

'Now what?': An examination of ongoing gaps post-diagnosis for justice-involved youth with Fetal Alcohol Spectrum Disorder

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Abstract

Fetal alcohol spectrum disorder (FASD) refers to the lifelong neurodevelopmental impacts resulting from prenatal alcohol exposure. Recent prevalence indicates it is a leading cause of developmental disability in Canada. Researchers have illustrated that the criminal justice system (CJS) is a common landing point for individuals with FASD, and entry commonly occurs during adolescence. Scholars have contributed to early intervention implementation or identifying FASD markers in adolescence to deter criminal behaviour; however, resources and information for individuals with current or historical CJS involvement require further attention. In this paper, we analyze newer research on the links between FASD and the CJS, discuss considerations from developmental perspectives and analyze salient issues involving youth with FASD. Three Canadian legal decisions involving justice-involved youth with FASD are drawn upon to mobilize three areas requiring further theorization and action regarding CJS responses to FASD. Using developmental perspectives, we centre the impacts of CJS on justice-involved youth with FASD and discuss possible resulting implications. We aim to highlight areas for further consideration when working with justice-involved youth with FASD, namely, gaps in early assessment and implementation of supports, needs to increase parent and caregiver capacity to maintain residential stability, and efforts to support desistance from crime in the context of an FASD diagnosis.

Keywords: fetal alcohol spectrum disorder; developmental perspective; case law; youth; stigma

Résumé

Les troubles causés par l'alcoolisation fœtale (ETCAF) désignent les effets neurodéveloppementaux à vie résultant de l'exposition prénatale à l'alcool. La prévalence récente indique qu'il s'agit d'une des principales causes de troubles du développement au Canada. Les chercheurs ont montré que le système de justice pénale (SJP) est un point d'arrivée courant pour les personnes atteintes de l'ETCAF, et que l'entrée dans le système se fait généralement à l'adolescence. Les chercheurs ont contribué à la mise en œuvre d'interventions précoces ou à l'identification des marqueurs de l'ETCAF à l'adolescence afin de décourager les comportements criminels ; cependant, les ressources et l'information destinées aux personnes qui sont ou ont été impliquées dans le système de justice pénale doivent faire l'objet d'une plus grande attention. Dans cet article, nous analysons les recherches les plus récentes sur les liens entre l'ETCAF et la SJC, nous discutons des considérations liées aux perspectives de développement et nous analysons les questions importantes concernant les jeunes atteints de l'ETCAF. Nous nous appuyons sur trois décisions judiciaires canadiennes concernant des adolescents atteints de l'ETCAF qui ont des démêlés avec la justice pour mobiliser trois domaines qui nécessitent une théorisation et une action plus poussées en ce qui concerne les réponses du SJC à l'ETCAF. À l'aide de perspectives développementales, nous centrons les impacts des SJC sur les jeunes atteints de l'ETCAF et discutons des conséquences possibles. Nous visons à mettre en évidence les domaines à prendre en considération dans le cadre du travail avec les jeunes judiciairisés atteints de l'ETCAF, à savoir les lacunes dans l'évaluation précoce et la mise en œuvre des mesures de soutien, la nécessité d'accroître la capacité des parents et des soignants à maintenir la stabilité résidentielle, et les efforts visant à soutenir la désistance de la criminalité dans le contexte d'un diagnostic de l'ETCAF.

Mots clés : troubles causés par l'alcoolisation fœtale ; perspective développementale ; jurisprudence ; jeunes ; stigmatisation

1.0 Introduction

Identified in the 1970s, understandings of fetal alcohol spectrum disorder (FASD) have evolved and become more nuanced as research has progressed (Armstrong, 1998; Cook et al., 2016; Zizzo & Racine, 2017). Under the Canadian diagnostic guidelines, FASD refers to a lifelong neurodevelopmental disorder with brain and bodily impacts (Cook et al., 2016; May et al., 2017; Popova et al., 2021). FASD is 2.5 times more common than autism spectrum disorder (Ofner et al., 2018), 19 times more common than cerebral palsy (Oskoui et al., 2013), 28 times more common than down syndrome (Public Health Agency of Canada, 2017), and 40 times more common than tourette's syndrome (Mela et al., 2022; Yang et al., 2016). Despite being a leading cause of neurodevelopmental disability in North America, FASD remains a largely 'invisible' disorder commonly impacting individuals' development, language, decision making, and their social worlds (Bell et al., 2016; Dunbar, 2020). Further, as a result of common misunderstandings about how FASD occurs and blaming and shaming as to its cause (prenatal alcohol consumption), FASD is also a condition that is commonly stigmatized. Currently, there is no clear path of treatment, structured resources, and care for those with FASD post-diagnosis.

Individuals with FASD are overrepresented in justice settings (Brown et al., 2017; Brown et al., 2020; Dej, 2011; Fast & Conry, 2004). However, the pathways of individuals with FASD and how they become involved with the criminal justice system (CJS) are often overlooked, as research focuses more on early diagnosis or intervention during adolescence (Popova et al., 2021). The overrepresentation of individuals with FASD in justice and correctional systems and the disproportionate rates of recidivism amongst people with FASD suggest the current approaches of the CJS are inadequate and fail to account for the complex impacts of FASD (Popova et al., 2011). Evidence suggests that the use of police discretion, diversion programs, specialized courts, trained correctional staff and use of specialized

probation services would be highly beneficial in accommodating the unique needs of justice-involved youth and adults with FASD (Fast & Conry, 2009; Peters & Dunbar, 2017).

In this paper, we discuss current literature on FASD and utilize developmental perspectives (Corrado & Freedman, 2011) to review three Canadian legal decisions involving justice-involved youth with FASD. We highlight issues that these cases make visible and emphasize potential strategies that could assist individuals with FASD, including, gaps in early assessment and implementation, addressing parental and caregiver capacity to maintain residential stability and strategies to support desistance amongst youth with FASD and justice involvement. However, we begin by discussing the complex implications of FASD as a commonly stigmatized condition.

2.0 Literature Review

2.1 Impacts of Stigma

Multiple intersecting factors contribute to the ongoing underdiagnosis of FASD and a prominent factor is stigma. FASD connects alcohol consumed during pregnancy with the actions of the mother or pregnant individual, thereby creating a space for both external and/or internalized stigma, shame, and judgement (Choate et al., 2019; Dunbar, 2020). This stigma can further perpetuate the mothers' resistance to seeking medical care for their pregnancy or drinking habits (Bell et al., 2015; 2016). Further, FASD prevention messaging has long been a complex area of work that tries to balance informing the public without creating unnecessary fear and anxiety. As Zizzo & Racine (2017) state, "well-intentioned prevention messages that stress the preventability of FASD or focus on exclusively the mother's behaviour or role in developing FASD can inadvertently contribute to blame and shame" (p. 415).

Similarly, unintentionally stigmatizing information about FASD can perpetuate apprehension among pregnant people, resulting in fewer disclosures to healthcare professionals and support providers (Lyall et al., 2021; Poole &

Isaac, 2001). Beyond FASD prevention, researchers have found that stigma is a dominant discourse in current literature (Choate et al., 2019). Further uncertainty about the possible interventions of social workers or child protective services or fear of addressing health concerns can be exacerbated and lead to reduced or incomplete disclosure of prenatal alcohol exposure (PAE). The implications of stigma carry well into the lives of individuals with FASD. As Dunbar (2020) argues, despite the negative impacts of stigma, disclosure of diagnosis in justice and legal settings can supply a pathway for justice and legal actors to understand the various impacts of FASD related to their justice-involved client(s).

2.2 Child Protection Involvement

Stigmatization and lack of knowledge persist the estimated rate of the Canadian population with FASD, approximately 4% (Burns et al., 2020). Researchers have determined higher prevalence estimates in specific groups, such as those involved in the child welfare system (Fuchs et al., 2010; Popova et al., 2013). Compared to youth without FASD, those with FASD are placed in the child protection system at younger ages, become permanent wards more quickly and are in the child welfare system for extended periods (Burns et al., 2020; Fuchs et al., 2010). Some American researchers have estimated that as many as 80% of children in the welfare system have prenatal substance exposure (Dicker & Gordon, 2004; Paley et al., 2010), while more conservative Canadian estimates identify a prevalence of 18% (Popova et al., 2021). The Canadian diagnostic guidelines recommend that assessments for diagnosing FASD begin as early as possible; however, diagnosis before age three can be challenging (Hanlon-Dearman et al., 2020; Marcellus, 2021), and symptoms of FASD may be misattributed to alternative causes, such as trauma. Children in the welfare system can be significantly impacted by additional factors such as non-compliance from known relatives, lost or misplaced assessments, or simply no one observing the markers that would prompt an

assessment (Burns et al., 2020). When a history of PAE is known or suspected, the implications of such history are often ignored or misunderstood by mental, educational, child welfare, and legal systems (Paley et al., 2010).

Children with FASD commonly require additional support, (e.g., teaching, supervision, consistent and straight forward language) primarily through development which can often result in adolescents moving around the welfare system. Many foster parents may not be aware of FASD and its challenges or be equipped to provide the necessary care. Researchers have shown that unstable environments can increase chances of mental health problems, challenges in the education system, substance abuse, unemployment, and homelessness (Badry et al., 2009; McLachlan et al., 2020; Wyper & Pei, 2016). This is more impactful for children living with FASD, as poor outcomes have been directly correlated with adverse environmental factors, such as frequent changes in living situations (Burns et al., 2020). Without the early implementation of assessment, supports and resources, people with FASD are at a higher risk of becoming involved in the CJS (Popova et al., 2011) and particularly important during adolescence (Paley et al., 2010).

2.3 Justice Involvement

Paley et al., 2010 suggest that suspicion of FASD requires early evaluation of when the child entered the foster system to aid juvenile courts with children and youth who have not been diagnosed. Without prompt intervention upon entering the child welfare system, multiple risk factors can accumulate and lead children on negative life-path and developmental trajectories (p. 511). The researchers found that the lack of FASD assessments and resources seen in the child welfare system are mirrored in correctional and justice systems (Paley et al., 2010). Other researchers have discovered a similar overrepresentation of FASD amongst justice-

involved individuals (Clarren et al., 2015; [McLachlan, 2019](#); Popova et al., 2017).

As a result of FASD symptoms such as hyperactivity, impulsivity, aggressiveness, and decision-making deficits, people with FASD can be vulnerable to engage in impulsive acts or be exploited by others (Dunbar, 2019; Paley et al., 2010). In a study conducted by McLachlan et al. (2019), of their 80 CJS involved participants, more than half ($n=44$, 55.0%) presented with ‘moderate’ neurodevelopmental dysfunction, and a third ($n=31$, 38.7%) presented with ‘severe’ dysfunction (pg. 5) According to their research, only five participants (6.3%) were free of any significant dysfunction (McLachlan et al., 2019). Researchers such as Fast & Conry (2009) state that the impacts of FASD can increase the chances of maladaptive behaviours, potentially leading to criminalization. Other researchers point out that individuals with FASD may experience challenges adequately applying thoughts and intuitions to determine how to act safely in complicated or multifaceted situations, which can further complicate circumstances (Greenspan & Driscoll, 2015). Differences in abstract thinking, executive functioning, cause and effect learning, working memory, and emotional regulation bring about potential long-lasting impacts once individuals become justice-involved (Fast & Conry, 2009; Rasmussen, 2005). In general, adolescence is a time of rapid change and socialization contributing to identity formation and development (Loeber & Le Blanc, 1990). Thus, deficits and impacts in development as a result of FASD can further contribute to the manifestation of symptoms.

Complicating various elements of justice involvement are the numerous impacts of language deficits related to information processing and verbal output. People with FASD can present with low verbal IQ, have difficulty reading aloud, verbal information recall, and have impairments in receptive and expressive language (Coggins et al., 2007; Gagnier et al., 2011; Rasmussen et al., 2006). According to Gagnier et al. (2011), language and executive functioning deficits impair individuals’ ability to comprehend what they are

being told; however, they can adapt throughout life to conceal their genuine abilities of understanding (pg. 427). Language impairments significantly heightens the risk of suggestibility through custodial and psychological pressure (Brown et al., 2011) and carry implications at many stages of the criminal justice process, including but not limited to police questioning, court proceedings, providing statements, and testifying in one’s defence and/or as a witness.

Much has been learned in recent decades about the implications of FASD for justice-involved individuals. Researchers have applied theoretical concepts of developing criminal behaviour and life courses into adulthood to understand further how these pathways form. Importantly, we have seen theorists also account for the impacts of prenatal substance use and its subsequent impacts in developmental/life-course pathways (see Corrado & Freedman, 2011). When using these models, antisocial behaviour in people with FASD, possibly leading to criminalization, can be observed through specific developmental periods and when implementing interventions or assessments for diagnosis is paramount.

3.0 Theoretical Framework

Farrington (2017) describes developmental criminology as the emergence of offending and antisocial behaviour while also focusing on the effects of risk, protective factors, and life events at different ages throughout an individual’s development (p. 60). McCall (1977) addresses developmental theory’s usefulness in criminological understanding of adolescence that often involve significant behavioural and environmental changes (p. 377). A principle of developmental criminology is that conduct problems predate and predict involvement in delinquency (Loeber & Le Blanc, 1990, p. 387). Some behaviours associated with conduct problems include aggression, lying, truancy, stealing, early educational issues, and general problematic behaviour predictive of later delinquency. Because individuals with FASD can experience neurocognitive deficits affecting self-

regulation and emotional control (Brown et al., 2012), they may present with behaviours associated with paths to delinquency. Environmental considerations, including parental monitoring of children's whereabouts, choice of friends, and activities (Loeber & Le Blanc 1990), also impact such pathways. Given the overlap of youth with FASD in the child welfare system, stable or constant monitoring of behaviour and actions can be challenging, especially for youth experiencing residential instability. While developmental processes can provide prevention and intervention for those deemed antisocial, Loeber and Le Blanc do not address neurocognitive factors and those whose antisocial behaviour is symptomatic of their primary disorders.

Acknowledging neuropsychological differences among individuals from pre, neo, and perinatal stages is integral to developmental life-course-persistent behaviour theories with FASD. Moffitt (1993, 2017) identifies two types of neuropsychological deficits associated with antisocial behaviour: verbal and "executive" functioning. Moffitt (1993, 2017) explains that verbal deficits in antisocial adolescents are persistent, affecting receptive listening and reading, problem-solving, expressive speech and writing, and memory. Executive deficits produce what is sometimes referred to as a 'compartmental learning disability' (Price et al., 1990), including symptoms such as inattention and impulsivity (p. 680). These findings are critical in applying these theories to FASD, as these behaviours are repeatedly expressed and documented in diagnosed individuals. Moffitt (1993, 2017) posits that disciplinary problems and academic failures beginning in childhood accumulate. Research findings indicate that early influences on child behaviour, the lack of additional and necessary support, coupled with educational challenges, potentially amplify the risk of life-course-persistent antisocial behaviour. As these challenges build in force, opportunities to practice prosocial behaviours are obscured, while

maladaptive behaviours are enhanced (p. 695) (Farrington, 2003).

Other researchers, such as Corrado and Freedman (2011), explore further dimensions, including multiple pathways and different risk patterns in previously identified pathways of antisocial behaviour. For example, they include prenatal risk factors, including alcohol and other substances, working from a developmental perspective and preceding other potential risk factors in early life. Their work posits that individuals and their subsequent risk factors are influenced by the earliest exposure to risk factors. They also aim for this research to inform professionals about potential program intervention points for specific sets of risk factors (p. 196). Corrado and Freedman acknowledge an important theme is a considerable increase in the number of risk factors identified, especially during the initial developmental stages, including pregnancy, birth, infancy, and early childhood (p. 198). This framework may be one of the most significant when studying FASD with developmental theories, as it incorporates the presence of prenatal risk factors, which precedes other potential risk factors (Dunbar, 2019). The pathway models proposed are as follows: 1) prenatal risk factors, 2) childhood personality disorders, 3) extreme child temperament, 4) childhood maltreatment pathway, and 5) adolescent onset. Each pathway highlights how and why types of youth experience certain risk factors with influences such as school performance, residential mobility, antisocial peers, substance abuse, and aggressive behaviours. While it is hypothesized that there are multiple developmental pathways, each requires different intervention points and programs corresponding to the initial risk factor (Corrado & Freedman, 2011). As discussed in the literature, the cases we analyze depict stigma, lack of caregiver knowledge and early intervention, child welfare custody, unstable living conditions and involvement with the CJS. We hope to show the connections between our discussions of risk factors and trajectories using real-life cases to illustrate the importance of FASD awareness. Accurate and valid assessments should

be used for suspicion of or diagnosis of FASD and, in turn, address the increased implementation of proper intervention and treatment during early development and life course.

4.0 Methodology

In order to select the cases discussed below, searches were conducted between October to December 2021, using the Canadian Legal Information Institute's (CanLII) database. Cases that were dated before 2005 were excluded as the Canadian diagnostic guidelines for FASD were not established until 2005 (Chudley et al., 2005). Key search terms included fetal alcohol; fetal alcohol spectrum disorder; FASD; FAS; fetal alcohol syndrome; youth; juvenile; adolescent; and underage. Cases were omitted if they involved adults, were appeals of youth, and if the individual was identified as Indigenous in the transcript. A cursory examination of the cases resulted in four cases being retained; however, one was omitted as it pertained to a Mr. Big investigative procedure used by police following a homicide, which did not fit our desired criteria. Mr. Big strategies are not commonly used, rarely involve youth, and are controversial (Smith et al., 2010). Our search parameters to fit the case criteria include residential mobility; prenatal risk factors; poor school performance; early substance use; antisocial peers; aggressive and risk-taking behaviour; and CJS involvement. All of which are risk factors in Corrado and Freedman's developmental framework, which, unlike many other developmental frameworks, includes prenatal risk factors. Specifically, we chose these cases of youth in the CJS because they have been involved with child protective services since infancy and do not have their biological parents as primary caregivers. They have repeated offences beginning at young ages and have consistently been failed or neglected by the systems put in place to protect and guide their development. These systems' purpose is to decrease risk factors for adolescents; however, these cases depict multiple missed opportunities for further assessment and

intervention, which could have contributed to their reoffending.

5.0 Lessons from Cases of Justice-Involved Youth with FASD

The following section provides descriptions of three court cases of youth with FASD who have been involved in the CJS. These cases present recurring themes of home displacement, repeated encounters with the CJS, and probation breaches. These cases provide further evidence of the criminal and antisocial behaviours observed in youth with FASD who have conflicted with the CJS. We chose these cases due to their circumstances allowing adequate application of the discussed literature, developmental theory frameworks, and life-course trajectories. These specific cases do not pertain to Indigenous peoples, although we acknowledge that there is an overrepresentation of Indigenous peoples in the CJS, and that ethnicity is often mentioned (Gladue). We are aware of how the Truth and Reconciliation Commission of Canada addresses this in Call to Action #34 (TRCC, 2015), however, that is not why we chose these cases. FASD occurs in every society that consumes alcohol. We actively avoid contributing to stereotypes and racial biases that often associate FASD with Indigenous peoples (Aspler et al., 2019).

We aim to identify youth involved in the CJS with observed patterns of risk factors, insufficient protective factors, and life events throughout these individuals' development. We are not highlighting or suggesting that these findings are novel; for example, other researchers have discussed similar findings (Brintnell et al., 2019; Fast & Conry, 2004; McLachlan et al., 2020; Pei & Burke, 2018; Streissguth et al., 2004; Verbrugge, 2003; Wyper & Pei, 2015). Instead, we underline that these youth cases illustrate all risk factors discussed by Corrado and Freedman (2011) within their developmental framework involving prenatal risk factors. Developmental frameworks then offer a perspective for understanding the complex interplay of multiple risk factors in individuals

with prenatal substance use (e.g., alcohol). Further, such frameworks can be examined to better understand potential interventions for risk factors to reduce or prevent criminal justice involvement.

5.1 Slipping through the cracks of Child Protective Systems

5.1.1 *The Director v. M.M.M. et al., 2017 BCPC 411*

This hearing was conducted in the Provincial Court of British Columbia regarding the *Child, Family and Community Service Act* (CFCSA) and the child, T.F.M. The *Ministry of Child and Family Development* (MCFD) had been involved in this child's life since she was 19 months old. Her biological parents could not care for her due to her extreme high-risk behaviour, she had damaged her relationships with her caregivers and “challenged the MCFD resources to their breaking point” (pg. 1, para 2) T.F.M. and her siblings were removed from her mother, M.M.M. and father, E.W.P.'s care in February 2012. Throughout T.F.M.'s formative years, her father, was in and out of the CJS. At the time of this case, T.F.M. was weeks away from turning 18-years-old. However, in the province of British Columbia, the 'ageing-out' process does not occur until an individual's 19th birthday. At this time, they are considered independent adults and no longer receive any financial or personal support from the government, foster parents, or social workers (Adoptive Families Association of BC, n.d).

In July of 2017, T.F.M.'s guardians G.K. and C.A., contacted MCFD as they could no longer care for her due to ongoing behaviours including stealing C.A.'s car, hundreds of dollars and bringing 'unsavoury' persons into the family home, such as convicted individuals convicted of sex offences. T.F.M. had a history of refusing to stay in MCFD foster placements, engaging in significantly high-risk behaviours, and perceived no limitations of boundaries. According to this hearing, T.F.M. conflicted with the CJS since she was 'old enough to be charged', had a lengthy

criminal history of violent offences and failed to comply with court orders (*The Director v. M.M.M. et al., 2017*). Recently, T.F.M. had been sentenced to a custody and supervisions order for the maximum period of six months under the *Youth Criminal Justice Act* (YCJA) for failing to comply with youth sentences and probation terms.

In September of 2017, T.F.M. was convicted of assaulting three people and was once again sentenced to a six-month Deferred Custody and Supervision order, followed by a six-month Intensive Support and Supervisions program, and was expected to stay in the Residential Treatment Program in Kamloops, B.C. for the remaining duration of her sentence. The Director sought continuous custody over T.F.M., which would make them the sole guardian until T.F.M. turned 19, was adopted, married, or the court cancelled the order or transferred custody (p. 17). T.F.M.'s biological parents were not notified of this custody hearing, as they were no longer her legal guardians and lived an unstable lifestyle, leading to their whereabouts being unknown. After T.F.M.'s removal in 2012, she was in the Director's care until custody was transferred to G.K. and C.A. in February 2016.

Until this transfer was granted, T.F.M. refused to remain in MCFD foster homes and instead lived transiently, engaging in high-risk behaviours such as participating in criminal behaviour, exposing herself to sexual exploitation, using street drugs, engaging in self-harm, hitch-hiking, and couch surfing (p. 9). Deciding parental rights was complicated, as The Director submitted that it was not entirely clear who T.F.M.'s "parent(s)" were and if they were entitled to be notified of the proceedings. T.F.M.'s biological mother and father were not her guardians, and it was uncertain if M.M.M. and E.W.P. remained her "parents" for the purposes of CFCSA. By describing the legal term for "parent(s)", T.F.M. did not have them, which was why T.F.M., in January of 2017, was transferred into the custody of C.A. and G.K. Following this ruling, C.A. and G.K. were entitled to custody. It was decided that the participation of M.M.M. and E.W.P. in the

proceedings would not be beneficial for themselves or T.F.M. Their involvement was stated to serve only as possibly reviving painful memories of having lost their children to MCFD long ago (p. 16). The potential psychological impacts on T.F.M. of having her biological parents participate was not stated.

When addressing T.F.M.'s physical and emotional needs and level of development, she was not yet an adult in the eyes of the law, and she exhibited patterns of high-risk behaviours and alienating her caregivers. MCFD social workers claimed to be doing what they could to meet her physical and emotional needs; however, T.F.M. needed to recover from her addictions and cooperate with MCFD's efforts to help her (p. 24). The decision states that T.F.M. was diagnosed with FASD in 2015 and that the treatment program she attended aimed to guide her through sober living and developing a healthy lifestyle (para 72). The Director further declared a Court Plan of Care, which would support T.F.M.'s attendance at school while providing her access to health care as needed. The case concluded by declaring the necessity for T.F.M. to remain in a safe and stable environment for the sake of her physical and emotional development. Given her guardians at the time, G.K. and C.A.'s inability to care for her, she would be transferred to the custody of The Director (p. 26).

As stated by Burns et al. (2020), adverse environmental factors, such as frequent changes in living situations, have been directly linked to negatively impacting children living with FASD. Given the early intervention of MCFD in T.F.M.'s life and her unstable living situations, this could have drastically affected her mental health and ability to understand the necessity for routine (Currie et al., 2018; Kalberg & Buckley, 2007). Another critical component of this case is that T.F.M. was not diagnosed until she was 15-16 years old and amassed a criminal record since a young age. Popova et al. (2011) emphasized the importance of early assessment and implementation of supports and resources, or youth with FASD are at a higher risk of becoming

involved with the CJS (p. 336). Paley et al. (2010) suggested that any suspicion of FASD requires early evaluation of when the child enters the welfare system to aid in juvenile courts, which was overlooked with T.F.M. As McCall (1977) stated, developmental theories were especially essential to apply for justice-involved youth as this time consists of numerous behavioural and environmental changes (p. 377) (also see Corrado & Freedman, 2011). From the court documents, T.F.M. had already gone through Loeber and Le Blanc's (1990) first and second processes-activation and aggravation. By becoming involved in criminal activity at such a young age and accelerating in her high-risk behaviour, which led to G.K. and C.A. being unable to care for her and MCFD exhausting all their limits. Her case does not provide further information on her rehabilitation; however, it seemed as if The Director's Court Plan of Care aimed at guiding her towards deceleration.

There were many opportunities through T.F.M.'s development that were opportunistic for intervention. Loeber and Le Blanc (1990) stated that conduct behaviour such as aggression, lying, truancy, stealing, early education issues, and general problematic behaviour is predictive of later delinquency (p. 387). Another developmental factor applied to T.F.M.'s circumstances is the complete lack of parental guidance (Loeber & Le Blanc 1990). T.F.M. was born into a home unable to care for her, and the timeline of MCFD involvement is lengthy with multiple custody and home transfers. This lack of structure can profoundly impact one's ability to learn and trust stability, especially if this person has FASD (Sampson & Laub, 2003; Paley, 2010). As Moffitt (1993, 2017) described, an effective tool of measurement for antisocial behaviour is tracking its stability throughout development, as observed stability in behaviour warrants an investigation to look at root causes in the individual's early life (p. 680). This inquiry did not happen for T.F.M., given her age of formal assessment and the recurring involvement with CJS.

By applying Corrado and Freedman's (2011) approach, T.F.M. was exposed to risk factors early on—prenatally—which accumulated throughout her initial developmental stages, into the fifth pathway, adolescent onset. According to Moffitt (1993, 2017), her behaviour could be peaking at the time of this hearing—17 years old—and The Director's Court Plan of Care had decently mapped out a plan for T.F.M.'s rehabilitation and care, which she could benefit if firmly and adequately implemented. Overall, T.F.M. was among the thousands of other youths with FASD whose opportunities for assessments throughout development were deprived by the systems put in place meant to 'protect' her. As Popova et al. (2021) state, approximately 18% of children in the welfare system have prenatal substance abuse exposure, which is why this case exemplifies many of the difficulties accompanying fostering adolescents with FASD. Nowhere does this case identify any pre-training or adequate knowledge for G.K. or C.A. to provide the necessary care and guidance to foster a child with FASD, which emphasizes the importance of obtaining such skills to prevent the risk of residential breakdowns. The case of T.F.M. is essential to understanding the crucial elements of becoming the guardian of an individual with FASD. Throughout her developmental years, she experienced unstable living environments, which could have been avoided or minimized through training programs for foster parents in advance of becoming guardians. Such programs would also allow the parents to judge if they feel prepared to foster or adopt a child with FASD, as this is a responsibility that requires total commitment from all parties involved.

5.2 Necessity of routine and structure for youth-involved in the CJS

5.2.1 *R. v. J.R., 2020 ONSC 1938*

At 16, J.R. pleaded guilty to possession of stolen goods and breach of probation in August 2019, assault and the second breach of probation in September 2019. The sole issue of this hearing was

what constituted an appropriate sentence for his offences. Given his age and nature of offences, it was concluded that he be sentenced to a probation period of twelve months, which stressed the sentencing principle of rehabilitation (*R. v. J.R.*, 2020). Since he was four years old, J.R. had lived with his grandmother and had little contact with his biological parents. In grade one, 2007, J.R. was diagnosed with partial fetal alcohol syndrome (PFA) and attention deficit hyperactivity disorder (ADHD) (*R. v. J.R.*, 2018).

J.R.'s pre-sentence report stated that in December 2019, he was placed under a Protective care Agreement with Child & Youth Services, resulting from his grandmother's inability to cope with his attitudes and behaviours exhibited at home and in the community. In March of 2020, he was transferred to residential housing with Blue Sky, in St. John's, where he resided (*R. v. J.R.*, 2020). J.R. had a youth court record and had been convicted of assault, uttering a threat, break and entry, damage to property, breach of probation orders and breach of an undertaking. In November 2018, J.R. was sentenced to a period of ten months of secure custody and supervision, followed by two years of probation due to multiple offences, including assault (*R. v. J.R.*, 2018).

It was stated in his pre-sentence that while in secure custody, J.R. "flourished academically". He achieved secondary education and was studying to receive his driver's permit and demonstrated continuous commitment. He also verbalized how drugs could harm a young person's life and brain development. Treatment options provided within Newfoundland and Labrador required the youth's consent for service, and at the time, J.R. was unwilling to agree to attend treatment for substance abuse (*R. v. J.R.*, 2020). Given J.R.'s age, behavioural issues, propensities to criminal behaviour and general non-compliance, placement options were difficult to secure, and if his pattern of placement breakdown continued due to his behaviour, other placement options would be challenging to identify (p. 6).

J.R. presented with a pattern of non-compliance to following Court Orders or

Undertakings; it was questioned if another period of secure custody was needed if rehabilitation was to be achieved. Being sentenced to secure custody, J.R. would have had access to educational, psychiatric, psychological, and counselling services in a structured environment where routine and consistent supervision existed (p. 6). If the court decided this would be against his best interest, a Supervised Probation, Curfew, and Order to Reside condition, any treatment deemed necessary by Child & Youth Services (CYS), or other service providers was recommended. While J.R. had a youth court record and difficulties responding to previous counselling opportunities, there was still hope for rehabilitating his situation. It was ruled that J.R. be sentenced to a non-custodial sentence and was placed on twelve months of probation.

Unlike T.F.M., J.R. was fortunate to be diagnosed with FASD at a young age, as earlier implementation can decrease involvement with the CJS or aid the individual in juvenile court proceedings (Popova, 2011). However, this was not the case for J.R., as his record showed multiple offences, the most common being probation breaches. J.R.'s case provided some positive aspects, such as his academic success while in secure custody. This formed the question of why his achievements while in custody and under supervision were not further deliberated for his sentencing. The conclusive ruling was that, as a minor, his consequences must reflect his crimes while also considering the higher chance of rehabilitation and reintegration for justice-involved youth. Unfortunately, all previous sentences of probation have led to further offences and breaches.

Loeber and Le Blanc (1990) emphasize that youth desistance is more common once the individual has reached the activation process. Some research has claimed that youth charged repeatedly can engage in desistance through intensive efforts by adults in controlled environments (p. 455). As earlier discussed, the lack of additional and necessary external support potentially amplifies the risk of life-persistent

antisocial behaviour. As these challenges build in force, opportunities to practice prosocial behaviours are disrupted, while maladaptive behaviours are enhanced (Moffitt, 1993, 2017). The sentencing stated that he must comply with the rules of his youth social worker and attend the counselling sessions they recommend. However, this did not compare to the structural support and routines implemented he responded to positively in custody. As seen in many studies, those with FASD react well to structured routine practices as they provide stability and reassurance of continuity (Paley, 2010; Sampson & Laub, 2003). These processes are also helpful for those who experience memory deficits and problems with cognitive functioning.

Given the research examined throughout this paper, it can be assumed that this incident was not J.R.'s last run-in with the CJS, especially if he continued receiving sentences that do not mandate daily supervision, structure, and routine. Despite J.R.'s early diagnosis of PFA, it appeared that the CJS failed to acknowledge this essential component when analyzing his actions and criminal behaviour. For justice-involved youth with FASD, this is a common practice that can be detrimental to the individual. J.R.'s frequent re-offending when on probation could likely be a secondary challenge that should warrant further consideration; however, it is not. The commonality of continuous involvement in the CJS for those with FASD is apparent in the literature review and framework, while this case study provides evidence on the benefits of supervised routine while in secure custody. There should also be further deliberation of J.R.'s ability to not consent to such rehabilitative options, as the documentation does not describe how this opportunity was explained to him or if it even was. Due to the maturity and cognitive deficits associated with FASD, individuals may reject proposals whose descriptions are similar to incarceration. This is an unfortunate depiction of how the CJS does not actively work with individuals with FASD to achieve long-term beneficial outcomes. Rather, as discussed by Fast

and Conry (2009), individuals with FASD who become justice-involved often remain engaged in a cyclical pattern of administrative and criminal charges.

5.3 Explicit limitations for youth understanding the CJS and capacity to stand trial

5.3.1 R. v. R.L.F., 2010 NBPC 35

A 15-year-old boy was charged with assault while carrying a weapon and uttering threats to his grandmother, with whom he had lived since he was three months old. In June 2010, Dr. Holly, a psychiatrist, assessed R.L.F.'s capacity to stand trial (C.S.T.)ⁱ. She determined that R.L.F. had a minimal vocabulary and had a deficit in understanding abstract concepts, stating that he had a 'reasonable understanding but not a competent understanding' of the court process (*R. v. R.L.F.*, 2010) and was deemed unfit to stand trial. The defence counsel disagreed with her conclusion, leading to another hearing on October 28, 2010. R.L.F. was diagnosed with FASD, attention deficit hyperactive disorder (ADHD), and Myoclonic Jerky Seizures. Although his chronological age was 15, Dr. Holly determined that he cognitively operated at a younger child level- approximately seven or eight years old. While he could dress, feed, and bathe himself, he needed constant supervision and reminders to attend to household chores and personal hygiene (p. 2).

R.L.F. attended a specialized class in school; however, this was only for one hour per day for two days a week (p. 1). R.L.F.'s grandmother, social worker, and Dr. Holly described him as having a limited vocabulary and thought processes; he answered monosyllabically and exhibited limited eye contact while speaking (p. 2). When assessing his understanding of court proceedings, Dr. Holly questioned R.L.F. what the roles were of the Judge, defence lawyer, and Crown prosecutor. Only after sketching the courtroom showing their relative positions, was he able to answer that the lawyer was "someone who helps you" and the Judge was someone who

decides "whether you went home or went to jail" (p. 2). During the discussed hearing, the defence counsel attempted to call R.L.F. to testify; however, he would not speak even with his grandmother and social worker coaxing him. This confirmed his grandmother's testimony that R.L.F. would not speak when he did not want to. R.L.F. showed clear limitations in vocabulary, conversing with strangers, and comprehending abstract concepts such as guilt, innocence, or motive. The Chief Judge Jackson believed that he was incapable of participating in any meaningful way in the trial process, including his inability to discuss options with a counsel and to give or receive instructions through the course of the trial, and therefore ruled him unfit to stand trial (p. 6).

The capacity to stand trial for those with FASD was assessed by Brown et al. (2015). Known as psycho-legal capacities (Kruh & Grisso, 2009), criminal defendants must have the ability to understand legal proceedings and actively participate in their defence (p. 20). McLachlan et al. (2014) found that justice-involved youth with FASD (ages 12-23) correlated with impaired psycholegal abilities, specific to capacity to stand trial. These capacity to stand trial impairments involved understanding legal proceedings, making informed decisions, serving as a witness, behaving appropriately in the courtroom, accurately completing legal documents, and participating in legal defence (Brown et al., p. 20). According to Douds et al. (2012), individuals with FASD often do not have the cognitive ability to form criminal intent, confess or testify meaningfully, or benefit from traditional sentencing structures (p. 494). People with FASD are also at risk of suggestibility from people in law enforcement or positions of authority. As Brown et al. (2010; 2011) state, situations such as police interrogations, meetings with defence counsel, or appearances before a court can be anxiety-inducing, significantly impacting how the defendants respond to questions (p. 24). The societal norm is to respect these figures and given that people with FASD are less likely to consider the long-term consequences of their current situation or actions, providing false

confessions to please the authority and decrease discomfort can occur.

Neurocognitive deficits observed in those with FASD often include maladaptive behaviours, which can impact an individual's ability to meet the personal independence and social responsibilities expected of an individual from the same age (Fast & Conry, 2009; Grossman, 1983). For R.L.F., language and comprehensive deficits are present, affecting his ability to understand the proceedings, ask questions, and provide answers. For many neurotypical individuals, the language used in court proceedings can be confusing without previous knowledge, so for those with FASD, not understanding legal terminology can significantly impact their case (Brown et al., 2015). This case is essential as R.L.F. was deemed unfit to stand trial, which often is not addressed in with FASD. Given R.L.F.'s assessments and psychiatric conclusions, it is discouraging that the defence counsel disagreed with this ruling and request further inquiry. The transcript describes an individual who clearly does not understand the proceedings. However, many individuals with FASD are not given the opportunity for CST assessment, which can lead to pleading guilty even if they are not, susceptibility to authoritative status, and confusion about providing testimonies.

This case is essential in addressing the ongoing difficulties for individuals with FASD involved with the CJS, especially for youth. R.L.F. was fortunate to have Dr. Holly suspect his deficits limited his comprehension of the trial; however, many do not have such opportunities. As stated, the language used in the CJS can be challenging for those presenting as neurotypical, which would make the comprehension of circumstances far worse for those with FASD. Prevalence estimates indicate that many justice-involved individuals do not have a formal diagnosis of FASD (Popova et al., 2011; Roozen et al., 2016) and assessments may not be incorporated into legal proceedings for accommodations (Brown et al., 2011; Douds et al., 2012). Without proper systems for neurodivergent people to comprehend each step of their proceedings, they are at risk of numerous

consequences such as longer or harsher charges, self-implication, false statements, or falling victim to manipulation (Brown et al., 2011; Douds et al., 2012). This case portrays the necessity for more experts of FASD to be included in trials involving youth as they can adequately delegate, intervene, and be an activist for the defendant.

6.0 Conclusion

This analysis aimed to provide insights on the current information and data regarding FASD and the CJS while identifying gaps in the literature, areas needing improvement, and commentary on advancing future approaches. In a primarily Canadian context, this paper provides critical findings in research and information necessary for addressing FASD and for justice-involved youth. Our paper provides evidence on the factors contributing to the underreporting of FASD in Canada, including stigmas preventing women from seeking medical advice and guidance for PAE. We also discuss the overrepresentation of FASD in the welfare system, decreasing assessment opportunities and poor transition methods to adulthood, legal procedures lacking in acknowledgment of the effects of FASD on criminal activity and involvement. Lastly, examine the neurological processes contributing to antisocial and criminal behaviour. This is important as it combines multiple factors contributing to this disorder's invisibility, lack of understanding in justice professions, and implementation of evidence-based strategies. The reviewed research also provides potential explanations for why professionals may not follow or implement suggested interventions and early assessments (i.e., lack of formal FASD knowledge and training in the CJS). The factors hindering accurate representation of FASD further perpetuates a cycle of not recognizing when interventions and assessments need to be implemented. There needs to be continuous studies on non-existent paths for those with FASD post-diagnosis, such as a broader overview within Canada.

Developmental framework provides critical concepts used to understand FASD, antisocial behaviour and criminal involvement through sociological and psychological perspectives. Loeber and Le Blanc (1990) provided potential causal factors for offending behaviour and discussed the importance of studying development during juvenile years. By developing the contradictory dual taxonomy, Moffitt (1993, 2017) theorized that antisocial behaviour is salient as one ages; however, it also changes and increases the most during adolescence. She also addresses neurological deficits seen with antisocial behaviour, which can often be misattributed to other causes or misdiagnosed. Corrado and Freedman's (2011) work hold significant relevance as they have identified multiple pathways to antisocial behaviour, including prenatal substance exposure, and the different risk patterns. Recognizing these risk factors can be monitored more closely, especially during an individual's developmental stages. Their pathway highlights important elements of our discussion and emphasize the importance of early assessment and intervention. These articles are essential for this paper's focus on individuals with FASD in the CJS because it allows professionals and people working in the CJS to visualize how people end up in legal processes rather than solely relying on inadequate data or incomplete health records.

When looking at the three case studies, information from the literature and theoretical framework can be combined to explain multiple processes which have impacted these individuals. PAE created a risk factor for antisocial behaviour before they were even born. They also were all impacted by home displacement, T.F.M. especially being subjected to constant environmental changes and instability. These systems failed her by not providing a diagnosis/assessment at an early age which is the most important recommendation for children entering foster care with suspicion of FASD. There were multiple opportunities throughout her involvement with the CJS to be assessed and diagnosed. Unfortunately, this did not

happen until she was in her mid-teens, which by then her formative developmental years had passed. J.R. faced repeated probation breaches but found a path to potential rehabilitation and desistance through secure custody and supervision. A routine allowed him to flourish academically and stay committed to his goals. Although he did not want to be back in custody, the choices between this or another sentence of probation were inadequate. Being sentenced to maintain contact with his social worker and attend counselling does not compare to the structural support that previously helped him thrive. Specialized courts and diversion programs exist for other groups, but there were no further options between being fully secured in custody or being let out on probation dismisses the necessary accommodations that could be incredibly beneficial for those with FASD involved in the CJS. R.F.L. appeared to have been affected the most by neurological deficits, which Dr. Holly fortunately addressed. Like many individuals with FASD, he did not operate cognitively at his age level, which could have severely impacted his trial if left unacknowledged. A massive problem with the lack of information on FASD is that people working within the court proceedings also do not have this knowledge. The defence counsel disagreed with the original decision of him being unfit to stand trial; however, it is not likely that they would expect an individual who is chronologically aged seven or eight to participate fully in proceedings with an understanding of the processes. In every sense of the word, this truly is an invisible disorder. Even with the additional academic assistance he was receiving, one hour per day for two days per week is not enough to support his individual needs.

Overall, these three cases are examples of the continuous insufficient care, acknowledgement, and disrespect faced by people with FASD in the CJS. Moving forward, stigmas regarding FASD need to be addressed by dismantling the notion that it is always the woman's fault for PAE and that they caused this disorder. Medical professionals need to vocalize their opinions from a place of zero judgment and

caring about the pregnant woman's well-being and health. Welfare systems need to increase their rates of early assessment of infants and children placed in their care to understand that they are liable for addressing their health needs while under their charge. Legal proceedings need to establish which, or if any, assessments have been conducted on individuals suspected of FASD or who have observed behavioural and risk patterns described in the literature review and theoretical framework.

People with FASD in the CJS deserve every right provided to other cases involving neurotypical individuals. Finally, individuals at every level of these discussed institutions need to have some comprehension and training in the diverse expressions and symptoms of FASD. In a society with such a prevalent disorder, yet underreported while overrepresented in specific systems, it is unacceptable to continue this cycle of neglect and avoidance.

Notes

ⁱ We note that issues surrounding the capacity to stand trial for individuals with FASD is a complex area that requires further research and attention.

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