSW).

*Criminal Law (Sentencing Act) 1988* (SA).

*Criminal Law Amendment Act, 1997*, (S Afr) n° 105 of 1997 as amended by *Criminal Law (Sentencing) Amendment Act*, n° 38 of 2007).

*Montana Code*, MCA §46-18-222 (2014).

## JURISPRUDENCE

*Babcock & Wilcox Industries Ltd v USWA, Local 2859* (1994), 42 LAC (4th) 209 (Ontario Arbitration), 36 CLAS 262.

*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 3 SCR 134.

*DPP v Gcwala* (295/13) ZASCA 44 (31 March 2014).

*Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4th) 385.

*Handfield v North Thompson School District No 26* (1995), 25 CHRR D/452 (BC Human Rights Trib), 1995 CarswellBC 3081.

*R v Adamo*, 2013 MBQB 225, 296 Man R (2d) 245.

*R v AWS*, 2009 ABPC 225, 12 Alta LR (5th) 200.

*R v Ayorech*, 2012 ABCA 82, 522 AR 306.

*R v Bagnulo*, 2012 ONCJ 815, OJ No 6328.

*R v Batisse*, 2009 ONCA 114, 93 OR (3d) 643.

*R v Belcourt*, 2010 ABCA 319, 490 AR 224.

*R v Bennight*, 2012 BCCA 461, 329 BCAC 250.

*R v Boone*, 2014 ONCA 515, 114 WCB (2d) 319.

*R v Bouchard-Lebrun*, 2011 SCC 58, 3 SCR 575.

*R v Branton*, 2013 NLCA 61, 341 Nfld & PEIR 329.

*R v Brizard* (2006), 68 WCB (2d) 556 (ONCA), OJ No 729 (QL).

*R v Buck*, 2014 SKCA 92, SJ No 505 (QL).

*R v Busch*, 2012 ONCJ 465, OJ No 3318 (QL).

*R v Carter*, 2014 SKPC 150, SJ No 432 (QL).

*R v Charlie*, 2008 YKTC 9, 77 WCB (2d) 718.



*R v Charlie*, 2012 YKTC 5, 2 CNLR 184.

*R v Charlie*, 2014 YKTC 17, YJ No 36 (QL).

*R v Chaulk*, [1990] 3 SCR 1303, 119 NR 161.

*R v Collier* (2013), 344 Nfld & PEIR 327 (NL Prov Ct), NJ No 429 (QL).

*R v Conception*, 2014 SCC 60.

*R v Cooper*, [1980] 1 SCR 1149, 110 DLR (3d) 46.

*R v Cross* (2012), 328 Nfld & PEIR 41 (NL Prov Ct), NJ No 356 (QL).

*R v DB*, 2008 SCC 25, 2 SCR 3.

*R v Decoteau*, 2013 ABPC 277, AJ No 1161 (QL).

*R v Dickson*, 2007 BCCA 561, 248 BCAC 217.

*R v Donnelly*, 2014 ONSC 6472, OJ No 5287 (QL).

*R v Dunne*, 2011 ABPC 103, AJ No 329 (QL).

*R v Durnford* (2014), 345 Nfld & PEIR 330 (NL Prov Ct), NJ No 5 (QL).

*R v Edmunds*, 2012 NLCA 26, 322 Nfld & PEIR 337.

*R v Ellis*, 2013 ONCA 739, 312 OAC 328, leave to appeal to SCC refused, 35649 (7 February 2014).

*R v England* (1976), 15 NSR (2d) 686 (NSCA), 1976 CarswellNS 73.

*R v Evans-Renaud*, 2012 PECA 21, 328 Nfld & PEIR 33.

*R v Fayemi*, 2009 BCPC 123, BCJ No 775 (QL).

*R v Ferguson*, 2008 SCC 6, 1 SCR 96.

*R v FJN*, 2012 ABPC 81, AJ No 483 (QL).

*R v Fleming*, [1995] AWLD 1080 (ABCA), CarswellAlta 1086 (unreported).

*R v Frampton* (2014), 346 Nfld & PEIR 38 (NL Prov Ct), NJ No 8 (QL).

*R v Frank*, 2012 NSPC 5, 312 NSR (2d) 328, aff'd 2013 NSCA 148, NSJ No 681 (QL).

*R v Fraser*, 2007 SKCA 113, 302 Sask R 210.

*R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385.

*R v Hasad*, 2013 ABQB 192, 559 AR 81.

*R v Hawkins*, 2008 NBCA 40, 331 NBR (2d) 129.

*R v Hiltermann* (1993), 141 AR 223 (CA), AJ No 609 (QL).

*R v Hurley*, 2008 BCCA 461, 237 CCC (3d) 135.

*R v Ipeelee*, 2012 SCC 13, 1 SCR 433.

*R v Joamie*, 2013 NUCJ 19, Nu J No 22.

*R v Kakekagamick* (2006), 81 OR (3d) 664 (CA), 211 CCC (3d) 289, leave to appeal to SCC refused, 31826 (22 January 2007).

*R v Knoblauch*, 2000 SCC 58, 2 SCR 780.

*R v Knott*, 2012 SCC 42, 2 SCR 470.

*R v Kohuch*, 2011 ONCJ 620, OJ No 5447 (QL).

*R v Laldin*, 2014 ONCJ 359, OJ No 3559.

*R v Lausberg*, 2013 ABCA 72, 544 AR 56.

*R v Lea-Mills*, 2013 BCSC 2417, 111 WCB (2d) 636.

*R v Lemoine*, 2014 NSPC 49, 345 NSR (2d) 19.

*R v Leudecke*, 2008 ONCA 716, 93 OR (3d) 89.

*R v Lewandowski* (1996), 30 WCB (2d) 338 (ABPC), 180 AR 313.

*R v Link*, 2012 MBPC 25, 276 Man R (2d) 157.

*R v Lundrigan*, 2012 NLCA 43, 324 Nfld & PEIR 270.

*R v Luxton*, [1990] 2 SCR 711, 58 CCC (3d) 449.

*Regina v M’Naghten*, (1843) 10 CL & Fin 200, 9 Eng Rep 718.

*R v M(CA)*, [1996] 1 SCR 500.

*R v McLean*, 2014 BCSC 1293, BCJ No 1466 (QL).

*R v Manitowabi*, 2014 ONCA 301, OJ No 1924 (QL).

*R v Middleton*, 2009 SCC 21, 1 SCR 674.

*R v Miller*, [1977] 2 SCR 680.

*R v MNJ*, 2002 YKTC 15, YJ No 49 (QL).

*R v Morton* (2013), 345 Nfld & PEIR 256 (NL Prov Ct), NJ No 405 (QL).

*R v Muldoon*, 2006 ABCA 321, 213 CCC (3d) 468.

*R v Nasogaluak*, 2010 SCC 6, 1 SCR 206.

*R v Nur*, 2013 ONCA 677, 117 OR (3d) 401, leave to appeal to SCC granted, [2014] SCCA No 17 (QL).

*R v Palma*, [2001] OJ 3283 (Sup Ct) (QL).

*R v Parks*, [1992] 2 SCR 871, 95 DLR (4th) 27.

*R v Passmore*, 2014 SKPC 38, SJ No 50 (QL).

*R v Paterson*, 2013 BCPC 5, BCJ No 71 (QL).

*R v Patey* (2012), 321 Nfld & PEIR 43 (NL Prov Ct), NJ No 113.

*R v Peddle* (2013), 338 Nfld & PEIR 143 (NL Prov Ct), NJ No 205 (QL).

*R v Peters*, 2000 NFCA 55, 194 Nfld & PEIR 184.

*R v Poucette*, 1999 ABCA 305, 250 AR 55.

*R v Powderface*, 2014 ABPC 193, AJ No 1037 (QL).

*R v Preston* (1990), 47 BCLR (2d) 273 (BCCA), 79 CR (3d) 61.

*R v Proulx*, 2000 SCC 5, 1 SCR 61.

*R v Rabey* (1977), 17 OR (2d) 1 (CA), 79 DLR (3d) 414.

*R v Race*, 2014 NSSC 6, 339 NSR (2d) 351.

*R v Ramsay*, 2012 ABCA 257, 536 AR 174.

*R v Resler*, 2011 ABCA 167, 505 AR 330.

*R v Reynolds*, 2013 ABCA 382, 561 AR 335.

*R v Robinson* (1974), 19 CCC (2d) 193 (ONCA), 1974 CarswellOnt 1073.

*R v Rogers* (1990), 61 CCC (3d) 481 (BCCA), 2 CR (4th) 192).

*R v Sellars*, 2013 NSCA 129, 336 NSR (2d) 204.

*R v Sheppard* (2013), 344 Nfld & PEIR 173 (NL Prov Ct), NJ No 435 (QL).

*R v Simpson* (1977), 35 CCC (2d) 337 (ONCA), 16 OR (2d) 129.

*R v SJB*, 2013 ABCA 153, 544 AR 342.

*R v Snowshoe*, 2007 NWTSC 41, 74 WCB (2d) 481.

*R v Soosay*, 2012 ABPC 220, 546 AR 155.

*R v Standingwater*, 2013 SKCA 78, 417 Sask R 158.

*R v Strickland-Murphy* (2012), 324 Nfld & PEIR 36 (NL Prov Ct), NJ No 208 (QL).

*R v Swain*, [1991] 1 SCR 933, 47 OAC 81.

*R v Tasew*, 2011 ABCA 241, 513 AR 154.

*R v Tremblay*, 2006 ABCA 252, 401 AR 9.

*R v Taylor* (2012), 326 Nfld & PEIR 134 (NL Prov Ct), NJ No 251 (QL).

*R v Taylor*, 2014 BCCA 304, BCJ No 2082 (QL).

*R v Valiquette* (1990), 60 CCC (3d) 325 (QCCA), 37 QAC 8.

*R v Walsh*, [2010] NJ No 163 (NL Prov Ct) (QL).

*R v Will*, 2010 SKCA 94, 359 Sask R 105.

*R v Ye*, 2012 ONSC 1278, OJ No 1231 (QL).

*R v Yuan*, 2013 ONSC 2855, OJ No 2691 (QL).

*S v Kgafela*, [2003] ZASCA 53

*S v Malgas*, [2001] ZASCA 30, 3 All SA 220 (A).

*S v Nkunkuma & others* (101/13) [2013] ZASCA 122.

*Thinashaka v State* (65/2013) [2013] ZASCA 127.

*Van der Westhuizen v S* (266/10) [2011] ZASCA 36.

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

*Yeager v RJ Hastings Agencies Ltd*, [1985] 1 WWR 218 (BCSC), 5 CCEL 266.

#### SECONDARY MATERIAL: MONOGRAPHS

Barrett, Joan M & Riun Shandler. *Mental Disorder in Canadian Criminal Law*, vol 1 (loose-leaf) (Toronto: Carswell, 2006-).

Berger, Benjamin L. “Mental Disorder and the Instability of Blame in Criminal Law” in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2012) 117.

Gert, B & C Culver, “Defining Mental Disorder” in J Raden, ed, *The Philosophy of Psychiatry: A Companion* (Oxford: Oxford University Press, 2004) 415.

Greely, Henry T. ““Who Knows What Evil Lurks in the Hearts of Men?”: Behavioral Genomics, Neuroscience, Criminal Law, and the Search for Hidden Knowledge” in Nita A Farahany, *The Impact of Behavioral Sciences on Criminal Law* (Oxford: Oxford Scholarship Online, 2009) 161.

- Hart, HLA. "Punishment and the Elimination of Responsibility" in HLA Hart & John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford: Oxford University Press, 2008).
- Manson, A. *The Law of Sentencing* (Toronto: Irwin Law, 2001).
- Miller, Laurence. *Criminal Psychology – Nature, Nurture, Culture* (Springfield, IL: Charles C Thomas, 2012).
- Nadelhoffer, Thomas & W Sinnott-Armstrong. "Is Psychopathy a Mental Disease?" in Nicole Vincent, ed, *Legal Responsibility and Neuroscience* (New York: Oxford University Press, 2013) 229.
- Paris, Joel. *The Intelligent Clinician's Guide to the DSM-V* (New York: Oxford University Press, 2013).
- Schneider, Richard D. "Sentencing the Mentally Disordered Accused" in Hy Bloom & Richard D Schneider, *Law and Mental Disorder: A Comprehensive and Practical Approach* (Toronto: Irwin Law, 2013) 703.

#### SECONDARY MATERIAL: ARTICLES

- Blair, RJR. "Aggression, Psychopathy and Free Will from a Cognitive Neuroscience Perspective" (2007) 25 Behav Sci & L 25.
- Braun, Evelyn. "Adverse Effect Discrimination: Proving the *Prima Facie* Case" (2005) 11 Rev Const Stud 119.
- Buchanan, Alec & Howard Zonana. "Mental Disorder as the Cause of Crime" (2009) 32:3 Int'l JL & Psychiatry 142.

- Burdon, Laura & Geoff Dickens. "Asperger Syndrome and Offending Behaviour" (2009) 12:9 Learning Disability Practice 14.
- Castillo, Eladio D & Leanne Fiftal Alarid. "Factors Associated with Recidivism Among Offenders with Mental Illness" (2011) 55:1 Int J Offender Ther Comp Criminol 98.
- Charland, Louis C. "Moral Nature of the DSM-IV Cluster B Personality Disorders" (2006) 20:2 J Pers Disord 116.
- Desmarais, Sarah L, et al. "A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the *Winko* Decision" (2008) 7:1 Int J Forensic Ment Health 1.
- Edwards, Craig. "Ethical Decisions in the Classification of Mental Conditions as Mental Illness" (2009) 16:1 Philosophy, Psychiatry & Psychology 73.
- Fast, Diane K & Julianne Conry. "Fetal Alcohol Spectrum Disorders and the Criminal Justice System" (2009) 15 Developmental Disabilities 250.
- Findlay, Isobel M. "Discourse, Difference and Confining Circumstances: The Case of *R v Gladue* and the 'Proper Interpretation and Application' of s 718.2(e) of the *Criminal Code*" (2001) 10:2 Griffith L Rev 225.
- Fine, Cordella & Jeanette Kennett. "Mental Impairment, Moral Understanding and Criminal Responsibility: Psychopathy and the Purposes of Punishment" (2004) 27 Int'l JL & Psychiatry 425.
- Fish, Morris J. "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28:1 Oxford J Legal Stud 57.
- Fox, Adam R, Trevor H Kvaran & Reid Griffith Fontaine. "Psychopathy and Culpability: How Responsible is the Psychopath for Criminal Wrongdoing?" (2013) 38 Law & Soc Inquiry 1.

Freckelton, Ian & David List. "Asperger's Disorder, Criminal Responsibility and Criminal Culpability" (2009) 16:1 Psychiatry Psychol & L 16.

Gregory, Sarah, et al. "The Antisocial Brain: Psychopathy Matters" (2012) 69:9 Arch Gen Psychiatry 962.

Hannah-Moffat, Kelly & Paula Maurutto. "Re-contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12 Punishment & Society 262.

Healy, Patrick. "Sentencing from There to Here and from Then to Now" (2013) 17 Can Crim L Rev 291.

Kaiser, H Archibald. "*Conway*: A Bittersweet Victory for Not Criminally Responsible Accused" (2010) 75 CR-ART 241.

Kiehl, Kent A & Morris B Hoffman. "The Criminal Psychopath: History, Neuroscience, Treatment, and Economics" (2011) 51 Jurimetrics 355.

Kinscherff, Robert. "Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act" (2010) 38:4 JL Med & Ethics 745.

Kober, HL & S Lau. "Bad or Mad? Personality Disorders and Legal Responsibility – The German Situation" (2000) 18 Behav Sci & L 679.

Loughnan, Arlie. "Mental Incapacity Doctrines in Criminal Law" (2012) 15 New Crim L Rev 1.

McIntyre, John. "*R v Nur*: The Need for the Supreme Court to Clarify *Charter* Standards for Mandatory Minimum Sentences" (2014) 7 CR-ART 132 (Carswell).

McLachlin, Beverley. "Medicine and the Law: The Challenges of Mental Illness" (2010) 33 Dalhousie LJ 15.

McLellan, Myles Frederick. "The Prospective Devitalization of Conditional Sentences" (2011) 57 Crim LQ 265.



- Malik, Athar K. "Mandatory Minimum Sentences: Shackling Judicial Discretion for Justice or Political Expediency" (2008) 53 Crim LQ 236.
- Martin, Michael S et al. "Stopping the Revolving Door: A Meta-Analysis on the Effectiveness of Interventions for Criminally Involved Individuals with Major Mental Disorders" (2012) 36:1 Law Hum Behav 1.
- Morse, Stephen J. "Diminished Rationality, Diminished Responsibility" (2003) 1 Ohio St J Crim L 189.
- Murphy, Emily R. "Paved with Good Intentions: Sentencing Alternatives from Neuroscience and the Policy of Problem-Solving Courts" (2013) 37 Law & Psychol Rev 88.
- Owusu-Bempah, Akwasi, et al. "Years of Life Lost to Incarceration: Inequities between Aboriginal and Non-Aboriginal Canadians" (2014) 14 *BMC Public Health* 585.
- Paciocco, Palma. "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 18 Can Crim L Rev 241.
- Pelletier, Renee. "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons" (2001) 39:2-3 Osgoode Hall LJ 469.
- Penney, Stephanie R, Andrew Morgan & Alexander IF Simpson. "Motivational Influences in Persons Found Not Criminally Responsible on Account of Mental Disorder: A Review of Legislation and Research" (2013) 31 Behav Sci & L 494.
- Pomerance, Renee M. "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2013) 17 Can Crim L Rev 306.
- Raina, Poonam, et al. "Pathways into the Criminal Justice System for Individuals with Intellectual Disability" (2013) 26 J Appl Res Intellect Disabil 404.

- Renwick, G Paul. "Conditional Acceptance of the Conditional Sentence" (2008) 12:3 Can Crim L Rev 227.
- Roach, Kent & Andrea Bailey. "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42 UBC L Rev 1 (QL).
- Roberts, Julian V & Howard H Bebbington. "Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-Based Policy" (2013) 17 Can Crim L Rev 327.
- Roberts, Julian V & Simon N Verdun-Jones. "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*" (2002) 39 Alta L Rev 788 (QL).
- Robertson, Gerald. "Mental Disability and Canadian Law" (1993) 2:1 Health L Rev 23 (QL).
- Sankoff, Peter. "The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case" 2013 22 Constitutional Forum 1.
- Schneider, Richard D & David Nussbaum. "Can the Bad be Mad?" (2007) 53 Crim L Q 206.
- Sparr, Landy F. "Personality Disorders and Criminal Law: An International Perspective" (2009) 37 J Am Acad Psychiatry Law 168.
- Terblanche, Stephan & Geraldine Mackenzie. "Mandatory Sentences in South Africa: Lessons for Australia?" (2008) 41:3 Aust NZ J Criminol 402.
- Verdun-Jones, Simon N & Amanda Butler. "Sentencing Neurocognitively Impaired Offenders in Canada" (2013) 55:4 Can J Crim & CJ 495.
- Victoroff, Jeff. "Aggression, Science, and Law: The Origins Framework" (2009) 32 Int'l JL & Psychiatry 189.

## OTHER MATERIALS

“Ashley Smith inquest broadened”, *CBC News* (12 November 2010) online: CBC News <

<http://www.cbc.ca/news/canada/ashley-smith-inquest-broadened-1.913597>>.

Alberta, Fatalities Inquiry Act, *Report to the Minister of Justice and Attorney General Public*

*Fatality Inquiry* (Edmonton: Fatalities Inquiry Act, 2014).

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th

ed (Arlington, VA: American Psychiatric Publishing, 2013) <online:

<http://dsm.psychiatryonline.org.ezproxy.library.ubc.ca/book.aspx?bookid=556>>.

American Psychiatric Association, *Mental Illness and the Criminal Justice System: Redirecting*

*Resources Toward Treatment, Not Containment* (Arlington, VA: American Psychiatric Association, 2004).

British Columbia, BC Minister of Health’s Advisory Council on Mental Health, *Discrimination*

*Against People with Mental Illnesses and their Families: Changing Attitudes, Opening Minds*

(Executive Summary and Major Recommendations) (Victoria, BC, Ministry of Health Services, 2002).

Brosnahan, Maureen. “Federal plan to help mentally ill female inmates on hold”, *CBC News* (18

July 2014) online: < <http://www.cbc.ca/news/canada/federal-plan-to-help-mentally-ill-female-inmates-on-hold-1.2710745>>.

Canada, Correctional Investigator Canada, *Annual Report of the Correctional Investigator 2012-*

*2013* (Ottawa: Her Majesty the Queen in Right of Canada, 2013).

Canada, Correctional Service Canada, *Persons with Intellectual Disability Who are Incarcerated*

*for Criminal Offences: A Literature Review* (Ottawa: Correctional Service Canada Research Branch, 1991).

- Canada, Department of Justice, *The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Research Report) (Ottawa: Department of Justice Research and Statistics Division, 2006).
- Canada, Library of Parliament, *Current Issues in Mental Health in Canada: Directions in Federal Substance Abuse Policy* (Background Paper) (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2014).
- Canada, Library of Parliament, *Current Issues in Mental Health in Canada: Homelessness and Access to Housing* (In Brief) (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2014).
- Canada, Library of Parliament, *Current Issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Background Paper) (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2013).
- Canada, Office of the Correctional Investigator, *Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women* (10 October 2013) online: < <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20130930-eng.aspx>>.
- Canada, Office of the Federal Ombudsman for Victims of Crime, *Shifting the Conversation: A Look at Refocusing Canada's Justice System to Better Meet the Needs of Victims of Crime* (Special Report) (Ottawa: Office of the Federal Ombudsman for Victims of Crime, 2011).
- Canada, Public Safety Canada, *Corrections and Conditional Release Statistical Overview* (Annual Report) (Ottawa: Public Works and Government Services Canada, 2012).
- Canada, Royal Commission on Aboriginal Peoples, *Bridging the Culture Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996).

Canada, Statistics Canada, “Adult correctional services, average counts of offenders, by province, territory, and federal programs (Provinces and territories)”, *Statistics Canada* (12 May 2014) (website), online: <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal31b-eng.htm>>.

Canadian Bar Association, National Criminal Justice Section, “Bill C-54 – *Not Criminally Responsible Reform Act*” (Ottawa: CBA, 2013).

Canadian Bar Association, “Mentally Ill Persons in the Criminal Justice System”, Resolution (Halifax: Annual General Meeting 13 – 14 August 2011).

Canadian Association of Drug Treatment Court Professionals, “DTC Program”, *CADTC* (website), online: <<http://www.cadtc.org/DTCProgram.aspx>>.

Carlisle, John. *Inquest Touching the Death of Ashley Smith: Jury Verdict and Recommendations* (Toronto, Office of the Chief Coroner, 2013).

Centre for Addiction and Mental Health, *Mental Health and Criminal Justice Policy Framework* (2013), online: <[http://www.camh.ca/en/hospital/about\\_camh/influencing\\_public\\_policy/Documents/MH\\_Criminal\\_Justice\\_Policy\\_Framework.pdf](http://www.camh.ca/en/hospital/about_camh/influencing_public_policy/Documents/MH_Criminal_Justice_Policy_Framework.pdf)>.

Dandurand, Yvon. *Exemptions from Mandatory Minimum Penalties* (Report prepared for the Uniform Law Conference of Canada Working Group on Mandatory Minimum Penalties) (Barrhaven, Ont: ULCC, 2012).

Gawande, Atul. “Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?”, *The New Yorker* (30 March 2009) online: The New Yorker <<http://www.newyorker.com/magazine/2009/03/30/hellhole>>.

Howard, Kristen. “‘Hurt People’ in the Courtroom: An Examination of Offender PTSD in Canadian Criminal Cases” (Masters Thesis) (Burnaby, BC: Simon Fraser University, 2009).

International Association of Chiefs of Police, *Enhancing Law Enforcement Response to Victims: A 21st Century Strategy* (Alexandria, VA: IACP, 2008).

International Dyslexia Association Ontario Branch, “What is Dyslexia”, *ONBICA* (website), online: <<http://idaontario.com/About-Us/What-is-Dyslexia.html>>.

Leblanc, Nicole & Jennifer M Kilty. *Ashley Smith (1988-2007): A Predictable Death* (Montreal: Institute for Research on Public Policy, 2013).

Legal Services Society of BC, *Gladue Report Disbursement: Final Evaluation Report* (Vancouver: LSS, 2013).

MacPhail, Alison & Simon Verdun-Jones, *Mental Illness and the Criminal Justice System* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013).

Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: The Inquiry, 1991).

Mental Health Commission of Canada, *Changing Directions Changing Lives: The Mental Health Strategy for Canada* (Calgary: Mental Health Commission of Canada, 2012).

National Judicial Institute, “Judicial Education in Canada”, *National Judicial Institute* (website), online: < <https://www.nji-inm.ca/nji/inm/progs-res/ressources-resources.cfm?lang=en&>>.

New Brunswick, Ombudsman and Child and Youth Advocate, *The Ashley Smith Report* (Fredericton, NB: Office of the Ombudsman & Child and Youth Advocate, 2008).

Office of the Correctional Investigator, “Roles and Responsibilities”, (16 September 2013) *Government of Canada* (website), online: < <http://www.oci-bec.gc.ca/cnt/roles-eng.aspx>>.

Ontario, Human Rights Commission, *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions* (Toronto: Ontario Human Rights Commission, 2012).

Parliament, Standing Committee on Public Safety and National Security, *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System* (December 2010) (Chair: Kevin Sorenson).

Sapers, Howard, *A Preventable Death* (Ottawa: Correctional Investigator of Canada, 2008).

Schizophrenia Society of Ontario, *Provincial Correctional Response to Individuals with Mental Illness in Ontario: A Review of Literature* (Toronto: Schizophrenia Society of Ontario, 2012).

Senate, Standing Committee on Social Affairs, Science and Technology, *Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada* (Interim Report) (Ottawa: Senate, 2004).

Senate, Standing Committee on Social Affairs, Science and Technology, *Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada* (Ottawa: Senate, 2006).

Service, John, *Under Warrant: A Review of the Implementation of the Correctional Service of Canada's 'Mental Health Strategy'* (Report Prepared for the Office of the Correctional Investigator of Canada) (Kanata, Ont: John Service Consulting, 2010).

Stewart, Lynn A, Geoff Wilton & Colette Cousineau, *Federally Sentenced Offenders with Mental Disorders: Correctional Outcomes and Correctional Response* (Research Report) (Ottawa: Correctional Service of Canada, 2012).

Turner, James. "Prosecutors appeal ruling rejecting mandatory minimums", *Winnipeg Free Press* (24 October 2013) online: Winnipeg Free Press

<<http://www.winnipegfreepress.com/local/Prosecutors-appeal-ruling-rejecting-mandatory-minimums-229112221.html>>.

Uniform Law Conference of Canada Criminal Section, *Statutory Exemptions to Mandatory Minimum Penalties: Final Report* (Victoria, BC: Uniform Law Conference, 2013).

Victoria, Law Institute Victoria, *Mandatory Minimum Sentencing* (Victoria, Australia: Law Institute of Victoria, 2011).

Vidovic, Petra Jonas. “Neuro-Cognitive Impairments and the Criminal Justice System: A Case Analysis of the Impact of Diagnoses of FASD and ADHD on the Sentencing of Offenders in the Courts of Three Canadian Provinces” (PhD Thesis) (Burnaby, BC: Simon Fraser University, 2012).