ALCOHOL USE DISORDERS AND CRIME: IDENTIFYING AND ANALYSING THE ROLE OF JUDICIAL DISCOURSE

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August 2019

A thesis submitted to McGill University in partial fulfilment of the requirements for the degree of Master of Laws (LL.M).

ACKNOWLEDGEMENTS

To my supervisor, Professor Marie Manikis: I am indebted to your knowledge and expertise so willingly offered throughout the drafting of this thesis. I am ever so grateful for your patient guidance and insightful contributions, without which this thesis would not have been possible.

To the faculty and staff of the Faculty of Law: Many thanks for your continued and tireless support of the graduate law students. Namely, I would like to thank Professor Lionel Smith, for his continued encouragement and reassurance in my academic endeavours, and lecturer Derek Jones, for cultivating my interest in the matters relating to health law in this thesis.

To my parents: Your continued emotional, mental and financial support throughout the completion of this thesis has been, to say the least, much appreciated. I am unable to articulate how grateful I am for your plentiful advice, both academic and personal in nature.

To my partner, Eoin: This thesis was nowhere near as difficult to write as it was to be with me while I was writing it. Your unwavering support is unparalleled and undeserved. Thank you for your relentless words and actions of encouragement. You are my remedy, my refuge, my reason for being.

ABSTRACT

Alcohol consumption is an activity enjoyed responsibly by most. However, for those struggling with addiction, alcohol may quickly become a catalyst for behaviour defined by law as criminal. In fact, the majority of criminal offenders in Canada suffer to some degree from an alcohol use disorder. Given the prevalence of addiction among criminal offenders, the Canadian criminal justice systems and its judges should be prepared to best deal with addicted offenders. This thesis will outline some of the most common responses and themes of discussion among judges who are faced with an offender suffering from an alcohol use disorder. Further, key terms relating to alcohol use disorders, crime and sentencing will be defined. The original research and analysis of this thesis will ultimately enable the first classification of its kind of judicial discourse on alcohol use disorders by theme of discussion, thus enabling an analysis of the impact that these various strains of discussion may have on the outcome of the accused or offender. The themes identified include incapacitation, recognition of rehabilitative efforts, acknowledgment of state responsibility, alternative treatment, and discussion of reform. Beyond the academic specificities of this study, this thesis has attempted to articulate the possibility that the criminal may not always be solely responsible for a crime and that society may have a contributory role in labelling the individual as criminal. Furthermore, the 'criminal' may simply be an addict.

La consommation d'alcool est une activité appréciée d'une manière responsable par la plupart des gens. Cependant, l'alcool peut rapidement devenir un catalyseur pour les comportements qui sont qualifiés comme étant criminels par la loi. En fait, la majorité des délinquants au Canada souffrent dans une certaine mesure d'un trouble lié à l'alcool. Étant donné la prévalence de cette dépendance dans le système, comment le système de justice pénale canadien et ses juges traitent-ils le délinquant alcoolique? Quels sont les réponses et les thèmes de discussion les plus courants parmi les juges confrontés à un délinquant souffrant d'un trouble de l'alcoolisme? Cette thèse définira les termes clés relatifs aux troubles de la consommation d'alcool, à la criminalité et à la détermination de la peine. La recherche et l'analyse originale de cette thèse permettront au final la première classification du discours judiciaire sur les troubles de la consommation d'alcool par thème de discussion, permettant ainsi d'analyser l'impact de ces différentes tensions de discussion sur la détermination de la peine de l'accusé ou du délinquant. Les thèmes identifiés comprennent l'incapacité, la reconnaissance des efforts de réadaptation, la reconnaissance de la responsabilité de l'État, le traitement alternatif et la discussion sur la réforme. Au-delà des spécificités académiques de cette étude, cette thèse a tenté d'expliquer la possibilité que le criminel ne soit pas toujours seul responsable d'un crime et que la société puisse jouer un rôle contributif en qualifiant l'individu de criminel. En outre, le «criminel» peut simplement être un toxicomane.

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CHAPTER 1 - INTRODUCTION

A. OVERVIEW

This thesis considers judicial discourses on alcohol use disorder in the Canadian criminal justice system. The central claim of this thesis is that richer judicial discourse at the sentencing stage on alcohol use disorders can contribute to improved sentencing practices, and therefore improved outcomes for the addicted offender. This thesis aims to highlight and analyse the current judicial and academic discourse regarding the relationship between alcohol use disorders and crime. Particular attention will be given to this discussion at the sentencing stage, and the subsequent incarceration of those with alcohol use disorders, given the flexibility of the sentencing in general and that the disorders that fall short of not criminally responsible defences are generally analysed at this stage of the court process. The subject is particularly relevant given that literatures beyond the legal sphere have already identified and confirmed a correlation between alcohol use disorders and crime. This topic will be explored with an overarching emphasis on the effects that judicial and academic discourse regarding a correlation between alcohol consumption and crime has on the offender. Although comparisons may be made in order to clarify or highlight certain issues, the focus of this thesis will be the Canadian context.

According to Health Canada, nearly 80% of Canadians drink alcohol.[1] The average Canadian household will spend over 1000 CAD on alcoholic beverages annually. Overall, alcohol sales in Canada have increased steadily over the past decade, culminating in 2016 when Canadians collectively spent 21.3 billion CAD on alcoholic products. Among alcohol consumers, nearly 20% can be classified as heavy drinkers.[2]

[1] Health Canada, Canadian Tobacco, Alcohol and Drugs Survey, 2013.
[2] This text provides general information. Due to varying update cycles, statistics in this document
[2] This text provides general information. Due to varying update cycles, statistics in this document may display more-up-to date data than referenced in the text; "Topic: Alcohol Consumption in Canada", online: *www.statista.com* <https://www.statista.com/topics/2998/alcohol-consumption-in-canada/> Accessed February 2018.

Ultimately, roughly 7% of Canadians suffer from some form of a diagnosed alcohol abuse disorder.[3] It is worth noting that this number is likely higher in reality due to potential anomalies between the number of actual cases in comparisons with the number of cases that are medically diagnosed. Alcoholism is therefore communally pervasive.

While it is widely accepted that social behaviour is a question of acceptability, a precise definition of what is acceptable in regard to alcohol consumption and the subsequent behaviour is largely avoided. An absence of meaningful discussion from the judiciary surrounding existent data and medical commentary regarding individual alcohol consumption and addiction would indicate this ignorance. Perhaps due to the lack of discussion on the issue, this thesis will show that the specificities of alcohol addiction are relatively unaddressed in the legal context and throughout judicial discourse.[4] Currently, the communal attitude towards alcohol consumption is relatively cavalier when compared to the attitude towards illicit drugs. This is most notably demonstrated by the fact that alcohol is legal to purchase and consume, whereas the purchase and use of the majority of narcotics is criminally sanctioned. This attitude, in conjunction with a number of other factors, has ultimately led to a lack of social support for those affected by alcohol addiction. Imprisonment and incapacitation have therefore become one of the only judicial responses to those suffering with severe alcohol use disorders.

B. ACADEMIC RELEVANCE

While existing research regarding the correlation between addiction to illicit drugs and incarceration rates is relatively well known, studies have also found a similar correlation between those who suffer with alcohol addictions and incarceration. For example, in the United States it is estimated that up to 70% of criminal offenders were under the influence of alcohol at the time of their offence, and up to 86% of inmates suffer from an alcohol use disorder.[5] Further, research establishes a correlation between

[3] *Canada: Alcohol Consumption: Levels and Patterns* (World Health Organization, 2014).
[4] Tim Murphy, 'Drugs, Drug Prohibition and Crime: A Response to Peter Charleton' [1996] ICLJ 1.
[5] "Alcohol and the prison system - IAS", online: <http://www.ias.org.uk/Alcohol-knowledge-centre/Crime-and-social-impacts/Factsheets/Alcohol-and-the-prison-system.aspx>.

alcohol and crime more broadly. For example, Seliger, an American psychiatrist, articulated a profile of the typical scenarios in which the relationship between alcoholism and criminality is particularly problematic.[6] He found that, when combined with a lower socioeconomic background, those suffering from an alcohol use disorder are nearly twice as likely to commit a criminal act. Walfish and Blunt describe the methodological approaches to proving a concrete link between alcohol consumption and crime, outlining aggregate and individual-level data, which demonstrated a correlation between criminality and recent alcohol consumption.[7] Shupe sought further confirmation of this link, studying the urine of felony offenders immediately after arrest to determine urine alcohol concentration finding that nearly 70% of offenders had alcohol in their system at the time of arrest.[8] Shepherd completed research in the area, which produced staggering statistics, most notably that up to 88% of Scottish offenders in custody were intoxicated with alcohol at the time of their offence.[9] It is however noteworthy that the research that does exist on this topic is predominantly featured in the fields of psychology and sociology. Despite the comprehensiveness of the research that exists regarding the relationship between alcohol consumption and crime, this research does not yet feature in judicial discourse and is absent from relevant legal literature. As will be discussed in the following chapters, a thorough understanding of alcohol as a substance and its subsequent consumption is a necessary foundation to the understanding of addiction to alcohol. Therefore, it follows that a lack of discussion is also noticeable within the legal sphere regarding the effects of alcohol use disorders on crime and sentencing patterns. Furthermore, the majority of existing research does not question the role of the judiciary in the incarceration of alcoholics. This thesis will utilise the existing research of scholars who have proven the existence of a link between alcohol and crime to research and analyse the role of judicial discourse in this complex relationship in order to argue that

[6] Robert V Seliger, "Alcohol and Crime" (1950) 41 J Crim L & Criminology 24.
[7] Steven Walfish & William R Blount, "Alcohol and Crime: Issues and Directions for Future Research" (1989) 16 Crim Just & Behavior 370.
[8] Lloyd M Shupe, "A Alcohol and Crime: A Study of the Urine Alcohol Concentration Found in 882 Persons Arrested During or Immediately after the Commission of a Felony Police Science" (1953) 44 J Crim L Criminology & Police Sci 661.
[9] Johnathan P Shepherd, "Alcohol and Violence" (1991) 59 Medico-Legal J 112.

enhanced judicial discourse on alcohol use disorders can positively impact sentencing outcomes by offering an individualised approach more suited to the specific offender.

Only a very small number of authors have even briefly alluded to the need to examine judicial discourse surrounding the correlation between alcohol-induced crime and incarceration of alcoholics. Seliger opened his article by suggesting that there are 'problems in the field of jurisprudence', but did not elaborate any further at any point throughout his research.[10] Whittle and Hall highlighted the lack of judicial reference to the blood alcohol level of Aboriginal homicide defendants, but did not elaborate further on the existence or non-existence of broad judicial discussion regarding the impacts of alcohol consumption or alcohol addiction.[11] In an analysis of the differences between male and female homicide offenders, Hall briefly mentions the acknowledgement of certain judges that alcohol consumption may play a significant role in a number of homicide cases.[12] Despite initial and brief mention of the presence of the judiciary in the relationship between alcohol and crime, the academic community has yet to classify the current judicial discourse on alcohol use disorders by theme of discussion, if discussion is present at all, and furthermore analyse the relevance of such a categorisation of discussion on the sentencing of offenders plagued by alcohol use disorders. This thesis seeks to fill this gap in the literature.

Admittedly, a number of disciplines have analysed the correlations between alcohol consumption, addiction in general, and crime. However, as seen in the previous sections of this chapter, very few of these academic analyses are from legal sources. Again, it has been clearly established in other disciplines that prisons contain a high number of alcohol use disorder patients. However, the precise cause of this is still unclear. Some research, particularly the work of Pittman and Gordon, has alluded to the complicated nature of identifying causation for this issue, but legal academic commentary

[10] Seliger, *supra* note 6 at 24.
[11] "The Use of Alcohol and/or Drugs in Intimate Partner Homicide: Themes in Judges' Sentencing Remarks: Psychiatry, Psychology and Law: Vol 0, No 0", online: <http://www.tandfonline.com/doi/full/10.1080/13218719.2017.1418145>.
[12] Guy Hall, Marion Whittle & Courtney Field, "Themes in Judges' Sentencing Remarks for Male and Female Domestic Murderers" (2015) Psychiatry, Psychology and Law 1 at 8.

in general has fallen short of actually evaluating any potential precise causes from the correlations between alcohol and crime and alcohol and incarceration. The research findings of this thesis evaluate to what extent the current strains of judicial discourse on alcohol use disorders have contributed to the incarceration of those with alcohol use disorders.

Given that authors from other disciplines have confirmed the presence of a correlation between alcohol consumption and subsequently deviant behaviour, it is imperative that the legal community address this given the particular impact of the criminal justice system on the outcome of judicial trials and the possible incarceration of alcohol use disorder patients. Legal sources engage more with the correlation between alcohol use disorders and incarceration given the law's innate capacity to break the cycle between alcohol addiction and crime. The most promising forum within the criminal justice system is at the sentencing stage, given the flexibility provided to judges at this stage to include and consider a number of subjective factors, including factors that relate to the offender's moral blameworthiness. The flexibility of sentencing is further enhanced by the forum's openness to recognise social responsibility rather than merely individual blame. Chapter 3 argues that improved use of this flexibility at sentencing has the potential to not only diminish the prevalence of alcohol use disorder patients in the criminal justice system, but also to provide more favourable treatment options for defendants plagued by alcohol addiction.

While this thesis will focus on judicial discourse and its possible impact on sentencing, it is essential to note that a variety of causes of criminality, most of which go beyond the confines of this thesis, could also be at play. Given that virtually no literature that is legal in nature has commented directly and explicitly on the causes of a statistical correlation between alcohol use disorders and incarceration, it follows that research has yet to be done regarding the possibility of certain types of judicial discourse as being factors in the resultant incarceration of offenders with alcohol use disorders. While Bernier touches upon the role of the judiciary in the communal treatment and rehabilitation of addicts, she does not go as far as to analyse judicial discourse

specifically.[13] In other terms, further research focused on the specific aims of the criminal justice system must reference established medical evidence regarding the treatment of alcohol use disorders in order to better encompass the interdisciplinary discussion on the matter. The main contribution of this thesis in filling this literary gap will be found in Chapter 4, where current judicial discourse on the matter will be categorised, and the discoveries regarding themes of judicial discourses will be analysed further to reveal any thematic patterns in discourse.

C. RESEARCH QUESTIONS

This thesis will explore the existing judicial discourse in sentencing regarding the relationship between alcohol and crime, and how this might explain the higher incarceration rates of those suffering from alcohol use disorders in Canada, if at all. The research questions are as follows:

1. What are the existing judicial discourses regarding the relationship between alcohol use disorders and crime?
2. To what extent can enhanced judicial discourse on alcohol use disorders at the sentencing stage improve the outcome for the offender?

D. OUTLINE

Chapter 2 will review and analyse the history of crime and alcohol in Canada in both the social and criminal contexts. Furthermore, it will provide a broader discussion of crime and how the criminal justice system has historically responded to crimes involving alcohol. This chapter will argue the clear relevance of alcohol use disorders in the criminal justice system, which will ultimately allow for the argument of sentencing as the appropriate forum for enhanced judicial discussion on the subject matter in Chapter 3.

Chapter 3 will argue that sentencing is an appropriate forum to respond to cases on alcohol use disorders. This is argued through the presentation of the relevant sentencing objectives, as well as the limitations of other currently existing forums for

[13]Dominique Bernier, "Le droit pénal dans le continuum des soins de santé" University of Ottawa Law Journal 2017, 286.

discussion, such as the defences of intoxication and not criminally responsible (NCR). This will allow for the introduction of the specific findings and claims of this thesis, most notably that sentencing offers a space to explore social responsibility of crime, which is inherently an important aspect to be discussed when considering alcohol use disorders.

Chapter 4 will present the key piece of research in this thesis.[14] Through the codification and categorisation of the most recent criminal law cases involving an accused or an offender with a diagnosed alcohol use disorder, the main types of judicial discourse regarding the correlation between alcohol use disorders and crime will be delineated. Further, this chapter will include the most crucial analysis of the thesis. The relevant case law according to the data presented will be classified and analysed by themes of judicial discourse. Particular attention will be given to the discourse of the judiciary in matters relating to the sentencing of offenders with alcohol use disorders. Patterns in discussion will be identified and critically analysed. Furthermore, emphasis will be placed on the patterns of discourse that did not emerge through the analysis of relevant case law.

Lastly, the conclusion will serve to complete the main argument of the thesis. Once the current judicial and academic discourse on the relationship between alcohol use disorders and crime has been established, this can be referenced in future research. Therefore, an offering of brief insight into the possibilities for reform will conclude the thesis.

[14] See Appendix A.

CHAPTER 2 – THE RELATIONSHIP BETWEEN CRIMINAL JUSTICE AND ALCOHOL USE DISORDERS

A. OVERVIEW

Chapter 2 presents essential literature and analysis regarding the relationship between criminal justice and alcohol use disorders. Ultimately, this section will further advance the argument of this thesis by cementing the connection between the Canadian criminal justice system and alcohol use disorders. This will be done though the presentation of historical and social context in order to better understand the positioning of this relationship in modern society and how this relationship particularly affects marginalised populations such as Indigenous peoples. Then, alcohol use disorder itself will be explained in depth, along with how the disorder manifests itself in criminality. Once this information has been established, this chapter will then move forward to argue the relevance of an enhanced understanding of alcohol use disorders within the criminal justice system. This argument will be made through the analysis of the works of notable authors, such as Seliger and Berger, regarding the converging objectives of criminalisation and the criminal justice system more generally, and therefore how these objectives allow scope for further judicial discourse on alcohol use disorders.

B. SOCIAL CONTEXT OF ALCOHOL USE DISODER

I. Historical Context

In early 19th century Canada, alcohol consumption was prevalent, and notably not associated with criminality.[15] Alcohol became central to two facets of Canadian life: the average person's daily routine, and the political and social backlash caused by rampant drunkenness.[16] Drinking became so common that it was described as the caffeine of

[15] "7.7 Temperance and Prohibition | Canadian History: Post-Confederation", online: <https://opentextbc.ca/postconfederation/chapter/temperance-and-prohibition/>.
[16] Morris J Fish, "The Effect of Alcohol on the Canadian Constitution...Seriously F.R. Scott Lecture - Conference F. R. Scott" (2011) 57 McGill L J 189 at 194.

everyday life.[17] A typical day would consist of whiskey for breakfast, followed by buckets of whiskey passed around at work in fields and factories, and then an evening spent drinking and socializing in one of the many public houses in the area.[18] Alcohol was even favoured over water due to fear that the water was unfit for human consumption.[19]

Given the commonality of alcohol consumption and public drunkenness, the resultant social backlash against it developed quite slowly. Regulations of any sort for the white population, albeit relatively insignificant, only came in the mid 19th century following the period of industrialisation, and resulted in an increased need to secure a reliable work force.[20] They initially targeted only specific groups of people or specific drunken behaviours, such as drunk driving of horse-drawn carriages.[21] It is essential to note that, at this time, drinking to the point of committing a criminal offence began to involve an element of moral blameworthiness. The origins of the stigma that is now associated with the consumption of alcohol in conjunction with the commitment of a criminal offence can be traced back to this time. In Canada, this has been most notably solidified in case law in *R v. Leary.*[22]

Social acceptance of alcohol consumption began to shift gradually further with the rise of temperance movements. Driven primarily by women, and therefore largely unofficial, temperance advocates encouraged others to informally pledge their abstinence to alcohol. By the 1850s, approximately 500,000 Canadians had pledged their abstinence from alcohol.[23] Eventually, the colloquial social backlash against alcohol consumption

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[17] Jan Noel, *Canada Dry: Temperance Crusades Before Confederation* (Toronto: University of Toronto Press, 1995) at 13.
[18] Fish, *supra,* note 16 at 195.
[19] "The Rise and Fall of Prohibition in Canada (Part One)", (25 April 2017), online: *All About Canadian History* <https://cdnhistorybits.wordpress.com/2017/04/25/temperance-movement-in-canada/>.
[20] Charles Patrick, Alcohol, Culture and Crime, (Duke University Press, New York, 1952) at 26-27.
[21] Alcohol Policy Network, "Milestones in Alcohol Policy", online: Alcohol Policy Network <http://www.apolnet.ca>.
[22] *R. v, Leary*, [1978] 1 S.C.R. 29 at para 40.
[23] Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines, 2003) at 27.

and drunkenness morphed into political backlash. The *Dunkin Act* was passed in 1864, which permitted individual municipalities to prohibit alcohol sales within their town-limits. In 1877, the *Habitual Drunkards Act* was passed in British Columbia, which entitled wives of alcoholics to legal title of their property.[24] By 1921, every province in Canada had enacted provincial prohibition.[25]

Legislative prohibition was short-lived in Canada, however. Outrage ensued when veterans returned from overseas to discover that they could not relax with a shot of whiskey.[26] Bar owners and breweries suffered diminished livelihoods. Underground organised crime, such as illegal smuggling, rum-running and gang violence therefore became prevalent.[27] Flexible laws and minimal enforcement meant that the prohibition became more of a light suggestion rather than hard law over time. Beginning in 1921, the same year the last province adopted prohibition legislation, Canadian provinces began one-by-one to repeal all prohibition legislation. Alcohol consumption in Canada then increased steadily every decade until the 1980s.[28] Indeed, alcohol is a unique substance. While illicit drugs often carry with them social stigma and criminal sanctions, alcohol and alcohol consumption are widely socially accepted unless they are combined with criminal offences. Alcohol is not only legal to purchase, but promotional deals and misleading advertising even implicitly encourage it.[29] Furthermore, given the social element of its consumption, problematic drinking patterns often go unnoticed by family and friends.[30] In fact, over 40% of admissions to publicly funded substance abuse treatment programs are patients struggling with consumption of alcohol only or alcohol and another drug.[31] This can be contrasted with only 20% of admissions due to opiate abuse and 17% of admissions due to marijuana abuse. When considering the social

[24] *Habitual Drunkards Act*, SBC 1887, c 11.
[25] J.M. Bumsted, "The Peoples of Canada: A Post-Confederation History, Third Edition, 260
[26] Noel, *supra*, note 17.
[27] *Ibid*.
[28] Andrew Lefebvre, "Prohibition and the Smuggling of Intoxicating Liquors between the Two Saults" (2001) 11:3 Northern Mariner 33.
[29] *Ibid*.
[30] *Ibid*.
[31] National Institute on Drug Abuse, "Treatment Statistics", online: <https://www.drugabuse.gov/publications/drugfacts/treatment-statistics>.

acceptance of alcohol consumption combined with the prevalence of addiction issues in comparison to other substances, the importance of isolating alcohol as a unique substance when considering substance abuse and addiction is evident.

II. Public Perceptions on Alcohol Use Disorder and Criminality

As will be discussed further in Chapter 4, the relationship between alcohol use disorders and criminality is evidenced disproportionately in a number of specific marginalised populations. For example, it was previously widely assumed that the majority of alcohol-induced crimes were committed by young men with lower than average socio-economic backgrounds.[32] However, following the emergence of further research in the 1960s, it is now understood that social status or financial income rarely have any direct impact on the likelihood of an individual to turn to delinquency.[33] Conversely, some studies have indicated that a higher socio-economic background could actually increase the likelihood of criminal activity. Baron found that young people from high socio-economic families were 'most likely to commit violent crimes, sell more drugs, and generally be more involved in criminal activity than their peers who came from more humble origins.'[34] A similar study by Schissel indicated that more youths from higher-income families were arrested for aggressive crimes, such as assault, than those from lower socio-economic backgrounds. Therefore, it is generally quite likely that a misconception exists among members of the public regarding the types of individuals who commit crimes related to alcohol consumption.

In Canada in particular, a notable bias among public perceptions about crime rates exists towards Aboriginal people.[35] This has existed since long before the implementation of the *Indian Act* in 1985, an act used by colonisers to ban their consumption of alcohol, furthering the unequal treatment of Aboriginal people.[36] This highlights a strong

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[32] The National Council of Welfare, "Justice and the Poor" (2002), online: <http://www.oaith.ca/assets/files/Publications/justice_andthe_poor.pdf> at 6.
[33] *Ibid.*
[34] *Ibid* at 9.
[35] "The Inquiry and the Issues", online: <http://www.ajic.mb.ca/volumel/chapter1.html#1>.
[36] Refer to Sections 94 to 100 for information specifically pertaining to the punishment of Aboriginal people.

correlation between alcohol use disorders and colonialism in general. Despite only representing 2.7% of the population in Canada, Aboriginal people represent roughly 17% of the prison population.[37] It is statistically evident that Aboriginal people come into conflict with the criminal justice system more frequently than other population, however this does not conclusively indicate that Aboriginal people commit more crime. Generally, Aboriginal people that are convicted of an offence did not engage in violent activity, but rather alcohol-induced deviant behaviour.[38] It is not necessarily the case that Aboriginal people are more criminally active in society, but rather that they are over-represented in the criminal justice and penal system, primarily as a result of colonial practices. A similar overrepresentation of those suffering with mental illnesses is also demonstrated in the criminal justice system. As is evidenced in the findings of this thesis, the confluence of two categories of overrepresentation within the criminal justice system – Aboriginal people and mental illness - are at the heart of the vast majority of criminal cases involving an alcohol use disorder. As with other marginalised populations, these categories of people are often over-policed, over-arrested, and over-charged.[39] This furthermore systematically defines crime and crime statistics as discriminatory decisions made by actors within the criminal justice system. The overrepresentation of these marginalised populations will be essential to note throughout the remainder of this thesis, particularly throughout the analysis of relevant case law in Chapter 4.

C. UNDERSTANDING ALCOHOL USE DISORDER

I. Defining Alcohol Use Disorder

The definition of intoxication should be defined prior to any definition on alcohol use disorder, given that the latter builds upon the former. Alcohol intoxication is a medical term referring to ‘a temporary altered mental state associated with alcohol in the

[37] Correctional Service of Canada Government of Canada, “Demographic Overview of Aboriginal Peoples in Canada and Aboriginal Offenders in Federal Corrections”, (15 August 2013), online: <http://www.csc-scc.gc.ca/aboriginal/002003-1008-eng.shtml>.
[38] *Ibid.*
[39] Camille A Nelson, “Frontlines: Policing at the Nexus of Race and Mental Health Mental Health, the Law, & the Urban Environment” (2016) 43 Fordham Urb LJ 615 at 649.

body.'[40] The term is generally used to describe the acute behavioural and psychological changes that occur following the consumption of alcohol. Most notably however, these changes must occur simultaneously with a blood alcohol concentration (BAC) above zero in order to distinguish these changes from other conditions associated with, for example, alcohol withdrawal.[41] The most recent fifth edition of the *Diagnostic and Statistical Manual* (DSM-5) states that these changes must be 'clinically significant', indicating behaviours such as 'inappropriate sexual or aggressive behaviours'.[42] An intoxicated individual must demonstrate at least one or more of the following symptoms during or very shortly following alcohol consumption: slurred speech, incoordination, unsteady gait, nystagmus, impairment in attention or memory, or stupor or coma.[43] It is important to note that the DSM-5 does not make any mention of BAC or specific quantities of alcohol, stressing the subjectivity and unpredictability of the effects of alcohol on each individual.[44]

The definition of intoxication is outlined above to provide background context and information to support the definition of alcohol use disorder. In the most recent update of the DSM-5, two former classification of alcohol use, then labelled 'alcohol abuse' and 'alcohol dependence' respectively, were amalgamated into one broader diagnosis: 'alcohol use disorder'.[4546] In order to be diagnosed with alcohol use disorder, a patient must exhibit at least two out of twelve specified symptoms, such as strong cravings to use alcohol or forgoing important activities to consume alcohol, in a 12-month period.[47] The number of symptoms present is then used to specify severity, ranging from mild (2-3 symptoms) to severe (6 or more symptoms).

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[40] Amy Wenzel, *The SAGE Encyclopedia of Abnormal and Clinical Psychology* (SAGE Publications, 2017) at 95.
[41] *Ibid*.
[42] "Substance-Related and Addictive Disorders" in *Diagn Stat Man Ment Disord*, DSM Library (American Psychiatric Association, 2013).
[43] *Ibid*.
[44] Wenzel, *supra,* note 40 at 96.
[45] DSM-5, *supra*, note 42.
[46] For further background information regarding the change in terminology, see "Alcohol Use Disorder: A Comparison Between DSM–IV and DSM–5" 2, online: <https://pubs.niaaa.nih.gov/publications/dsmfactsheet/dsmfact.pdf>.
[47] *Ibid*.

More broadly, three notable factors are present when diagnosing alcohol use disorders. Firstly, the presence of alcohol withdrawal generally exists, which takes place when alcohol withdrawal symptoms present themselves within 4-12 hours of alcohol intake, followed by a period of heavy intake.[48] Secondly, an assessment of tolerance is done to cross evaluate symptoms of intoxication with BAC. For example, an individual with a high BAC but few symptoms of intoxication may indicate at least some degree of acquired tolerance to high amounts of alcohol. Thirdly, craving is characterised by a desire so intense to consume alcohol that it is difficult for the patient to think about anything else.[49] This often results in alcohol consumption even when the individual is aware of the harmful risks potentially associated with this behaviour. Furthermore, given that depression and anxiety frequently either accompany alcohol use disorders or precede them, an increased rate in suicidal behaviour has also been established.[50]

Within the context of the criminal justice system, it is essential to note that the state of intoxication in and of itself is not illegal. However, it may become illegal when paired with other behaviours, such as driving or disrupting public peace. Legal definitions of alcohol intoxication tend to rely on relatively specific factors, albeit less explicitly. Generally, the BAC of the individual is used to determine alcohol intoxication. A BAC threshold is typically established in any given jurisdiction to indicate a level above which one can be deemed to have an impaired ability to perform certain activities, such as operate machinery, or consent to a contract or sexual activity.[51] In doing so, the judiciary implicitly assume that an individual with a BAC above this level is generally more prone to criminal behaviours associated with alcohol intoxication. This assumption, however, does not include evaluation or consideration of the specific effect that alcohol has on that particular individual.

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[48] Schuckit MA, *Alcohol and alcoholism, in Harrison's Principles of Internal Medicine*, 18th ed (New York: McGraw Hill, 2012) at 3446–3552.
[49] Hintzen AK , Cramer J , Karagülle D , et al:, *Does alcohol craving decrease with increasing age? Results from a cross-sectional study* (J Stud Alcohol Drugs 72(1), 2011) at 158–162.
[50] *Ibid*.
[51] *Ibid*.

In order to better understand the current judicial discourse on alcohol use disorders, it is imperative to understand the behavioural systems that are evaluated by the courts in order to determine the subjective effects of alcohol on a given individual. The most obvious example of this is when an individual's ability to walk in a straight line is tested, often by a police officer.[52] In other instances, the court has taken an even more subjective approach in stating that an 'intoxicated condition' can be defined by the individual's likelihood to cause danger or injury to themselves or others.[53] In cases where the defence of intoxication is raised, a difference is highlighted between intoxication and *extreme* intoxication leading to a state of automatism, but little details are provided regarding the exact definition of either term.[54] For example, in *R. v. Leary*, the defence raised is not drunkenness, but rather 'an absence of voluntariness caused by excessive drinking.'[55] This was revisited again in *R v. Daviault*, where it was determined that an extreme state of intoxication may be akin to automatism.[56]

While it is possible to determine the courts' definition of alcohol intoxication, it is far more difficult to discern a judicial definition of alcohol use disorder. However, the willingness of the judiciary to discuss and define intoxication indicates a potential willingness and scope to possibly further discussions to extend to alcohol use disorder. Simultaneously, the narrowness of the scope of the defence of intoxication may be introduced and will be further analysed in Chapter 3. The judicial definition of alcohol use disorder, as it exists currently, will be discussed in the following section.

II. Common Factors of Alcohol Use Disorder in Criminality

Surprisingly, the sociological and scientific communities are not yet sure of any precise definitive predication of the individual behavioural effects of alcohol

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[52] *Ibid* at 97.
[53] See, for example, *R. v. K* (EB) [2003] YKSC 63, [2003] CarswellYukon 156, Table of Authorities.
[54] See, for example, *R. v. Bernard*, [1988] 2 S.C.R. 833 and *R. v. Daviault,* [1994] 3 S.C.R. 63.
[55] *R. v. Leary*, [1978] 1 S.C.R. 29 at para 62.
[56] *Daviault*, *supra*, note 54 at para 4, 29, 38, 63 and 67.

consumption, nor alcohol use disorder.[57] Medical professionals are certain that alcohol consumption impairs judgment, lessens inhibitions and increases impulsive behaviour.[58] However, they cannot determine with precision how the full extent of each of these impacts can vary from individual to individual. This lack of definitive and predictable behavioural information is precisely what renders alcohol a particularly problematic factor in many crimes.

Obviously, not all individuals who consume alcohol or who suffer from an alcohol use disorder will commit a crime. However, evidence does exist which suggests that alcohol consumption by an individual already plagued with stress or emotional discomfort is predisposed to more violent, and therefore often criminal, behaviour.[59] Various attempts have been made to clarify and specify this link between alcoholic consumption and criminal behaviour. One study determined a correlation between levels of paranoia and fear and increased drinking habits amount young men. It was assumed that alcohol was used a type of 'defence' activity that developed overtime.[60] This could furthermore explain why many studies have indicated that an individual, especially a young male, is more likely to perceive another individual's actions as threatening or insulting when intoxicated.[61]

Medically speaking, there is not necessarily a specific profile of an individual that appears to infallibly fulfil the criteria of a person prone to alcoholism. However, it is generally agreed upon that an alcohol use disorder is a manifestation of an underlying personal disturbance or mental health issue.[62] It is perhaps this lack of ability to cope with repressed emotions or issues that most clearly distinguish those more prone to alcohol use

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[57] Stanley M Beck & Graham E Parker, "The Intoxicated Offender-A Problem of Responsibility" (1966) 44 Can B Rev 563 at 570.
[58] *Ibid*.
[59] Shepherd, *supra*, note 9 at 112.; Siann G, 'Accounting for aggression: perspectives on aggression and violence' (1985) Boston, Allen and Unwin.
[60] R Gustafson and H Kallinen, 'Changes in the psychological defence system as a function of alcohol intoxication in men', (1989) Br J Addict; 84: 1515-21.
[61] RO PihI, 'Alcohol and aggression: a psychological perspective' in: E Gottheil, KA Druley, TE Skoloda, HM Waxman (eds) *Alcohol, drug abuse and aggression*, (Springfield, Charles Thomas 1983) at p. 292-313.
[62] Seliger, *supra,* note 6 at 26.

disorders from those who do not suffer with addiction related behaviours. Along with this, Seliger identified a variety of other common factors that appear to be frequently prevalent among those suffering from alcohol use disorders. These factors include, but are not limited to, the following:[63]

1. A peculiar central nervous system, which is particularly susceptible to a variety of chemical substances, including alcohol.
2. An underdeveloped emotional-thinking system, which results in exceptional vulnerability in social situations.
3. Many patients often reveal a traumatic history of events, ranging from family abuse, divorce or employment difficulties, and so on.
4. Undetermined genetic, physiological, biological, glandular, metabolic or neurological peculiarities.
5. Often, patients demonstrate a lack of engagement in community or religious groups, likely due to the emotional difficulties previously outlined.

While a number of these factors are arguably unchangeable biological facts of nature, many factors associated with those suffering from alcohol use disorders are acquired, or at least changeable. This is to say that, for example, an emotional immaturity may be a simply biological fact, but is also possible that it is either aggravated or even onset by an individual's surroundings. In this regard, acknowledgement of social and state responsibility is essential, as will be further discussed throughout this thesis. Furthermore, such underdevelopment could at least be improved with varying medical techniques, such as psychotherapy. This information is particularly relevant when considering factors common among *criminal* alcohol use disorder patients, and therefore judicial discourse in relevant cases could benefit greatly from considering it. Further analysis regarding the anticipated role of judicial discourse in this regard will be discussed in Chapter 3.

[63] Seliger, *supra,* note 6.; Seliger, "Psychiatric Orientation of the Alcoholic Criminal." Handbook of Correctional Psychology (Philosophical Library, New York, 1947) at p. 517; Seliger, "Alcoholics Are Sick People." (Oakridge Press, Baltimore, 1945).

The impact of alcohol consumption on one's behaviour has been researched and analysed largely from two perspectives: the biological perspective of the medical community and the sociological perspective of the liberal arts faculties, notably sociology and criminology communities. From the biological perspective, Wenzel described a state of intoxication by alcohol as an 'altered mental state' that is temporary and directly resultant of alcohol consumption.[64] However, no further specificities regarding how the mental state is altered as compared to the state of mind prior to intoxication is provided. The DSM-5 provides some specific examples of what behaviour impacted by alcohol intoxication may look like. These non-exhaustive examples include 'inappropriate sexual or aggressive behaviour, mood liability, impaired judgment, [and] impaired social or occupational functioning'.[65] Other medical sources have provided further examples of behaviours associated with alcohol intoxication. For example, Nelson et al. discussed the possibility of a loss of memory regarding the events that occurred during the period of alcohol intoxication.[66] It was noted, however, that research was still unclear regarding the precise cause of these episodic losses of memory. Most notably, lack of consensus emerged regarding whether or not this resulted from the mere presence of a high blood alcohol level, or if it was more specifically the result of a rapidly increasing blood alcohol level.[67] Furthermore, some authors have determined alcohol intoxication to be a contributor to suicidal behaviour and thoughts.[68] This finding is in keeping with previously mentioned medical literature, which indicates a correlation between alcohol intoxication and mood instability and impaired judgment.

Academic commentary in the fields of sociology and criminology has ultimately expressed similar behavioural concerns, albeit in less explicit terms. For example, Beck

[64] Wenzel, *supra,* note 40 at 95.
[65] DSM-5, *supra*, note 42.
[66] Nelson EC, Heath AC, Bucholz KK, et al: 'Genetic epidemiology of alcohol-induced blackouts' (2004) Arch Gen Psychiatry 61(3):257–263.

[67] *Ibid.*
[68] See, for example, Dawson DA, Goldstein RB , Chou SP , et al, 'Age at first drink and the first incidence of adult-onset DSM-IV alcohol use disorders' (2008) Alcohol Clin Exp Res 32(12):2149–2160;Johnston LD , O'Malley PM , Bachman JG , Schulenberg JE, 'Monitoring the Future: National Survey Results on Drug Use, 1975–2008' (2009) Volume 1: Secondary School Students. NIH Publ No 09-7402. Bethesda, MD, National Institute on Drug Abuse.

and Parker expressed the difficulties associated with the unpredictability of the behavioural results of alcohol intoxication.[69] However, as indicated by Shepherd, it is reasonable to presume that the resultant behaviour has the potential to be classified as criminal in a number of scenarios.[70] The aforementioned behaviours associated with alcohol intoxication as stated in the DSM-5 could potentially lead to criminal behaviour, for example impaired judgment, or in the case of inappropriate aggressive or sexual behaviour, can be unequivocally criminal in nature. While alcohol intoxication specifically is not the focus of this thesis, it is important to understand this state in order to understand the basis of alcohol use disorders.

While not necessarily explicitly mentioned, a correlation between behaviour traditional classified as criminal, or at the very least deviant, and behaviours that the medical community has identified as being consistent with alcohol intoxication can be drawn. This correlation should be of particular relevance to the judiciary when ruling on criminal cases in which alcohol intoxication is a factor in order to better adjudicate such cases. Seliger identifies a number of possible reasons for this correlation between deviance and alcohol consumption, particularly addictive alcohol consumption. Most notably, he identifies an alcoholic prone to criminal activity as someone who is also particularly prone to depressive feelings of inadequacy. This is in contrast to the literature on crime mentioned above which indicates violence as a predominant tendency in alcoholics. He argues that this, among other psychological factors, may cause irrational behaviour when combined with the neurological effects of alcohol. Essentially, he suggests that alcohol consumption is perhaps not the root cause of deviance, but that it can exacerbate deviance when combined with other psychological ailments. He continues his characterisation of the criminal alcoholic as follows:

> He lacks self-assurance except when in a buoyant mood, and he is uncertain in regard to his role in life and in regard to the quality of inner self-reliance and self-government. As a consequence, he frequently

[69] Beck & Parker, *supra,* note 57 at 570.
[70] Shepherd, *supra* note 9 at 112.

> develops protective techniques by which he consciously or unconsciously learns to avoid responsibilities that would require long-term perseverance and sacrifice on his part. Often one finds that he appears to pamper himself in many ways, and to behave like a spoiled child when criticized or thwarted or challenged.[71]

He further suggested that the final stage of this cycle involves another heavy drinking episode, which in turn deepens the individual's sense of inadequacy and weakness.[72] Following extensive research regarding the alcoholic offender as an *individual,* it is not unreasonable to assume that Seliger's key claim throughout the majority of his relevant literary contributions is that in order to respond to alcohol-induced crime, one must first respond to the needs of the alcoholic, as opposed to mere traditional responses to the criminal.[73] This was confirmed by Bernier, who agreed that intervention outside of the sphere of the traditional criminal justice system focused on treatment and compassion is not only necessary for the rehabilitation of addicts, but is also imperative in the general efforts of the criminal justice system to protect society.[74]

However, not all commentators have approached the disease model of alcohol use disorders as delicately. For example, Nemerson takes a more nuanced approach to the alcoholic offender as described by Seliger.[75] Nemerson questions whether or not it is acceptable to accord moral culpability to deviant actions committed by those suffering from alcohol use disorders, particularly if we are to accept the discourse put forward by authors such as Seliger and the medical community that an alcohol use disorder is in fact a disease. Given that culpability generally requires voluntariness, he notes a certain level of dissonance between what the medical community has identified as a number of

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[71] Seliger, *supra* note 6 at 26.
[72] *Ibid* at 27.
[73] For example, see Robert V. Seliger, M.D, "Psychiatric Orientation of the Alcoholic Criminal", Handbook of Correctional Psychology (Philosophical Library, New York, 1947) at p. 517; Robert V. Seliger, M.D.: "Alcoholics Are Sick People" (Oakridge Press, Baltimore, 1945).
[74] Bernier, *supra*, note 13.
[75] Steven S Nemerson, "Alcoholism, Intoxication, and the Criminal Law" (1988) 10 Cardozo L Rev 393.

involuntary behaviours associated with alcohol addiction and what the legal community often perceives as voluntary deviance.[76] He notes that while alcohol consumption is generally voluntary in its initial stages, this may progress to an involuntary behaviour in those suffering from alcohol use disorders. He expresses a lack of clarity emerging regarding the culpability of those who consume alcohol, and subsequently commit a criminal act, as a result of an involuntary alcohol use disorder:

> While an intoxicated alcoholic cannot control his drinking, he may have substantial control over all other behaviour. Criminal acts by an intoxicated alcoholic may be sufficiently voluntary to satisfy that requirement of moral fault. For such an intoxicated alcoholic to be culpable, however, an additional mental element must be present, and any such element may be negated by the intoxication caused by his alcoholism.[77]

While authors such as Nemerson have taken a more nuanced view of the culpability of those suffering from alcohol use disorders, it is the general position of the academic community, in both the medical and liberal arts fields, that the culpability of the alcoholic offender must at least be considered differently that than of the non-intoxicated offender.[78] However, a significant number of offenders with alcohol use disorders are

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[76] *Ibid* at 411–412.
[77] *Ibid* at 417.
[78] Richards, Esther L., M.D, "Introduction to Psychobiology and Psychiatry" (2nd Edition). C. V. Mosby, St. Louis, 1946; Sadler, William S., M.D, "Pre-Institutional Recognition and Management of the Potential Delinquent." Contemporary Criminal Hygiene (pp. 107-129). Oakridge Press, Balti- more, 1946; G. Fletcher, Rethinking Criminal Law 846-47 (1978): 'The issue of intoxication is buffeted between two conflicting principles. One principle is that if someone voluntarily gets drunk and then commits a crime, his prior fault in getting drunk should deprive him of the claim that he was not responsible for his drunken acts. ... But the period at the end of this provision is in fact only a semicolon. For it is obviously unjust to hold that an intoxicated actor is responsible for all crimes that he might commit as a result of drinking excessively and taking the risk of irresponsible conduct. His fault in rendering himself non-responsible at the time of the violent act is constant, whether he commits a bur- glary, a rape, or a murder. To bring the scope of his liability into line with his culpability in getting drunk, the law seeks a compromise. There has to be some accommodation between (1) the principle that if someone gets drunk, he is liable for the violent consequences, and (2) the principle that liability and punishment should be graded in proportion to actual culpability.'

convicted without significant regard for their disorder,[79] regardless of the reasoning for culpability, and this directly impacts the overrepresentation of those suffering from alcohol use disorders in correctional facilities. While it is likely that this lack of regard for alcohol use disorders is a result of the systematic aims of sentencing, the limited understanding and discussion of the courts in this regard must be highlighted. This is of particular importance to the central claim of this thesis. Although the determination of culpability in Canada is understood in more rigid terms, sentencing offers a framework where these nuances, particularly within the context of alcohol use disorders, may be understood. Therefore, this framework should be availed of more frequently and more constructively.

D. RELEVANCE OF ALCOHOL USE DISORDERS IN CRIMINAL JUSTICE

I. Converging Objectives of Criminalisation

As touched upon earlier in this chapter, the historical evolution of the objectives of criminalisation has been significant in Canadian history. In the 19th century, for example, it was firmly believed that the person is a moral agent, and therefore solely responsible for their crimes. While rationality is still an important element behind the criminal justice system in Canada, a slightly more nuanced and individualised approach is favoured today, and different values are upheld in the criminal justice system. Generally, it can be assumed that certain behaviours are classified as criminal due to the general communal desire to ensure societal safety. In simplified terms, the behaviour of killing someone is classified as a crime in order to condemn the act with the ultimate hope of preventing it. The person who commits such an act is classified as a criminal to facilitate public safety initiatives. However, the objectives at play when criminalizing certain acts or individuals is often much more nuanced than this and can include objectives ranging from assigning blame to punishing moral blameworthiness to punishing the offender for the harm caused. For example, it is not as easy to rationalise the criminalisation of drug possession as a matter of public safety. Rather, it could perhaps be best seen as a means of incapacitating populations prone to drug use. While

[79] See Appendix A.

neither the purchase nor consumption of alcohol is criminalised, it similarly follows that a number of subsequent behaviours are. Admittedly, only subsequent behaviours that would be criminalised regardless of alcohol use are punished, however it is still worth questioning the true purpose of criminalisation, which can be to incapacitate, and even blame, those with alcohol use disorders.

On the surface, the criminalisation of behaviours associated with alcohol use disorders may appear to fulfil the mandates of public safety. However, the deeper analysis undertaken in this thesis suggests that it is a flawed attempt at incapacitating and morally blaming those with addiction issues rather than treating them. This questioning of the purpose of criminalisation is essential to further analysis of judicial discourse. However, there is an obvious tension between the criminal law that aims to punish rational minds and criminalizing an alcohol-addicted person. It is in this respect that the criminal justice system overlaps with the objectives of the medical and psychiatric community.

The core objectives of medicine and criminal law respectively are inherently unique, and therefore either system may present different definitions of the same term in order to better accommodate the specific needs of each system. Generally, the medical system seeks to treat patients, while the criminal justice system is concerned with a wide variety of objectives, some of which were mentioned in the previous section. Given the ambiguity surrounding a precise definition of alcohol use disorder between disciplines, jurisdictions and individual cases, it is important to note that each definition carries with it a different systemic purpose. For example, the medical definition of alcohol use disorder seeks to concisely define and generalise a wide subjectivity observed in different cases of alcohol use disorders, as seen in the non-exhaustive list of criteria for alcohol use disorders in the DSM-5. Through the delineation and categorisation of associated behaviours, the medical definition attempts to capture the numerous nuances of alcohol use disorders. Conversely, the criminal justice system is inherently less obligated to provide such accessible information to the public, and instead aims to assign blame in an

objective manner.[80] While it is common for the judiciary to reference these medical definitions, most notably referencing the DSM-5, interpretations and applications of the medical definitions can vary slightly from case to case, given the individualistic nature of cases in the common law. This variety of definitions could also be caused by a lacking desire to truly understand the disorder, and instead to assign blame quickly and efficiently. These varying interpretations will therefore be juxtaposed to the generalised scientific definition as provided by the medical community.

Contrary to common use, the terms 'alcoholism' or 'alcoholic' are non-medical terms used colloquially to describe alcohol use disorders or an individual suffering from an alcohol use disorder, respectively. However, the courts tend to employ the more commonly understood colloquial terms, partly in order to satisfy the aforementioned objectives of the criminal justice system. It is necessary to note prior to any discussion surrounding the legal definition of alcohol use disorder that the subject is seldom discussed in Canadian case law, as will be discussed in subsequent chapters of this thesis. Meaningful judicial discussion surrounding a specific legal understanding of alcohol use disorder is sparse, if at all existent. As a matter of positive law, questioning the role of addiction in relation to a criminal act is irrelevant given that the main objective is to determine guilt rather than reasons for guilt. However, given the prevalence of alcohol use disorders among those who come into contact with the criminal justice system, it should follow that the judicial discourse regarding alcohol use disorders is proportionate to its relevancy. This discourse is particularly relevant at the sentencing stage, given the expanded scope for consideration of a number of factors that may have impacted the actions of the defendant along with their moral blameworthiness, such as an alcohol use disorder. Further analysis regarding the appropriateness of judicial discourse on alcohol use disorders at the sentencing stage will be provided in the subsequent chapter.

[80] Benjamin L. Berger, 'Mental Disorder and the Instability of Blame in Criminal Law' in James Stribopoulos and François Tanguay-Renaud, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law*, (Hart Publishing, 2012).

When alcohol use disorder is currently considered by the judiciary at the sentencing stage, reference is often solely briefly made to medical discourse rather than creating a judicial discourse on the subject matter. More recently, the courts have demonstrated a reliance on the diagnostic requirements of the DSM-5, noting its specific use in medical evaluations.[81] This again is likely due to the courts' mandate to ensure continued and consistent public safety. As explained by Berger, the fulfilment of this mandate requires a certain stability which may require the courts to disregard the possible subjective influences of an alcohol use disorder, and rather rely on objective written factors, such as those outlined by the DSM-5.[82] Conversely, in Ontario, it has been argued that an alcohol use disorder should be considered a disability for the purposes of disability benefits. However, in this case, discussion surrounding the symptoms of alcohol use disorders was not present and the argument was essentially dismissed.[83]

Given the absence of a precise legal definition of alcohol use disorder in Canadian jurisdictions, a brief overview of the current rhetoric in the United States could provide further insight.[84] The leading case on the matter, *Roberts v State*, discusses 'chronic alcoholism'. It establishes that alcohol use disorder may be an 'independent affirmative defence' to the charge of murder.[85] The most essential element of the rule established is that the defendant must have a *disease* in order to be classified as having an alcohol use disorder, indicating that the American courts will consider an alcohol use disorder to be a true mental disease, as desired by the medical community.[86] Again, the courts generally do not offer their own engagement with the medical definitions available, but rather make brief reference to the relevant medical criteria. This is understandable, given that the objectives of the court system are inherently different than those of the medical community and that the court has in a legal sense provided their own definition which is sufficient for the purposes of the criminal justice system.

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[81] See, for example, *R. v. Powder* [2017] NWTTC 4 at para 24.
[82] Berger, *supra*, note 80 at 25.
[83] *Ontario (Director of Disability Support Program) v. Tranchemontagne* [2010] ONCA 593.
[84] 1 Wis. 2d 537, 164 N.W.2d 525 [1969].
[85] John E Herald, "Criminal law: alcoholism as a defense" (1970) 53:3 Marquette Law Review 445 at 445.
[86] *Ibid* at 449.

A key complexity of the criminal justice system in general is that recourse to criminal justice is not only influenced by criminal offenders, but also by the narrative of victims.[87] Therefore, it is essential to recognise that many crime statistics, which can generally only articulate the crimes reported, are influenced by the personal perception of crime of members of the public. For example, in Canada, the public tends to perceive crime as being primarily acts of isolated violence. In a review of opinion polls, the Department of Justice noted the following:

> Despite concerns about walking alone at night in the community, Canadians perceive the level of violent crime in their communities to be decreasing. Conversely, Canadians perceive crime rates in general as increasing, and respect for the law as decreasing. In reality, rates of violent crime in Canada reported to the police, including homicide, sexual assault and assault have been decreasing now seven consecutive years.[88]

This same review found that the fear many Canadians felt regarding the dangers of criminal activity in their neighbourhoods was unrelated to the actual levels or occurrences of crime. In fact, the report found that public perception regarding violent crime is generally 'not in tune with reality.'[89]

This comprises a relevant limitation for the criminal justice system in dealing with matters related to alcohol use disorders for a number of reasons. As a matter of confidence in the administration of justice, the criminal law must, at least in part, respond to the safety concerns that are perceived by the public. Therefore, if the public perceives a threat to be viable, the courts must respond to it, even if this threat is in fact far less menacing in reality. In relation to alcohol use disorders, this means that the criminal

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[87] Law Commission of Canada, ed, *What is a crime? challenges and alternatives: discussion paper* (Ottawa: Law Commission of Canada, 2003) at 19.
[88] Department of Justice Government of Canada, "Public Perception of Crime and Justice in Canada: A Review of Opinion Polls", (11 November 2001), online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr01_1/p0.html>.
[89] *Ibid*.

justice system is often forced to soothe public fears regarding violence inevitably associated with alcohol addiction by incapacitating the offender, rather than invoking rehabilitating treatment options.

E. SUMMARY

This chapter presented essential information and arguments found in relevant literature regarding the relevance of alcohol use disorders in the criminal justice system. The historical and social context of alcohol consumption and alcohol use disorders in Canada highlights the importance of this discussion. Further, the detailed explanation of alcohol use disorder both medically and within the context of the criminal justice system provides a clear platform on which the research findings of this thesis can be presented and analysed. Now that these elements have been clearly established, Chapter 3 will subsequently serve to argue to the appropriateness of sentencing as the most promising forum for enhanced judicial discourse on alcohol use disorders in the criminal context.

CHAPTER 3 - SENTENCING AS AN APPROPRIATE FORUM FOR JUDICIAL DISCOURSE ON ALCOHOL USE DISORDERS

A. OVERVIEW

Chapter 3 argues that sentencing is one of the most appropriate stages of criminal proceedings, and subsequently the most appropriate and promising forum for enhanced judicial discourse on alcohol use disorders. This chapter signals many of the substantive claims made in Chapter 4 regarding the research findings of this thesis. Prior to the key analysis of this chapter, an overview of the relevant sentencing objectives will be provided in order to better contextualise the central claim of this thesis that enhanced judicial discourse at the sentencing stage on alcohol use disorder can potentially contribute to improved sentencing practices. These relevant objectives include moral blameworthiness, just deserts models, aggravating and mitigating factors, and Gladue reports. Then, the limitations of other stages and forums within criminal proceedings to address alcohol use disorders will be highlighted, with particular focus on the narrowness of the defences of intoxication and not criminally responsible. Finally, the specific findings and claims of the subsequent chapter will be presented and contextualised. This chapter will ultimately argue that the flexibility of sentencing allows for the consideration of social responsibility, which is of paramount importance in any judicial discourse considering alcohol use disorders.

B. OBJECTIVES OF SENTENCING

Prior to an analysis of the current case law that touches upon the correlation between alcohol use disorders and criminality, an understanding of the relevant sentencing objectives and principles, as well as subsequent literary analysis on sentencing objectives, is necessary. Given that this thesis argues that sentencing is one of the most appropriate forums within the criminal justice system for alcohol use disorders to be addressed, a thorough understanding of the key sentencing objectives is essential. As summarised by Manson, the express articulation of criminal law demonstrates what we as a community are currently choosing to protect, and the enforcement of these laws, often

through sentencing, provides the state with an instrument for pursuing this protection objective.[90] The various relevant sentencing objectives, theories and principles will be outlined in this section to further explain the intersection at sentencing between the communal objective of public protection and alcohol use disorders.

I. Functions of Punishment

Legal debate often evolves from the distinction (or lack thereof) between sentencing and punishment in the context of criminal justice.[91] Historically, legal practitioners, academics, and the public alike generally have agreed that a sentence of some sort in response to a criminal conviction is acceptable and warranted. However, the perception of these respective groups on the acceptability and fairness of punishment has evolved over time. Hart characterised punishment as an objective consequence enforced by an authority, which is constricted by the relevant legal system that is normally considered unpleasant.[92] However, it could be argued that punishment is actually quite subjective, depending on how the inmate's personal experiences are accounted for throughout their sentence. Furthermore, the definition itself of punishment is rather subjective. For example, while some may assume that a sentence based on principles of retributive justice would not be overly punitive, the conditions of the sentence could in reality cause a very punitive experience for a specific individual, despite this not being the intention of a restorative justice system. Alternatively, in some cases emphasis is placed specifically on causing harm to an individual.[93]

However, one must consider whether or not the functions of punishment are entirely fulfilled when punishing the addicted offender. If the function of punishment within the context of the criminal justice system is believed to be to enforce an unpleasant consequence for committing a crime, this would indicate that the crime is the

[90] Allan Manson, *The law of sentencing*, Essentials of Canadian law (Toronto, Ont.: Irwin Law, 2001) at 3.
[91] *Ibid*.
[92] H.L.A. Hart, Punishment and Responsibility (Oxford: Clarendon Press, 1968) at 3-9.
[93] Joel Meyer, "Reflections on Some Theories of Punishment" (1968) 59:4 The Journal of Criminal Law, Criminology, and Police Science 595 at 595.

root cause of the punishment. The theory of rational choice would assume that an offender *chooses* to commit these crimes. However, it is perhaps instead possible that the root cause of crime in certain instances is addiction, as expressed by Seliger and Berger, for example.[94] In these instances, it is arguable that the punishment is a consequence ultimately for the offender's addiction rather than the crime committed, and thereby does not fulfil the true function of punishment. Addiction is not a rational choice. Therefore, a more flexible and nuanced judicial discourse allows for a more tailored approach to sentencing which acknowledges the offence, yet seeks to rehabilitate an offender rather than merely punish.

II. Relevant Sentencing Principles

When sentencing an offender who was intoxicated at the time of the offence, the question of moral blameworthiness is generally considered. In *R. v. M. (C.A.)*,[95] moral culpability was determined to be essential in the determination of a fair and appropriate sentence. Lamer C.J.C. said that the 'element of moral blameworthiness' and its relationship with the harm caused must be viewed as a function of the sentencing standard for culpability.[96] The level of moral culpability of the offender must be adequately evaluated and considered at the sentencing stage.[97] In *R. v. Sweeney*,[98] a case relating specifically to alcohol consumption, Wood J.A. also concluded that moral culpability was key in sentencing, particularly when questioning the degree of culpability for consequences:

> As a society, we long ago opted for a system of criminal justice in which the moral culpability of an offence is determined by the state of mind which accompanies the offender's unlawful act. Thus the consequences of an unlawful act when either intended, or foreseen and recklessly disregarded, aggravate its moral culpability. But consequences, which are

[94] Seliger, *supra*, note 6 and Berger, *supra*, note 80.
[95] *R. v. M. (C.A.)* [1996] 1 S.C.R. 500.
[96] *Ibid* at para 97.
[97] Manson, *supra,* note 90 at 89.
[98] *R. v. Sweeney* (1992), 71 C.C.C. (3d) 82 (B.C.C.A.).

> neither intended nor foreseen and recklessly ignored, cannot aggravate the moral culpability of an unlawful act, except and to the extent that Parliament so decrees.[99]

According to the reasoning of Wood J.A., moral culpability of an offender is only aggravating if the consequences of their actions were 'intended, or foreseen and recklessly disregarded.' Therefore, the essential question for the purposes of this thesis becomes whether or not criminal acts committed while suffering from an alcohol use disorder, either by way of intoxication or withdrawal, are intended or foreseen by the offender. As seen in the previous section of this chapter, the courts have adamantly ruled that a state of intoxication does not mean that the consequences of this state could not be foreseen prior to consuming alcohol. However, judicial discourse on the moral blameworthiness of alcohol use disorder patients, albeit sparse, will be reviewed in Chapter 4.

The discussion of sentencing proportionality has been most recently revived through the emergence of many supporters of a just deserts model of sentencing. Under a just deserts model, the according sentence must be commensurate with the severity of the crime committed.[100] Furthermore, the sentence should also be commensurate with other sentences for similar offences. This is of particular importance in cases involving an offender with an alcohol use disorder, given that elements such as social responsibility and diminished moral blameworthiness could arguably lead to a lesser sentence, regardless of the severity of the crime. This retributive approach to sentencing has been most notably propositioned by Von Hirsch, who states that a just deserts model may encompass a series of numerical sentencing guidelines, such as ranges which may be departed from based on applicable aggravating or mitigating factors.[101] A willingness to rehabilitate, as will be further elaborated upon in Chapter 4, could be one of these

[99] *Ibid* at para 97.
[100] Andrew Von Hirsch & Committee for the Study of Incarceration, *Doing justice: the choice of punishments : report of the Committee for the Study of Incarceration*, northeastern university press ed. ed (Boston: Northeastern University Press, 1986), ch 8; Andrew Von Hirsch & Andrew Ashworth, *Proportionate sentencing: exploring the principles*, Oxford monographs on criminal law and justice (Oxford ; Oxford University Press, 2005), ch 9.
[101] Andrew von Hirsch, "The 'Desert' Model for Sentencing: Its Influence, Prospects, and Alternatives" (2007) 74:2 Social Research 413 at 416.

mitigating factors. Another method of implementation may be through the legislation of statutory sentencing principles, which outline in detail how sentences may be amended to ensure proportionality to the crime.[102] Accordingly, the *Criminal Code* does stipulate that the fundamental principle of sentencing is that the sentence must be proportionate the crime.[103] However, specific sentencing guidelines (other than maximum available sentences) have yet to be implemented. It is important to note that, while just deserts models of sentencing may be appealing, very few jurisdictions have actually implemented such a model.

III. The Role of Aggravating and Mitigating Factors

In order to further understand the ways in which judicial discourse may be enhanced at the sentencing stage, the current role as well as the potential role of aggravating and mitigating factors, in conjunction with Gladue reports, should be highlighted in order to better situate the arguments advanced by this thesis.

Section 718.2(a) of the Criminal Code provides an exhaustive list of factors that the courts will automatically consider to be aggravating. However, in addition to this codification of aggravating factors, the judiciary has also recognised a number of additional circumstances which may be considered aggravating. According to Manson, these factors are the following:[104]

- Previous convictions
- Actual or threatened violence or use of weapon
- Cruelty or brutality
- Offences while subject to conditions
- Multiple victims or multiple incidents
- Group or gang activity

[102] Ann Munster, "The sentencing commission and its guidelines by Andrew von Hirsch, Kay A. Knapp, and Michael Tonry", Northeastern University Press (1988) 16:3 Journal of Criminal Justice 263.
[103] 718.1 'A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.' R.S., 1985, c. 27 (1st Supp.), s. 156; 1995, c. 22, s. 6.
[104] Manson, *supra* note 90 at 151–158.

- Impeding victim's access to the justice system
- Substantial economic loss
- Planning and organisation
- Vulnerability of the victim
- Status or role of the victim
- Deliberate risk taking

The *Criminal Code* does not include definitive mitigating factors. However, according to Manson, the judiciary has recognised the following mitigating factors in Canada:[105]

- First offender
- No prior record advanced
- Prior good character
- Guilty plea and remorse
- Evidence of impairment[106]
- Employment record
- Collateral or indirect consequences
- Post-offence rehabilitative efforts
- Unrelated meritorious conduct
- Act of reparation or compensation
- Provocation and duress
- Delay in prosecution or sentencing
- Gap in criminal record and the intermediate recidivist
- The test case scenario
- Disadvantaged background
- Mistaken belief in the nature of a prohibited substance

[105] *Ibid* at 131–148.
[106] Generally, voluntary intoxication will not be a mitigating factor. Refer to Chapter 3, Section B.III. of this thesis for further discussion.

The above enumeration of currently recognised aggravating and mitigating factors is of particular importance, given that it highlights what is not currently recognised. This thesis, particularly in Chapter 4, highlights factors which could potentially be recognised as mitigating factors. Further, it is important to note that, while the judiciary may consider mitigating factors in an effort to reduce the overall sentence, judges are still restrained by the mandatory minimum sentence for the given offence committed by the offender. Therefore, it is possible that even the most compelling mitigating circumstances, such as a disadvantaged background as seen in many cases analysed in Chapter 4, may ultimately have very little impact on the actual sentence.

Given the number of cases analysed in Chapter 4 that incorporate a *Gladue* report, a review of the background of the policy is essential to understanding subsequent analysis in this thesis. *R. v. Gladue*[107] was a landmark decision of the Supreme Court of Canada on the sentencing principles under Section 718.2(e) of the *Criminal Code*,[108] which directs the courts to take into account non-custodial options 'with particular attention to the circumstances of Aboriginal offenders.' This case was preceded by a particular social climate, due namely to the over-representation of Aboriginal peoples in prisons, which called for a revision of criminal justice practices in this respect. This case was affirmed recently in *R. v. Ipeelee.*[109] *Gladue* reports emerged from the judgments as specific pre-sentencing reports in the context of Aboriginal offenders which may provide the sentencing courts with relevant elements of the background of the offender in order to assess moral blameworthiness. These reports may even provide better-suited alternatives to incarceration with regards to the particular cultural considerations of the Aboriginal community. When a *Gladue* report is presented, it provides clear instruction, and arguably even a clear obligation, for the sentencing judge to consider relevant elements of the offender's background and to embrace the concept of judicial notice. Unfortunately,

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

[108] '718.2(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.'

[109] *R. v. Ipeelee* [2012] 1 S.C.R. 433

however, *Gladue* reports often fail to be brought forward in court, and the judge is left to implicitly fill in historical gaps.[110]

Notably, *Gladue* reports do not have the main objective of identifying and discussing addiction issues. However, it must be considered that mental health issues and substance or alcohol use disorders may be manifested as part of an inter-generational trauma and isolation inflicted upon Aboriginal peoples by the state. Therefore, while the discussion of alcohol addiction is not necessarily a key aim of *Gladue* reports, the core aim of communicating and highlighting the effects of inter-generational trauma will often result in the disclosure of an alcohol use disorder, if such an addiction is present. This also supports the recognition of state responsibility regarding alcohol use disorders, and further highlights the appropriateness of sentencing to discuss this contribution to criminality. *Gladue* reports expressly recognise that criminal responsibility is not merely individual, but may also be shared by the state.

A wide variety of *Gladue* factors may be brought forward at sentencing. The most relevant factors for the purposes of this thesis include alcohol or drug use, poor mental health, and interventions or treatment for alcohol or drug use.[111] While *Gladue* reports essentially seek to force the judiciary to consider the relevant difficult circumstances of the offender empathetically, this does not necessarily always occur.[112] In Alberta, for example, the Cawsey Inquiry voiced specific concerns regarding the lack of attention that judges pay to the addiction and rehabilitative needs of Aboriginal offenders.[113] Furthermore, the report highlighted the fact that *Gladue* reports, while certainly a step in the right direction and the only pre-sentencing reports available specifically for

[110] For further discussion, see "Nearly 20 years after the Gladue decision, lawyers say national standards lacking", online: <https://www.theglobeandmail.com/canada/article-nearly-20-years-after-the-gladue-decision-lawyers-say-national/>.
[111] Legal Services Society of British Columbia, "Gladue Report Guide", March 2018, online: < http://www.bcrb.bc.ca/Gladue-Report-Guide-eng.pdf>.
[112] Philip Stenning & Julian V Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask L Rev 137 at 142.
[113] Alberta,"Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta", vol. 1 (Edmonton: Government Printer,1991) at 4-29.

Aboriginal offenders, are mostly anecdotal and are not accompanied by any concrete sentencing guidelines or frameworks. This concern is echoed by this thesis, and furthermore expands beyond the lack of judicial discourse on addiction in the Aboriginal community to explore the lack of judicial discourse on alcohol use disorders across all populations.

C. LIMITATIONS OF OTHER MECHANISMS AND FORUMS

This section argues that there are limitations in considering alcohol use disorders at the stage of conviction. One of these limitations includes the narrowness of existing defences, such as the intoxication and the not criminally responsible (NCR) defence.

I. Narrowness of Intoxication as a Defence

In order to evaluate current judicial discourse on alcohol use disorders, familiarisation with past discussion is essential. This section serves not only to indicate that judicial discussion surrounding alcohol use has proven to be possible at the sentencing stage, but also to highlight the limitations of existing patterns of judicial discussion regarding intoxication as a defence.

Historically, this conversation has been had in the context of intoxication only, as opposed to addiction, in the context particularly of the defence of intoxication, which was considered to be an aggravating factor in crime. This was largely due to the assumption that that state of intoxication was caused by the accused's 'own act and folly, and he might have avoided it.'[114] However, with the rise in emphasis placed on subjective *mens rea* in the 19th century, the courts became increasingly concerned that perhaps intoxication, when combined with a number of other factors, could prevent the formation of intent.[115] While this did not completely deprive intoxication of all moral culpability in the eyes of the law, intoxication did become an admissible defence for specific intent offences, which requires not only a physical act but also a specific state of mind that extends beyond simple intent to commit the immediate act in question. Throughout the

[114] *Reniger v. Fogossa* [1548], 75 E.R. 1.
[115] Kent Roach, *Criminal Law* (Irwin Law, 2012) at 252.

years, the distinction of intoxication defences between general and specific intent offences has remained uncertain. Generally, though, the defence of intoxication is often influenced heavily by presumptions regarding the 'ultimate disposition' of the accused offender.

The 1920 decision in *DPP v Beard* presents the origin of the defence of intoxication.[116] In this case, Beard raped a 13-year-old girl while intoxicated. The victim died of suffocation after Beard placed his hand over her mouth to stop her screams. The House of Lords confirmed that intoxication 'could be no defence unless it could establish that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended.'[117]

Since *Beard*, Canadian courts have interpreted the decision's requirement of the formation of specific intent as distinguishing crimes of specific intent from those of general intent, with intoxication only serving as a defence to the former category.[118] Despite being consistently criticised as uncertain and difficult to apply, the Supreme Court of Canada has insisted upon its use, largely for broader policy reasons. In *R. v. Leary*, the Supreme Court approved the decision in *DPP v Majewski*, holding that the distinction between general and specific intent offences must preside in order to protect community values, and that voluntary intoxication sufficiently substituted for the fault element in crimes of general intent.[119][120] In *Majewski*, Lord Elwyn-Jones held that voluntary intoxication in itself fulfilled the requirements of *mens rea*, stating, '[the accused's] course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases.'[121] In *R. v. Daviault*, a departure from the *Leary* rule was made, allowing for a defence akin to that of automatism when the accused is so

[116] *DPP v Beard* [1920] A.C. 479.
[117] *Ibid* at 504-2.
[118] Roach, *supra* note 132 at 254.
[119] *Leary, supra,* note 55.
[120] *DPP. v. Majewski* [1977] A.C. 443.
[121] *Ibid* at 262

intoxicated that they are not capable of forming *mens rea*.[122] The *Leary* rule was found to be in violation of Section 7, which imposes a basic requirement of a blameworthy state of mind, and Section 11(d) of the Charter, which stipulates the right to be presumed innocent until proven guilty.[123] Justice Cory stated:

> The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime. Rather, the substituted mens rea rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, mens rea for a crime is so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice.[124]

Ultimately, the decision in *Daviault* raises the possibility that a state of extreme intoxication may give rise to a defence for both general and specific intent offences.[125]

In response to *Daviault*, Parliament amended the *Criminal Code* to include Sections 33.1(1) and (2), which legislate that there will be no defence for an accused 'by reason of self-induced intoxication, [lacking] the general intent or the voluntariness required to commit the offence' by reason of a serious behavioural departure from 'the standard of reasonable care generally recognised in Canadian society.'[126] This would appear to be parliamentary confirmation of the rules established in *Leary* and *Majewski*, which hold that the state of mind required to voluntarily become extremely intoxicated can replace the *mens rea* requirements for a particular offence. It is notably problematic that Section 33.1 would appear to allow for the conviction of an accused even if they were 'incapable of consciously controlling' their behaviour, or in other terms, involuntary actions.[127]

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[122] *Daviault*, *supra,* note 54.
[123] *Ibid* at 16-17.
[124] *Ibid* at 60.
[125] Roach, *supra,* note 58 at 266.
[126] Section 33.1(2) of the *Code*. Note that this section only applies to offences which interfere, or threaten to interfere, with the bodily integrity of another person, such as assault.
[127] *Ibid.*

The distinction that the courts have made between voluntary and involuntary intoxication is particularly interesting when discussing addiction. In contrast to Section 33.1, the courts have historically recognised involuntary intoxication as an independent defence to crime, given that an accused who 'became impaired through no act of his own will […] could not reasonably be expected to have known that his ability was impaired or might thereafter become impaired…'.[128] However, uncertainty remains regarding the meaning of self-induced intoxication, as expressed in Section 33.1, in cases of involuntary intoxication. If the intoxicating substance is administered by the accused themselves without knowing the impairing effects of this substance, can this still be said to constitute self-induced intoxication under Section 33.1, or does Section 33.1 not apply to involuntary intoxication of any kind? Without a clear response from the Supreme Court to date, it would seem reasonable to assume that the substitution of fault for becoming intoxicated with the fault of intent for the particular crime should not occur if the accused can be said to not have been at fault for their own intoxication.[129]

Interestingly, the courts and academics alike have yet to question how an alcohol use disorder might or should impact the determination as to whether or not the self-administration of a substance is voluntary or involuntary. Given that addiction is medically classified as a mental disorder, and therefore involuntary, the courts should respond differently to cases involving alcohol consumption by an individual suffering from an alcohol use disorder. However, given the limitations of the intoxication defence, we do not know whether alcohol use disorders are considered by the courts to be involuntary, and therefore sentencing is the most appropriate forum for this ensuing discussion. In Chapter 4, this will be further explored through the analysis of the judicial discourse regarding the relationship between alcohol use disorders and crime in relevant case law.

II. Narrowness of the NCR Defence

[128] *R. v. King* [1962] S.C.R. 748.
[129] Isabel Grant, "Second Chances: Bill C-72 and the Charter" (1995) 33:2 Osgoode Hall Law Journal 379.

Section 16(1) of the *Criminal Code* states that '[n]o person is criminally responsible for an act committed or an omission made while suffering from a mental disorder […]'. Given that the DSM-5 classifies alcohol use disorder as a mental disorder, it follows that a number of cases involving an accused or defendant suffering from a diagnosed alcohol use disorder resort to the defence of not criminally responsible by reason of mental disorder (NCRMD). In the findings of this thesis, 30% of the cases analysed in Appendix A involved an NCR finding.[130] Despite its evident popularity, the appropriateness of the NCR defence as a means of responding to the prevalence of alcohol use disorders within the criminal justice system is weak in comparison to sentencing, which allows for past experiences to be taken into account. Furthermore, the NCR defence is very narrowly applied in Canadian criminal law, and therefore highlights the appropriateness of sentencing as the more ideal forum for judicial discussion on alcohol use disorders. It is essential to note that defendants do not 'get off' when NCRMD is found. In some cases, the liberty and freedom of the defendant is even more disproportionately restricted upon such a finding than it would be in more traditional sentences. When the offence in question is particularly mild or moderate in severity, it could be argued that to raise a defence of NCR is rather irresponsible,[131] given the consequences of continued psychiatric detention and care.

The NCRMD defence is analysed at length by Berger.[132] Berger's analysis applies to a number of disorders beyond alcohol use disorder and discusses the limited scope of the NCR defence in relation to a wide variety of mental disorders. However, in relation to alcohol-related disorders, Berger discusses the prevalence of fetal alcohol spectrum disorder (FASD) in the criminal justice system. He notes that, under the NCR defence, the criminal justice system has 'difficulty learning from past experiences and, in particular, connecting cause and effect.'[133] This observation is of particular relevance when considering alcohol use disorder as well, given that the disorder is intrinsically

[130] Appendix A.
[131] Joan Barrett & Riun Shandler, Mental Disorder in Canadian Criminal Law (Scarborough, Ont: Carswell, 2006) at 4-38.22.
[132] Berger, *supra*, note 80.
[133] Berger, *supra*, note 80 at 17.

connected to the past experiences and the effects of these experiences on the offender. Furthermore, Roach and Bailey found evidence that an alarming number of cases in the Canadian criminal justice system involved a defendant with FASD, proving that 'the criminal justice system is being left to deal with more and more failures of social policy and the effects of mental illness, substance addiction, poverty, and despair.'[134] It is for this reason that enhanced judicial discourse that transcends the confines on the NCR defence is needed.

Under the current NCR framework in Canada, the key legal question is whether or not the defendant poses a 'significant threat to the safety of the public'.[135] Under s. 672.54(a) of the *Criminal Code*, the defendant must be discharged if found not to pose a significant threat. The limitations of this question in the context of alcohol use disorders, and even mental disorders more generally, are problematic. As established in the previous chapter, criminal behaviour is often correlated to an alcohol use disorder. In other words, it can be said that this 'significant threat' posed by a defendant is a direct result of their alcohol use disorder. The key legal question could instead be phrased as whether or not the defendant's alcohol use disorder poses a significant threat to public safety. However, it is very difficult to ask this question without discussing the alcohol use disorder itself, and discussion of this kind has a very limited scope under a defence of NCR. It therefore becomes glaringly obvious that the key legal questions reviewed in an NCR finding are far too limited to include significant judicial discussion on the impact of an alcohol use disorder on criminal behaviour both generally and in the individual case presented.

D. SPECIFIC FINDINGS AND CLAIMS

A number of original findings were researched in this thesis, the bulk of which will be further analysed in the subsequent chapter. However, this section will serve to introduce and anticipate a few central claims of this thesis, which particularly

[134] K. Roach and A. Bailey, 'The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing' (2009) 42 UBC L Rev 1 at 9.
[135] Note this outcome in most of the NCR cases in Appendix A.

demonstrate the appropriateness of sentencing as a forum for judicial discourse on alcohol use disorders.

I. State v. Individual Responsibility

At times, judges have acknowledged the role and responsibility of the state in the addiction and treatment, or lack thereof, of the offender in question. This demonstrates a shift away from the criminal justice system's emphasis on individual responsibility. For example, in *R. v. Avadluk,* Shaner J explicitly states that '[t]he system has failed [the offender…]'.[136] In *R. v. Smith*, the impact of residential schools specifically was acknowledged. In both of these cases, the judges invoked a form of collective responsibility for the alcohol use disorders of the respective individuals and for the crime itself. In these cases, it may be argued that the judges have still fulfilled their judicial duty to assign blame and responsibility. However, they have chosen not to assign this blame and responsibility entirely to the individual offender, but rather to the state and community more broadly. While it was mentioned previously that the judiciary has yet to comment on the involuntary nature of intoxication in an alcohol use disorder patient, the comments of these two decisions which invoke state responsibility may be interpreted as to limit the blame, or in other words reduce the voluntariness, of the intoxicated state of the offender. By saying that the 'system' has failed these offenders, the judicial discourse in these cases is ultimately implying that blame and responsibility for their crimes should not be placed solely on the individuals themselves. It is submitted by this thesis that this is the correct direction which should be taken by the judiciary in recognizing the role of the state. Further analysis of the aforementioned cases demonstrating this theme will be provided in the subsequent chapter.

Further to the argument that sentencing is the appropriate forum for enhanced judicial discourse on alcohol use disorders, a contrast can be highlighted between the flexibility seen at the sentencing stage and the intense focus on individual responsibility at the conviction stage. The openness of blame assignment possible at the sentencing

[136] *R. v. Avadluk* [2017] NWTSC 51 at para 110.

stage is in direct contrast to the limitations presented at the conviction stage, which implies a much more narrow focus in assigning individual blame in a more black and white fashion.

II. Mind-set of the Defendant

It is imperative to note that the cases discussed in Chapter 4 do not at any point specifically identify an alcohol use disorder in and of itself as a mitigating factor in sentencing. However, it is observed that a number of judges have considered an understanding of the gravity of one's addiction and a subsequent demonstrated effort and willingness to seek treatment as a mitigating factor which may ultimately reduce the severity of the sentence imposed.[137] This can also be framed as a flexible way of thinking of mitigation, which further proves that sentencing is a forum which allows for the inclusion of such understandings of mitigation. While incapacitation is still ultimately favoured in these cases, either the terms or length of imprisonment is markedly reduced as result of the offender's willingness to rehabilitate from their alcohol use disorder. Based on the analysis of these cases, it seems that addiction is not an element that diminishes the offender's moral blameworthiness, but rather that the realisation of this addiction and willingness to rehabilitate is considered mitigating.

This line of judicial discussion is corroborated by medical research which indicates that willingness is an essential aspect of recovery.[138] Further, the discussion evidenced in the cases analysed in Chapter 4 demonstrates the scope of judicial discussion at sentencing to address and recognises the efforts and willingness to recover of the defendant. This furthers the claim of this thesis that it is certainly possible for judges to discuss alcohol use disorders more thoroughly at the sentencing stage. As will be discussed in Chapter 4, an enhanced pattern of judicial discourse that consistently recognises factors such as a willingness to rehabilitate as mitigating would result in more

[137] *R. v. Hemmerling* 2017 NWTTC 4, *R. v. Powder* 2017 NWTTC 4, *R. v. Kurek* [2018] SKQB 168, and *R. v. Smith* 2017 BCSC 2513.
[138] Rosemary A Boisvert et al, "Effectiveness of a peer-support community in addiction recovery: participation as intervention" (2008) 15:4 Occupational Therapy International 205 at 208.

effective and appropriate sentences and outcomes for both the defendant and public safety.

E. SUMMARY

This chapter has presented essential background information required for a richer understanding of the research findings that will be presented both in Chapter 4 and Appendix A of this thesis. Through the analysis of the relevant objectives of sentencing and the limitations of alternative forums for discussion, an appropriate platform has been created to discuss the specific findings and claims of this thesis.

CHAPTER 4 - CASE LAW: AN ANALYSIS OF CURRENT JUDICIAL DISCOURSE

A. OVERVIEW

This chapter will present the key contribution and essential research findings of this thesis. Cases concerning alcohol use disorders and crime have been organised and analysed based on the quantity and quality of judicial discussion regarding this issue. This chapter will present the research findings, offer further details regarding the methodology used, and provide clarity regarding the specific codes used to categorise the cases analysed. This analysis will focus particularly on what *has* been said by the judiciary regarding the role of alcohol addiction in crimes. Based on the research findings presented, further analysis will be provided of the cases in which it was determined that judges spoke meaningfully about alcohol use disorders. These Category 4 cases will be presented, discussed, analysed and further categorised according to the nature of the judicial discourse. Then, certain patterns in sentencing are highlighted as they relate to the respective categorisations of judicial discourse. Ultimately, this will allow for the creation of an accurate and current portrayal of the judicial discourse and sentencing patterns presently emerging in Canada regarding alcohol use disorders in the criminal context.

B. SUMMARY OF FINDINGS

Table 1 presents a summary of the findings. The complete table, which includes the entirety of the research findings, may be found in Appendix A.

Table 1 – Categorisation of Cases

CATEGORY	NUMBER OF CASES
0 - Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.	28
1 - Alcohol use disorder was objectively re-stated by the judge in	34

the analysis portion.	
2 - Judge commented briefly on alcohol use disorder negatively.	22*
3 – Judge commented briefly on alcohol use disorder empathetically.	14**
4 – Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.	11

*This figure includes cases in Category 4. Otherwise, the figure would be 21.

** This figure includes cases in Category 4. Otherwise, the figure would be 6.

C. METHODOLOGY AND CATEGORISATION

I. Selection of Cases

In selecting the sampling of cases, factors such as objectivity, diversity of cases and accuracy were considered. Thus, Appendix A consists of the one hundred most recent criminal cases involving an accused with a diagnosed alcohol use disorder.[139] The one hundred most recent cases were chosen to facilitate the analysis of data, while still ensuring that a broad enough sampling was being assessed in order to assure accuracy and objectivity. Furthermore, the relatively large number of cases allows for increased accuracy in statistical inferences made, which will be presented in Chapter 6. Cases range in date from as recently as July 20, 2018[140] back to November 17, 2014.[141] No restrictions were placed on the type or level of court, therefore the list includes a wide variety of decisions. Similarly, no restrictions were placed on the province of the court, therefore the list includes decisions from a wide variety of jurisdictions within Canada. The decisions analysed include sentencing hearings (37 cases), disposition hearings (32 cases), applications for either long-term offender status or dangerous offender status (21 cases), appeal hearings (5 cases), and criminal trials (2 cases).

It is worth noting that a relatively small number of cases exist in Canada involving an accused diagnosed with an alcohol use disorder. In fact, only 124 cases were

[139] As of August 1, 2018.
[140] *Re Jansen* 2018 CarswellOnt 12021.
[141] *R. v. McLaughin* 2014 ONSC 6537.

found in total.[142] This could be for a number of reasons. First, as discussed in previous chapters, the specific phrase "alcohol use disorder" is a relatively new term, most notably only employed in the DSM-5. Therefore, it is likely that a number of cases preceding 2013 use different terms, such as "alcohol abuse" or "alcohol dependence" when discussing what we now refer to as alcohol use disorders. The choice to search only for the specific phrase "alcohol use disorder" was largely made due to the temporal constraints to this research. However, this decision was also made to avoid decisions based on general knowledge, and rather to highlight cases where significant engagement with reputed medical literature was made.[143] Secondly, this methodology is unable to consider any offender who may be struggling with alcohol addiction issues, but has not yet been diagnosed as having an alcohol use disorder by a medical professional. Furthermore, given that cases were chosen only if specifically an alcohol use disorder was diagnosed, it is possible that any case which employed only more colloquial terms such as "alcoholism" or 'alcoholic" when describing the addiction issues plaguing the offender were omitted. Beyond the limitations of this research, it is also essential to note that the small number of cases of relevant emerging cases could be due to a simple lack of discussion.

II. Categorisation of Cases

In order to best represent and classify the research findings, a codification system was used. The categories seek to organise the 100 cases analysed by the type of judicial discourse regarding alcohol use disorder. This section will provide further clarity regarding the specificities of each category.

> **0 – Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.**

[142] As of August 1, 2018.
[143] Kent Roach and Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing, (2009) 42 UBC L Rev 1 at 50.

In Category 0 cases, the diagnosis of an alcohol use disorder was only stated in the outlining of facts of the case, and/or in the evidence presentation portion of the case. This means that the judge did not personally mention the alcohol use disorder at all.

1 – Alcohol use disorder was objectively re-stated by the judge in the analysis portion.

In Category 1 cases, the diagnosis of an alcohol use disorder was stated in the outlining of the facts of the case, and/or in the evidence presentation portion of the case, and the judge noted this in their analysis. This means that the judge recognised and restated the diagnosis but did not discuss the diagnosis at all.

2 – Judge commented briefly on alcohol use disorder negatively.

In Category 2 cases, the judge noted the alcohol use disorder diagnosis in their analysis briefly, but viewed the diagnosis as a negative factor when assessing the accused. In most cases, this means that the judge listed the alcohol use disorder as an aggravating factor. However, the judge did not provide any further explanation as to why the alcohol use disorder was listed as such.

3 – Judge commented briefly on alcohol use disorder empathetically.

In Category 3 cases, the judge noted the alcohol use disorder in their analysis briefly, but viewed the diagnosis with empathy when assessing the accused. In most cases, this means that the judge listed the alcohol use disorder as a mitigating factor. However, the judge did not provide any further explanation as to why the alcohol use disorder was listed as such.

4 – Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.

In Category 4, the judge noted the alcohol use disorder in their analysis meaningfully. For the purposes of objectivity and clarity, "meaningfully" has been defined as a discussion of more than 3 lines. This means that the judge went beyond objectively restating the diagnosis or simply listing it as a mitigating or aggravating factor, and instead offered analysis and a judicial opinion regarding the specific alcohol use disorder plaguing the accused. In most cases in this Category, the judge's discussion regarding the alcohol use disorder is either negative or empathetic in nature, or both. Chapter 6 will look at these Category 4 cases in more depth to further analyse the specific content of the respective judicial discourses.

D. SUMMARY OF ANALYSIS CATEGORISATION

Table 2 showcases a summary of the categorisation of cases by themes of discussion analysed in this chapter.

Table 2 – Summary of Analysis Categorisation

Theme	**I. Imprisonment and Incapacitation Despite an Empathetic Recognition of the Importance of Rehabilitation**	**II. Willingness to Rehabilitate as a Mitigating Factor**	**III. Acknowledgement of State Responsibility**	**IV. Alternative Rehabilitative Treatment Programs**	**V. Calling for Judicial and Legislative Reform**
Cases	*R. v. Baldwin*	*R. v. Kurek*	*R. v. Smith*	*R. v. States*	*R. v. Macdonald (2015)*
	R. v. Macdonald (2018)	*R. v. Smith*	*R. v. Avadluk*		
	R. v. Jones	*R. v. Powder*			
	R. v. Avadluk	*R. v. Hemmerling*			
	R. v. Courtoreille				

E. ANALYSIS OF CATEGORY 4 CASES

I. Imprisonment and Incapacitation Despite an Empathetic Recognition of the Importance of Rehabilitation

One of the rationales in sentencing emerging from this research is the incapacitation of offenders. For example, a judge may determine that incarceration is the only sentence that will ensure the offender is incapable of reoffending for a substantial period of time.[144] While this sentencing objective is traditionally used when considering particularly dangerous or violent offenders, it is evidenced in the cases below that judges also demonstrate an inclination to favour the certainty of prolonged incapacitation through incarceration, despite engaging in discussion which at times indicates a theoretical inclination towards the advantages of a rehabilitative sentence. Given that the behaviour of offenders diagnosed with alcohol use disorders is largely unpredictable,[145] it is likely that it is precisely the predictability of incapacitation on preventative grounds that is appealing to the judges in these cases.

xiv. R. v. Baldwin

Mr. Baldwin was of Indigenous heritage, and grew up with an alcoholic and abusive father, among other difficulties at home.[146] He started drinking alcohol at the age 14, and started drinking heavily and regularly by the age of 18.[147] In this case, the judge considered Mr. Baldwin's alcohol use disorder in a relatively empathetic fashion, but still stressed the 'need' for incapacitation. Cardinal J noted that Mr. Baldwin was very much in need of treatment for his alcohol use disorder, stating that '[h]e will continue to be a threat to society unless he gets the necessary help. Consequently, in the interest of public safety he requires a substantial period of incarceration.'[148]

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[144] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge, UK: Cambridge University Press, 2005) at 80.
[145] See Chapter 3 for further discussion.
[146] *R. v. Baldwin* [2017] ONSC 5040 at para 23.
[147] *Ibid* at para 27.
[148] *Ibid* at para 40.

Cardinal J's comments highlight a certain contradiction that, as will be noted again subsequently, is not uncommonly made by judges in their comments on alcohol use disorder. While Cardinal J recognises that treatment is not only the proper response to Mr. Baldwin's addiction, but is also in the best interest of the public, she still ultimately resorts to a 'substantial period of incarceration'. While this contradiction is largely due to the lack of treatment services available to offenders as alternatives to incarceration, it is still problematic that the judge does not further explain or elaborate on this lack of resource. Furthermore, elaborating on this lack of services would implicitly engage state responsibility in its failure to provide adequate means to treat this type of disorder – an admission that judges are not prepared to make, in part due to the myopic lens through which they view responsibility. The fact that objectives such as deterrence and rehabilitation are not mentioned throughout the judgment in this case indicate that there is scope for enhanced judicial discourse which implicates established research on alcohol use disorder to improve the outcome for the offender, as noted in certain cases below.

xiv. R. v. Macdonald[149]

In this appeal, Newbury J.A., did acknowledge the difficulties facing those with substance use issues in an urban setting.

> 'Although Ms. Macdonald told the Court at sentencing that in getting sober in custody she had had an "inspiring sense of enlightenment through introspective reflection" and achieved "an understanding of spirituality, healing and wellness that I never had before even considered", it would be naïve to think that she can develop the psychological strength and "commitment to abstinence" in such a short period. **Overcoming an addiction to opioids, or to alcohol for that matter, requires a powerful and sustained effort. The addiction is also dangerous on the streets of Vancouver, as in any big city. Although I wish Ms. Macdonald every**

[149] *R. v. Macdonald* 2018 BCCA 102.

> **success in developing this strength, I am unwilling to diverge from the conclusion of the sentencing judge, who was not satisfied that the risk to society could be sufficiently contained and 'held in check' by a conditional sentence order**.'[150]

Ultimately, Ms. McDonald's appeal was rejected and she was forced to complete the remainder of a 12-month sentence. While Newbury J.A.'s commentary is relatively empathetic in its tone, he fails to go beyond the sphere of commentary into the sphere of action. Potential for rehabilitation is expressed, but nevertheless incarceration is enforced. While he acknowledges Ms. Macdonald's alcohol use disorder, and even recognises the strength required to overcome this disorder, he does not ultimately act on this acknowledgment in a concrete manner. Instead, he insists that no change, either to Ms. Macdonald's current sentence or to sentencing norms in general, would be appropriate.

xiv. R. v. Jones

In the sentencing case of *R. v. Jones*,[151] Gabriel J referred to an article by Dr. Robert Huebner and Lori Kantor in order to guide the discussion on possible treatment for alcohol use disorders and medications that could assist with this treatment plan.[152] The defence psychologist initially brought the article into evidence. In particular, the judge acknowledged the suggestion of the psychologist to combine both medication and behavioural rehabilitation in order to optimise the recovery prospects of the convicted offender Mr. Jones.[153] Despite this initial recognition, Gabriel J ultimately decides that he is not entirely convinced of this argument, nor is he convinced of Mr. Jones likelihood of succeeding under a rehabilitation-focused sentencing program:

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[150] *Ibid* at para 17.
[151] *R. v. Jones* [2015] NSPC 87.
[152] Robert B. Huebner and Lori Wolfgang Kantor, "*Advances in Alcoholism Treatment*", National Institute in Alcohol Abuse and Alcoholism, Volume 33, Issue Number 4.
[153] *Jones*, *supra,* note 151 at para 18-19.

> ‘Largely because of my concerns arising from the chronicity of Mr. Jones' alcohol abuse, his serious record, and his prior criminal record involving three other alcohol related driving offences, (including the fact of his prior curative discharge in 2007, which was very unsuccessful in eliminating, or significantly curbing his alcohol abuse) and his insufficient motivation in seeking out and putting in place sufficient structure (to date) to guard against future alcohol use, the evidence does not satisfy me […] that it would be appropriate to provide Mr. Jones with a (second) curative discharge in relation to his current section 253(1)(a) offence. His application in that respect is therefore dismissed.’[154]

In this case, Gabriel J explicitly recognises Mr. Jones’ alcohol use disorder. This must be commended in itself given that 89 of the judgments in this study failed to do even that. However, Gabriel J essentially does not go beyond an objective acknowledgement of Mr. Jones’ addiction to characterise it as something that aggravates or mitigates his offence. Further discussion from Gabriel J would be needed in order to draw such a conclusion. However, it is clear that incarceration and incapacitation in this case is once again the final result, despite an empathetic tone towards the difficulties facing Mr. Jones’ on his journey to rehabilitation.

xiv. R. v. Avadluk

In *R.v. Avadluk*, one of the most meaningful discussions on alcohol use disorders that took place in this study may be found. Most importantly, the case discusses the role of state responsibility, which will be analysed in a subsequent section. However, in relation to the objective of incapacitation, Shaner J is still notably confined by the fact that limited alternatives to incarceration exist. In his judgment, Shaner J makes it very clear that he is empathetic towards Mr. Avadluk’s addiction. However, his empathy is fettered by the confines of the courts, meaning that Shaner J recognises the role of the judicial system in Mr. Avadluk’s addiction, but is unable or unwilling to act on this in a

[154] *Ibid* at para 71.

more concrete manner. While this is mostly due to the lack of availability of alternative rehabilitative sentencing pathways, it is still essential to note that Shaner J does not explicitly state this as his reason for failing to offer alternative treatment. In fact, Shaner J does not provide any reasons whatsoever for failing to provide an alternative treatment option.

xiv. R. v. Courtoreille[155]

Mr. Courtoreille was a 59-year-old man of Indigenous heritage. The court highlighted that he had been raised by alcoholic parents and had witnessed alcohol abuse constantly throughout his upbringing.[156] His addiction was so chronic that he was incapable, or at least felt incapable, of reducing his alcohol consumption and would even turn to 'glue, gasoline, solvents or Listerine' if traditional forms of alcohol were not available.[157] This addiction, according to the medical report, appeared to trigger sexually inappropriate activities. In outlining the circumstances of Mr. Courtoreille, J.N. LeGrandeur A.C.J., said that '[h]e is a product of the environment he grew up in of alcohol, physical abuse, sexual abuse and if not directly, then indirectly colonialism, racism, and poverty arising from his indigenous roots.'[158] This statement offers explicit judicial recognition of a form of collective responsibility as a product of the colonial environment of Mr. Courtoreille. Furthermore, the judge recognised that it was most likely Mr. Courtoreille's severe alcohol use disorder that caused his criminal behaviour, as opposed to a more sinister or deliberate deviance.[159] However, this was contradicted when the judge ultimately decided that he was at a high risk to reoffend, in part because of his 'inability to control his alcoholism'.[160]

It is interesting to note that this inability to curb addiction is identified as an individual responsibility, rather than highlighting the lack of services and resources

[155] *R. v. Courtoreille* [2017] ABPC 231
[156] *Ibid* at para 14.
[157] *Ibid* at para 16-17.
[158] *Ibid* at para 20.
[159] *Ibid* at para 25.
[160] *Ibid* at para 38.

available in the community, which would invoke state responsibility. As noted in the analysis of *R v. Baldwin*, this admission of state responsibility is one that a number of judges are not yet prepared to make. Ultimately, the judge decided to sentence Mr. Courtoreille to 7.5 years – nearly half the sentence suggested by the Crown. His reasoning for this was as follows:

> 'Although I agree that he has had many opportunities to address these issues and has ultimately been unsuccessful, it is nonetheless this deep-rooted consequence of this constellation of classic *Gladue* factors passed on through his father that continues to underlie his criminality. These factors are so pervasive and destructive that it is not as simple as saying you have had your chance and therefore Gladue has no impact in the sentencing consideration.'[161]

While it is obvious that the judge is referring to a large number of *Gladue* factors, many of which are beyond the scope of this thesis, the offender's alcohol use disorder was one of the factors listed, which ultimately contributed to the decision to reduce the initially suggested sentence.[162] This case could arguably be classified under the subsequent category of analysis given that the sentence was ultimately reduced in consideration of Mr. Courtoreille's alcohol use disorder, in conjunction with other mitigating factors. However, this case must be differentiated due to the lack of rehabilitative efforts evidently made by Mr. Courtoreille.

II. Willingness to Rehabilitate as a Mitigating Factor

As noted in the previous chapter, the courts have demonstrated that evidence of a willingness to rehabilitate, rather than an addiction itself, has scope to be interpreted as a mitigating factor. This style of judicial discourse was noted in the following cases.

[161] *Ibid* at para 85.
[162] *Ibid* at para 83.

xiv. R. v. Kurek[163]

Ms. Kurek was of First Nation's heritage and had a long history of substance abuse. Her substance abuse was so significant that even the Crown acknowledged her addiction empathetically, stating that 'she was struggling with her addictions and attempting to become sober while going through a very serious withdrawal process at the time of the offence.'[164]

While Dawson J's analysis regarding Ms. Kurek's alcohol use disorder had an overall empathetic tone, he was very careful not to categorise Ms. Kurek's *state of intoxication* at the time of the offence as mitigating, citing *R. v. Daviault* in reaffirming that 'alcohol consumption does not mitigate sentence.'[165] Furthermore, Dawson J indicated that Ms. Kurek's *history* of alcohol use disorder, as opposed to her alcohol use disorder specifically at the time of the offence, was neither aggravating nor mitigating:

> 'In addition, I must consider the personal circumstances and the personal characteristics of the offender, Ms. Kurek, which either mitigate or aggravate her culpability. Ms. Kurek has had a difficult background. She struggles from a lengthy and serious history of serious substance abuse with both alcohol addiction, drug addiction and diagnosed mental disorders. She is presently on a variety of prescription medications. […]. Her drug and alcohol addictions drove her to engage in anti-social behaviour, including involvement in criminal activity. Her attempt to detoxify herself resulted in paranoia and some form of hallucinations.'[166]

However, Ms. Kurek's *acknowledgment* of her 'serious addiction' was unequivocally considered to be a mitigating circumstance in the judgment.[167] More specifically, Ms.

[163] *R. v. Kurek* [2018] SKQB 168
[164] *Ibid* at para 27.
[165] *Daviault, supra,* note 54.
[166] *Ibid.*
[167] *Kurek*, *supra,* note 163 at para 53.

Kurek's understanding of the *gravity* of her alcohol addiction seemed to be particularly mitigating in the mind of the judge. Ultimately, Dawson J determined that while Ms. Kurek's level of moral responsibility was diminished by a number of *Gladue* factors,[168] such as her alcohol use disorder, but was nonetheless quite high.[169] He alluded to the dichotomy of individuality and commonality that presents itself when considering *Gladue* factors, stating that 'the unique circumstances in Ms. Kurek's background, being all of the usual factors that we see in many cases, is comprehensible.'[170]

Despite stating that Ms. Kurek's addiction struggles were 'comprehensible', Dawson J sentenced her to 6 years. As outlined in the precedent presented in the case, this sentence was not necessarily any shorter than sentences for similar fact patterns in which the accused did not always suffer from a serious alcohol use disorder.[171] This case therefore also demonstrates incapacitation despite a recognition of a sincere rehabilitative effort and the difficulties associated with this.

xiv. R. v. Smith

Donegan J took a slightly more nuanced approach to discussing Mr. Smith's alcohol use disorder in *R. v. Smith*. While his discourse largely revolved around the impact of residential schools on Mr. Smith and his family, which will be subsequently discussed, it is essential to note that Donegan J did not list Mr. Smith's alcohol use disorder itself as a mitigating factor. Instead, he accepted Mr. Smith's desire and motivation to rehabilitate and abstain from alcohol as a mitigating factor, further assuming that he would be very unlikely to reoffend if he could control his drinking.[172] The judge included a quote from Mr. Smith's grandmother's victim impact statement that

[168] *Gladue, supra,* note 107.
[169] *Kurek, supra,* note 163 at para 50.
[170] *Ibid.*
[171] *Ibid* at para 56 and 60.
[172] *Ibid* at para 53.

perhaps best summarises his attitude towards the correlation between alcohol and crime in this case: 'Alcohol. That is the real cause.'[173]

xiv. R. v. Powder

In the sentencing judgment of *R. v. Powder*,[174] evidence was brought before the court which indicated Mr. Powder had taken significant steps towards rehabilitation and treatment of his addiction.[175] In this case, the judge again did not so much comment on Mr. Powder's addiction empathetically, but rather acknowledged his efforts to treat his addiction as significant mitigating factors. While he ultimately decided the conditions for a curative discharge had not been met, these mitigating factors were considered in his sentencing decision. On this matter, he stated the following: 'Although I am not satisfied that Mr. Powder should be granted a curative discharge, I am satisfied that he has made efforts to initiate recovery through the taking of courses, counselling, attendance at AA and arranging to enrol in the Fresh Start program.'[176]

While *R. v. Powder* admittedly represents some of the weaker judicial discussions on alcohol use disorders in this sampling, it does however raise an interesting note: Malakoe J acknowledges only Mr. Powder's rehabilitative efforts, rather than his alcohol use disorder directly, as being mitigating. This line of reasoning is similar, yet somewhat different than what has been seen in the previous judgments in this section, given that Malakoe J at no point acknowledges the difficulties directly associated with addiction. While it is certainly admirable that the judge at least recognises the rehabilitative efforts of Mr. Powder in this case, he still fails to recognise the root of the issue; the disorder itself.

xiv. R. v. Hemmerling

[173] *Ibid.*
[174] *R. v. Powder* 2017 NWTTC 4.
[175] *Ibid* at para 37.
[176] *Ibid* at para 51.

In *R. v. Hemmerling*,[177] Mr. Hemmerling was sentenced to two years less one day in prison for an arson he committed while intoxicated. The psychiatrist testified that Mr. Hemmerling's general delinquent behaviour was likely caused not by a major personality disorder, but rather by his addiction to alcohol.[178] As will be seen, a similar finding was also present in *R. v. States*.[179] Ultimately the judge in this case, Morgan Prov J, agreed with this finding.[180] Furthermore, he commended Mr. Hemmerling for overcoming the challenges often faced by an offender plagued by addiction:

> 'I fully recognize that Mr. Hemmerling has personal characteristics that may combine to make it a challenge for him to lead a successful life and make good decisions when he decides to consume alcohol or use street drugs. However, he has proven he can abstain from both, and be a significantly contributing member of society when he does so.'[181]

As in *R. v. Powder*, the judge in this case recognised Mr. Hemmerling's continuing rehabilitation from his alcohol use disorder as a primary mitigating factor.[182]

III. Acknowledgement of State Responsibility

As noted in the previous chapter, it was discovered throughout this research that certain cases have identified the magnitude of the role of state responsibility. In doing so, the courts have implicitly diminished the level of individual responsibility of the offender. This is particularly relevant in the following cases.

x. R. v. Avadluk

[177] *R. v. Hemmerling* 2017 NWTTC 4.
[178] *Ibid* at para 31.
[179] *R. v. States* 2017 ONSC 4023 at para 35-43.
[180] *Hemmerling, supra* note 177 at para 63-64.
[181] *Ibid* at para 65.
[182] *Ibid* at para 68.

Shaner J explicitly states that '[t]he system has failed [the offender…]'.[183] Mr. Avadluk, an Inuit man in his forties, had been convicted of a number of sexual assaults throughout his lifetime and in this judgment, was declared a dangerous offender. He had struggled with alcohol addiction for the majority of his adult life. In his final analysis, Shaner J expressed the following thoughts on Mr. Avadluk's struggle with alcohol use disorder:

> 'Residential school devastated his parents, particularly his mother. That filtered down and devastated Mr. Avadluk, wreaking havoc and chaos in his home, the place where he should have been safe and felt loved. When there was finally intervention, it did nothing to address his needs. Instead, it resulted in further trauma for him, in the form of sexual assault. He turned to substances for comfort and he started to engage in criminal conduct at a young age. He was in and out of prisons, his underlying needs, his addiction, his mental health problems, his anger issues and his own trauma, remaining unresolved. **It is little wonder Mr. Avadluk turned to solvent and alcohol abuse at a young age. It is little wonder he has spent much of his life incarcerated. And it is little wonder that he has now been designated a dangerous offender. The system has failed Noel Avadluk and in doing so, it has failed his victims. He now needs significant treatment and the public needs protection. I truly hope he will get the help he so desperately needs**.'[184]

Shaner J's statement in this case is an emphatic recognition of the irreversible damage caused to the offender and his family at the hands of the state, and furthermore an acceptance of partial responsibility on behalf of the state.

xi. R. v. Smith

[183] *Avadluk, supra,* note 136.
[184] *Ibid*; bold for emphasis.

In this case, the particular impact of residential schools specifically was acknowledged. Donegan J opened his judgment by highlighting the high degree to which the Smith family had been negatively impacted as a result of the abuses suffered while in residential schools. He went further to say that the aftermath of these residential school had left the family plagued by 'violence, addiction, abandonment, suicide, homicide, neglect.'[185] He recognised that the residential schools had the residual effects of 'prolific alcohol and drug use, violence, sexual assault, and incest.'[186] The *Gladue* report indicated that the majority of Mr. Smith's family members struggled with alcohol and substance abuse, and that resultantly, Mr. Smith began drinking at the age of 10. Once Mr. Smith's drinking became a daily habit, multiple attempts to reduce his drinking were largely unsuccessful due to his familial surroundings. As stated by Donegan J, '[v]iolence, suicidal ideation, and dependency on alcohol and other drugs were the legacy that [Mr. Smith] inherited.'[187]

IV. Alternative Rehabilitative Treatment Programs

While rehabilitation is sometimes problematically referred to within a discussion on incapacitation, rehabilitation has also been discussed as a distinct objective that places importance of the medical treatment of the offender as not just a measure to rehabilitate the offender, but also as an alternative means of crime prevention. Given that substance abuse is one of the leading factors in recidivism,[188] one must consider if a more targeted approach to the addicted offender would better serve not only their own rehabilitation, but also the greater need for societal safety. This is certainly the suggestion of Quigley J in the case below.

xiv. R. v. States

[185] *R. v. Smith* 2017 BCSC 2513 at para 2.
[186] *Ibid* at para 22.
[187] *Ibid* at para 27.
[188] Nicholas S Patapis & Benjamin R Nordstrom, "Research on naltrexone in the criminal justice system" (2006) 31:2 J Subst Abuse Treat 113.

The case of *R. v. States* involved a long-time offender who committed the majority of his offences while under the influence of alcohol.[189] The judge commented, most notably, on alcohol's ability to alter one's mental outlook.

> '[…] his use of drugs and alcohol gave him a false sense of acceptance, improved his self-esteem temporarily, even if without foundation, and gave him a sense of confidence, which he knows was false. At the end of his frequent binges, he would feel dejected over what he was doing to himself, his self-esteem would plummet, he would hate his lifestyle and friends and his involvement in the drug culture, and he would become increasingly depressed. While self-destructive, in those circumstances he quickly again resorted to cocaine and alcohol to assuage his negative self-perception, improve his mood, and elevate his confidence. Looking back he feels that for most of his early adult life, he was not living in reality but was immersed in a subculture where his own identity and origins did not matter.'[190]

Quigley J also noted that, in the opinion of Mr. States, the aggression displayed in the commission of a number of his offences was perhaps not due to 'an intractable flawed personality', but rather 'as being secondary to a treatable condition, a serious substance and an alcohol use disorder.'[191]

Furthermore, Quigley J acknowledged the difficulties that can arise when an offender is attempting to curb an alcohol use disorder in a less privileged environment.

> '[…] while his misconduct does start to emerge in early adulthood at about 22 or 23 years of age, by that time Mr. States also had become addicted to crack cocaine and had started down a road of serious alcohol abuse as well. Further support for this lies in the seeming matrix for so much of Mr.

[189] *States, supra,* note 179.
[190] *Ibid* at para 48.
[191] *Ibid* at para 201.

> States historical offending having plainly been associated with activities in the service of sustaining his substance use. It arises primarily out of the antisocial behaviour that exists between himself and others like him who are homeless, living in the Seaton House area, and whose sole daily direction in life is to have access to drugs and alcohol, and money to pay for their continuing addictions.'[192]

He goes on to agree with Mr. States and testifying medical experts that the criminal behaviour in question in this case was likely secondary to a serious alcohol use disorder.[193] It is most likely this belief that inspired Quigley J to suggest a long-term treatment plan which includes, but is not limited to, substance abuse treatment programs, regular urine screening, and the prescription of Antabuse[194] to curb Mr. States' alcohol use disorder.[195] This judgment demonstrates the sentencing process' flexibility and types of treatment plans which can be introduced by judges, and are in fact more likely to be introduced following meaningful discussion of the offender's alcohol use disorder.

V. Calling for Judicial and Legislative Reform

The categorisation of relevant case law in this thesis has produced a number of findings in relation to the impact that the quality and quantity of judicial discourse may have on the overall outcome for the accused or offender in question. One of these key findings that emerged from the categorisation of cases in Appendix A was that judges are far more likely to consider alcohol use disorders as a mitigating factor, or at the very least with an empathetic tone when they take the time to discuss the addiction meaningfully. This meaningful discussion may involve seeking information regarding alternative treatment options and services, or even admitting that services are lacking due in part to the state's failure to address alcohol use disorders. Therefore, it can be assumed from this

[192] *Ibid* at para 345.
[193] *Ibid* at para 346.
[194] In the judgment, Antabuse is described as a prescription drug 'which stimulates a severely negative physiological reaction in former alcohol abusers if they dare to take a drop' [para 50] and as 'a drug that will cause a violent reaction when taken and alcohol is consumed' [para 209].
[195] *States*, *supra* note 179 at para 413.

finding that an increase in judicial discourse on alcohol use disorders in the criminal justice system will ultimately lead to more leniency and restraint in the sentencing judgments of the addicted offender. Atwood J in *R. v. MacDonald* also made this assumption.

xiv. R. v. Macdonald (2015)

Prior to any analysis of the empathetic judicial discourse in *R. v. Macdonald*,[196] it is first necessary to acknowledge Atwood J's initial scepticism regarding the rehabilitative progress of Mr. Macdonald. In particular, he questions the utility of reports provided by addiction services:

> 'The 13 April 2015 letter from Addiction Services informs me that Mr. MacDonald completed their withdrawal protocol. How do they assess what constitutes completion? How do they measure success? What is Mr. MacDonald's risk of relapse? These questions loom large when the court considers the point made by the prosecution that Mr. MacDonald has been subject to eight court orders since 2002 which have sought to treat his alcohol-use disorder, but which have failed to stop him from committing crimes with alcohol in his body. […] While Mr. MacDonald's enrolment in the Opiate Treatment Program is a good development, how will it address Mr. MacDonald's mental-health and alcohol use comorbidity?' [197]

Despite this initial reservation, and what is in fact very minimal discussion on alcohol use disorders in general, Atwood J's closing comments in his judgment are perhaps the most poignant of any reviewed thus far. He is the only judge of all reviewed in this section of this thesis to directly address the need for a review of legislation as well as current judicial and sentencing practices when the court is faced with those suffering from an alcohol use disorder.

[196] *R. v. Macdonald* 2015 NSPC 56.
[197] *Ibid* at para 22-23.

> 'I feel compelled to observe that there is much about the current state of s. 255 of the *Criminal Code* that calls for a comprehensive review. The terminology used in sub-s. 255(5) in particular evinces an anachronistic approach to alcohol-use disorder.[198] Modern epidemiology recognizes alcohol-use disorder as an array of conditions, not the monolithic bête noire of "alcoholism". It is not something necessarily amenable to a supposed "cure" achieved of necessity through professionally dispensed treatment. […] **The bottom line is that there are many vectors to achieving pro-social outcomes which will protect the public from the grave risks inherent in substance-impaired driving; the current focus on two only — namely, mandatory-minimum sentences with steep penal gradients, and putatively "curative" treatment — might not be entirely in the public interest.'**[199]

It is worth noting that a few years after this judgment, s. 255 of the Criminal Code was repealed.[200]

Atwood J's comments embody the research objectives of this thesis. Furthermore, the very fact that his statement calling for a review of sentencing and legislative reform is the only statement in all of the one hundred cases analysed for this thesis stresses one of

[198] S. 255(5) reads as follows: 'Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.'

[199] *Macdonald, supra,* note 196 at para 47; bold for emphasis. Atwood J cites the following sources: Bridget F. Grant et al., "Epidemiology of DSM-5 Alcohol Use Disorder: Results From the National Epidemiologic Survey on Alcohol and Related Conditions III" JAMA Psychiatry, 2015 and Beau Kilmer et al., "Efficacy of Frequent Monitoring with Swift, Certain and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project" Am J Public Health, 2013.

[200] 2018, c. 21, s. 14.

the key objectives of this research – to highlight the lack of meaningful commentary that exists in judicial discourse regarding alcohol use disorders despite the plethora of social and medical research indicating its key role in deviant behaviour. While the cases analysed in this section often discuss important social and historical contexts relating to crime and alcohol use disorders, it is important to remember that these cases are few and far between, representing only 11 out of 100 cases reviewed. Atwood J states that the current sentencing regime is not necessarily in the best interest of the public, thereby implying that a series of new sentencing principles and guidelines should be implemented for offenders struggling with alcohol use disorders.

Again, the objective of this thesis is not to propose new sentencing policies, but rather to highlight the need for further judicial discussion on the matter. However, the conclusion of this thesis will build upon Atwood J's comments, which certainly provide encouragement for future research, discussion, and the evolution of judicial discourse, to suggest what legislative and judicial reform may look like in the future. Further research regarding methods of increasing judicial discourse on this subject matter could ultimately lead to a broader new approach in sentencing which further recognises the unique needs and circumstance of offenders with alcohol use disorders.

F. ROLE OF ENHANCED JUDICIAL DISCOURSE IN SENTENCING PATTERNS

In addition to providing an insight into the specific comments of judges regarding alcohol use disorders, the data in Appendix A also facilitates the possibility of extracting certain information about the role of enhanced judicial discourse at sentencing. Furthermore, this information provides evidence that further enhanced judicial discourse on alcohol use disorders has the potential to directly impact the sentencing outcomes for offenders, thereby having significant effects on the criminal justice system as a whole. Table 3 in this section indicates the categorisation of specifically the 37 sentencing cases reviewed.

I. Categorising Sentencing Cases

Table 3 – Categorisation of Sentencing Cases

CATEGORY	NUMBER OF SENTENCING CASES
0 - Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.	10
1 - Alcohol use disorder was objectively re-stated by the judge in the analysis portion.	11
2 - Judge commented briefly on alcohol use disorder negatively.	6*
3 – Judge commented briefly on alcohol use disorder empathetically.	10**
4 – Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.	8

*This figure includes cases in Category 4. Otherwise, the figure would be 5.

** This figure includes cases in Category 4. Otherwise, the figure would be 4.

As indicated in Table 3, 8 out of 37 sentencing judgments were codified as Category 4 judgments. This would indicate that in 21.6% of the sentencing cases reviewed, judges discussed the alcohol use disorder of the offender meaningfully. Conversely, this indicates that 78.4% of the judgments did not meaningfully discuss alcohol use disorders.

II. Comparing Sentencing Cases to Other Cases

The categorisation of sentencing cases specifically may be compared with the categorisation of all of the cases analysed in general. Among the 100 cases reviewed, only 11% were classified as Category 4. In other terms, judges did not meaningfully discuss alcohol use disorders in 89% of the cases reviewed. It was ultimately found that a judge is more likely to refer to an alcohol use disorder as a mitigating factor in Category 4 cases as compared with the other categories. Judges referred to alcohol use disorders empathically in 73% of Category 4 cases, as compared to a similar reference made in

only 6.7% of other categories of cases.[201] While the previous section of the chapter analysed what judicial discourse does exist in relation to alcohol use disorders and crime, it is important to internalise the evidence that the majority of judges are not yet participating in this valuable discourse.

G. SUMMARY

In this Chapter, the core piece of research was presented, along with tables summarising the research findings. Furthermore, essential methodological information was provided. Detailed explanations of each category used to organise the cases analysed serves to enhance understanding of Table 1 and Appendix A. Through a thorough analysis of all relevant parts of each Category 4 case, the reader was presented with a complete outline of the current judicial discourse on the correlation between alcohol use disorders and crime in Canada. This analysis exposed a number of key findings. Firstly, it was evident that a certain dichotomy exists in the current judicial discourse between the recognition of the gravity of the given alcohol use disorder by the judge and their inability or unwillingness to act upon this recognition in a meaningful way. This means that even when a judge recognises, discusses, and perhaps even empathises with the alcohol use disorder of the offender, traditional sentencing norms are still applied with little alteration. Secondly, it emerged that judges are more willing to regard an offender's *rehabilitation* from an alcohol use disorder as a mitigating factor, as opposed to the disorder itself. Furthermore, it was highlighted that some of these cases even acknowledged the role of state responsibility in the addiction of the offender. Lastly, it was determined that judges are more likely to discuss alcohol use disorders meaningfully in sentencing hearings than in any other type of case reviewed. Prior to the conclusion, a reiteration of the key objective of this thesis as being the presentation of these research findings and to highlight the current judicial discourse and lack thereof regarding the correlation between alcohol use disorders and crime is necessary. However, the

[201] 8/11 cases in Category 4 discussed alcohol use disorders empathically, whereas 6/89 cases in Categories 0, 1, 2, and 3 discussed alcohol use disorders empathetically. Refer to Appendix A for more detail.

subsequent concluding chapter will not only serve to summarise and highlight the key findings of this thesis, but it will also provide brief insight into possibilities of reform for the future.

CHAPTER 5 - CONCLUSION

A. OVERVIEW

The introductory chapter of this thesis presented the following two research questions:

1. What are the existing judicial discourses regarding the relationship between alcohol use disorders and crime?
2. To what extent can enhanced judicial discourse on alcohol use disorders at the sentencing stage improve the outcome for the offender?

The codification in Appendix A of the 100 most recent criminal cases involving an accused with an alcohol use disorder has presented the five main currently existing judicial discourses regarding the relationship between alcohol use disorders and crime. To summarise, these types of discourse were identified as follows:

0. Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.
1. Alcohol use disorder was objectively re-stated by the judge in the analysis portion.
2. The judge commented briefly on alcohol use disorder negatively.
3. The judge commented briefly on alcohol use disorder empathetically.
4. Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.

The extent to which these varying categories, particularly Category 4, of judicial discourses impact the outcome for the offender was analysed further in Chapter 4. Ultimately, it was determined that a judge is more likely to consider alcohol use disorders empathically or as a mitigating factor when the addiction is discussed meaningfully. While this thesis has responded to these essential research questions, further academic contributions beyond the confines of these specific questions were made. This concluding chapter will summarise these contributions, as well as provide brief insight into possibilities for reform that have emerged from this research.

B. SUMMARY OF ACADEMIC CONTRIBUTION

I. Legal Academic Commentary on Relevant Literature

Chapters 2 and 3 provided a review of the relevant research and literature, both within the legal sphere and beyond. This literature review highlighted the key existing academic discourses relating to the relationship between alcohol use disorders and crime, as well as the appropriateness of sentencing as a forum for enhanced judicial discourse on alcohol use disorders. The impact of alcohol use disorders on criminality was first explored. As expressed by authors such as Beck and Parker,[202] and Shepherd,[203] it is perhaps more productive to consider the resultant behaviours of alcohol intoxication as behaviours that happen to have been classified as criminal, rather than criminal behaviours being the direct result of intoxication. Nonetheless, Seliger identified a strong correlation between behaviours typically associated with alcohol intoxication and behaviours traditionally considered to be deviant, and in some cases, criminal.[204] While he continues to indicate that alcohol is perhaps not the root cause of deviance, he admits that it is nonetheless pervasive in criminal activity. This was confirmed most recently by Bernier, who adamantly supported direct addiction intervention in place of traditional punitive justice systems.[205] While various contradictory research was presented, it was ultimately found that the vast majority of research suggested that the offender struggling with addiction must at least be treated differently in the criminal justice system than other offenders.

A summary of the most pertinent literature regarding the relevant sentencing principles to this thesis such as moral blameworthiness, just deserts models and the impact of aggravating and mitigating factors was also outlined. Furthermore, the chronology, prevalence and impact of *Gladue* reports were also introduced. Generally, it was seen that dissatisfaction among legal academics exists regarding the impact of

[202] Beck & Parker, *supra*, note 57.
[203] Shepherd, *supra*, note 9.
[204] Seliger, *supra*, note 6.
[205] Bernier, *supra*, note 13.

Gladue reports on the outcome for Aboriginal offenders.[206] This sentiment may be juxtaposed with the overrepresentation of alcohol use disorder patients in prison.[207] This is an area which could benefit from further research in the future.

Most notably, however, it was determined that very little academic literature currently exists regarding how this relationship between alcohol and crime is understood by the judiciary, particularly at the sentencing stage. While some literature did identify the importance of judicial discourse in the general outcome for the offender with an addiction,[208] no literature was found with the key objective of identifying, classifying and analysing the current judicial discourse on the matter. Thus, this thesis has sought to fill this noted gap in relevant academic literature and provide important paths forward for discussing and understanding this relationship.

II. Classification of Judicial Discourse on Alcohol Use Disorder

Chapter 4 and Appendix A of this thesis contained the key piece of original research. Through the classification of the most recent case law, an accurate and contemporary image of the current streams of judicial discourse regarding the relationship between alcohol use disorders and crime was provided. As outlined in Table 1,[209] it was noted that the judge simply objectively re-stated the existence of an alcohol use disorder in their analysis, without characterizing it as aggravating or mitigating and without providing further discussion in 34% of cases analysed. The judge did not mention the alcohol use disorder of the accused or the offender in 28% of the cases. The judge considered the presence of an alcohol use disorder to be aggravating in 22% of the cases, and to be mitigating in 14 % of the cases. Of the 100 cases analysed, only 11 cases contained meaningful discussion on alcohol use disorders by the judge.

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[206] Philip Stenning & Julian V Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask L Rev 137.
[207] IAS, *supra*, note 5.
[208] Kate Seear & Suzanne Fraser. "Addiction veridiction: gendering agency in legal mobilisations of addiction discourse" (2016) 25:1 Griffith Law Review 13; Lyons, Tara. "Simultaneously treatable and punishable: Implications of the production of addicted subjects in a drug treatment court" (2014) 22:4 Addiction Research & Theory 286.

[209] See page 46.

III. Analysis of Judicial Discourse on Alcohol Use Disorder

Throughout the analysis of the existing judicial discourses that do exist on alcohol use disorders, four notable categories of discussion emerged. Firstly, it was noted that a number of judges seemed to appreciate addiction rehabilitation in theory, but nevertheless still opted for imprisonment and incapacitation. Secondly, a demonstrated and genuine willingness to rehabilitate from an alcohol use disorder was seen by certain judges to be a mitigating factor in ultimately limiting the severity of the sentence imposed. However, even in these cases, incapacitation was still an essential objective in sentencing. Thirdly, two cases in which the judicial discourse identified and invoked a form of collective responsibility were highlighted. Fourthly, an alternative rehabilitative treatment program for the addicted offender, namely mandated pharmacotherapy, was addressed and supported by one of the cases analysed.[210] Lastly, and perhaps most notably, one judgment did acknowledge the importance of the role of judicial discourse on alcohol use disorders in the overall sentencing outcome for the addicted offender.[211]

C. TOWARDS LEGAL REFORM: POSSIBILITIES FOR THE FUTURE

Articulated in its simplest form, it is the overarching objective of this thesis to encourage increased and enhanced judicial discourse on alcohol use disorders in the criminal justice system. However, the practical implementation of this objective is likely to be more complicated than this. While a number of possible initiatives that would increase judicial flexibility in sentencing are plausible, whether their impact would be as effective or impressive in reality is yet to be seen. To think that any one of the subsequently mentioned reform proposals would be successful independent of a dramatic cultural shift towards an enhanced understanding of addiction would be naïve. The purpose of this section is simply to create a useful link between the literature on sentencing, the interdisciplinary literature on addiction, and other alternative reforms that could be of use in parallel or complementary to the current sentencing framework.

[210] *States, supra,* note 179 at para 35-43.
[211] *Macdonald, supra,* note 196.

It should again be stressed that the essential objective of this research, as indicated by the research questions, is not to suggest potential reform measures. Given that a similar study has yet to be completed by the legal academic community and little academic interest has yet to be invested in this topic thus far, it would be imprudent to base prospective reform measures on data that has yet to be extensively peer reviewed. The core objective of this thesis has been to produce data and academic commentary on the current judicial discourse relating to the relationship between alcohol use disorders and crime. Therefore, it would be beyond the scope of this thesis to suggest concrete reform measures without further research. However, a number of future research suggestions and directions have emerged throughout this thesis. Further research in these areas could further illustrate what empathetic judicial discourse on alcohol use disorders in the criminal justice system could look like going forward.

I. Recognition of Rehabilitative Efforts as a Mitigating Factor

While a number of judges in this study did refer to rehabilitative efforts as a response to alcohol use disorders as a mitigating factor, albeit to varying extents, the majority of judges in the judgments analysed did not even consider the mere presence of an alcohol use disorder as a relevant factor in their decision. The prevalence of alcohol use disorders as a relevant factor in sentencing or other judgments could perhaps be increased if a demonstrated willingness to rehabilitate was more widely and concretely recognised as a mitigating factor. This could be accomplished through two potential avenues. Firstly, the *Criminal Code* currently does not stipulate any mitigating factors in sentencing. Should a list prescribing specific conditions, circumstances and treatments which judges should consider exist, empathetic judicial discourse on the subject matter would increase and eventually contribute to alternate sentencing methods for the addicted offender. Secondly, the possibility of establishing judicial recognition of a demonstrated desire to rehabilitate an addiction as a mitigating factor should be explored.[212] While the latter may be less effective, it is probably more realistic and likely. This type of reform relates directly to the identified issue of moral blameworthiness and would demonstrate a

[212] For existing judicially recognised mitigating factors, see Chapter 3, Section B.III.

positive step towards admitting state responsibility in certain cases where the individual has clearly worked towards rehabilitation. However, the limitations of such reform, such as the explicit exclusion of certain mitigating factors, should also be concerned should legislative action be taken.

II. Alternatives to Incarceration

A counter-argument could be made that drug treatment courts (DTCs) already exist as a judiciary response to addiction in criminality. However, throughout the research conducted for this thesis it became apparent that further peer-reviewed research is required in order to better situate the potential of DTCs in addressing alcohol use disorders in the Canadian criminal justice context. Thus far, De Web et al. have provided the most extensive and direct research regarding the long-term successes of DTCs.[213] However, their research most notably determined that a lack of randomised controlled tests on the effectiveness of DTCs has created a barricade for further test analysis. Therefore, the expansion of DTCs in Canada is heavily reliant on the production of more independent data regarding their success rates. The preliminary research on DTCs, however, is very promising. A number of researchers, such as Meyer and Ritter,[214] as well as Curriden,[215] have found that DTCs were effective in lowering the recidivism rates of offenders. Therefore, further research and discussion on the possibility of an increased use of DTCs for alcohol use disorder patients and addicts in general would likely be fruitful and contribute greatly to general sentencing reform within the criminal justice system.

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[213] "Drug treatment courts in Canada: an evidence-based review – HIV/AIDS Policy & Law Review 12(2/3) — Canadian HIV/AIDS Legal Network", online: <http://www.aidslaw.ca/site/drug-treatment-courts-in-canada-an-evidence-based-review-hivaids-policy-law-review-1223/?lang=en>.

[214] William G Meyer & A William Ritter, "Drug Courts Work" (2001) 14:3–4 Federal Sentencing Reporter 179.

[215] Mark Curriden, "Drug Courts Gain Popularity: Studies show rearrests lower for defendants treated for addiction" (1994) *ABA Journal,* Vol. 80, No. 5.

In *R. v. States*,[216] Quigley J suggested another possible alternative to incarceration which could benefit from further research. Based on the advice of the psychologist in the case, Quigley J suggested that a mandated long-term treatment plan that includes a prescription drug that can contradict the effects and pleasures of alcohol could be ideal for the addicted offender. Judicially mandated pharmacotherapy with Antabuse or Naltrexone for the offender suffering from an alcohol use disorder is a subject that has seldom been discussed in the legal community.[217] However, the research that has been produced in the medical community has been extremely positive. For example, Roozen et al. concluded that Naltrexone is 'effective in the treatment of alcohol dependence, especially with regard to […] heavy or uncontrolled drinking.'[218] In the United States, Bonnie has introduced preliminary discussion regarding the constitutionality of judicially mandated pharmacotherapy.[219] His research could certainly benefit from further review to determine if judicially mandated pharmacotherapy could better serve the unique circumstances of alcohol use disorder patients in the criminal justice system.

D. SUMMARY

In conclusion, this thesis has defined key terms relating to alcohol use disorders, crime and sentencing. The relevant literature, both in the medical and legal fields, was analysed and juxtaposed with the findings of this study. The original research and analysis of this thesis ultimately enabled the classification of judicial discourse on alcohol use disorders by theme of discussion, thus enabling an analysis of the impact that these various strains of discussion may have on the outcome of the accused or offender. This thesis has demonstrated that richer judicial discourse at the sentencing stage on alcohol use disorders can contribute to improved sentencing practices, meaning improved outcomes for the offender, and should therefore be favoured. Beyond the academic

[216] *States, supra*, note 179.
[217] For information on Antabuse, see note 194. Naltrexone is an opiate-antagonist, which prevents opiate effects, such as a sense of well being or pain relief.
[218] Hendrik G Roozen et al, "A systematic review of the effectiveness of naltrexone in the maintenance treatment of opioid and alcohol dependence" (2006) 16:5 European Neuropsychopharmacology 311 at 314.
[219] Richard J Bonnie, "Judicially Mandated Treatment with Naltrexone for Opiate-Addicted Criminal Offenders" (2005) 13 Va J Soc Pol'y & L 64.

confines of this study, this thesis has attempted to articulate the possibility that a criminal may not always be responsible for a crime. Instead, the ‘criminal’ may simply be an addict.

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R. v. Leary, [1978] 1 S.C.R. 29

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R. v. Daviault [1994] S SCR 63.

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0 - Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.
1 - Alcohol use disorder was objectively re-stated by the judge in the analysis portion.
2 - Judge commented briefly on alcohol use disorder negatively.
3 – Judge commented briefly on alcohol use disorder empathetically.
4 – Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.

APPENDIX A

	CASE	CITATION	CHARGES/CASE TYPE	OUTCOME	SENTENCE	RELEVANT PARAGRAPH (S)	CATEGORY
1.	Jansen, Re	2018 CarswellOnt 12021	Jansen challenged a disposition prohibiting him from leaving hospital grounds after being placed there following being found NCR on account of mental disorder on a charge of criminal harassment; disposition	No change to previous disposition – still a threat to society	Must continue to remain in treatment centre according to previous disposition	12 and 40	1
2.	R. v. Hoshal	2018 CarswellOnt1201 6	Convicted in 2015 to mischief under $5000, assault with weapon, overcome resistance to commission of offence, forcible confinement, assault cause bodily harm, three counts of fail to	Dangerous offender status not granted	4 years served concurrently, 10 year long supervision order	99-101, 129	2

0 - Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.
1 - Alcohol use disorder was objectively re-stated by the judge in the analysis portion.
2 - Judge commented briefly on alcohol use disorder negatively.
3 – Judge commented briefly on alcohol use disorder empathetically.
4 – Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.

			comply – probation and assault; Crown applied for dangerous offender				
3.	Somerville, Re	2018 CarswellOnt 11658	NCR on account of mental disorder on charge of aggravated assault, possess a weapon/carry concealed weapon; disposition	Found to represent significant threat to society and should be detained accordingly	Continued care until medical release	37	2
4.	R. v. Bird	2018 ABPC 135	Convicted of aggravated sexual assault, break and enter, mischief, and breach of a recognizance contrary to s145(3); sentencing	N/A	15 years	56 and 72.	2
5.	R. v. McRae	2018 ONSC 3694	VOIR DIRE to determine whether accused should be permitted to tender expert report of forensic psychiatrist in his murder trial	Report not admissable	N/A	5, 6 and 25	1
6.	**R. v. Kurek**	2018 SKQB 168	Convicted of	N/A	6 years with	27, 46, 47,	4, 3

0 - Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.
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3 – Judge commented briefly on alcohol use disorder empathetically.
4 – Alcohol use disorder was discussed meaningfully in the analysis portion of the judgment.

			manslaughter in 2016; sentencing		credit for time served (must serve additional 2 years and 9 months)	44, 50, 53	
7.	Normand, Re	2018 CarswellOnt 8878	NCR on account of mental disorder for arson-damage property; disposition	Found to pose significant threat to society	Continued care until medical release	31	1
8.	R. v. Jararuse	2018 NLSC 118	Convicted of sexual assault; Crown applied for either dangerous offender or long term offender designation	Dangerous offender, subject to long term supervision order	5 years less 73 days	20, 24, 25	2
9.	R. v. Roman	2018 ONCJ 344	Written reasons for prohibiting Roman from possessing a variety of weapons for 3 years, pursuant to s111.	N/A	N/A	94	2
10.	R. v. RTJ	2018 ABQB 451	Convicted of second degree murder; sentencing	N/A	3 years, plus 2 years under community supervision	67, 75, 77	1
11.	R. v. SR	2018 ABPC 108	Convicted on multiple counts such as	N/A	159 days, plus 90 days community	18,19	0

0 - Alcohol use disorder was only mentioned in the facts or evidence presented. It was not mentioned in the analysis portion of the judgment.
1 - Alcohol use disorder was objectively re-stated by the judge in the analysis portion.
2 - Judge commented briefly on alcohol use disorder negatively.
3 – Judge commented briefly on alcohol use disorder empathetically.
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			possessory offences and assault with a weapon; sentencing		supervision		
12.	R. v. Herrera	2018 ONSC 1604	Convicted of assault with weapon and aggravated assault; sentencing	N/A	2 years, plus 3 years probation	11, 16, 24	3
13.	R. v. Dumas	2018 MBQB 49	Convicted of two counts of sexual assault; Crown applied for dangerous offender status	Declared dangerous offender	24 months	26, 28, 33, 37, 43, 63	1
14.	R. v. Hamer	2018 BCSC 783	Convicted of aggravated assault, assault with a weapon, unlawful confinement; Crown applied for dangerous offender status	Declared dangerous offender	N/A	118, 147, 150	1
15.	Gonczi, Re	2018 CarswellOnt 5246	NCR on account of mental disorder on counts of sexual assault, indecent act, and criminal harassment; disposition	Significant threat to society; no change to previous disposition	N/A	12	0

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16.	Blake, Re	2018 CarswellOnt 4823	NCR on a number of charges related to stalking a victim; disposition	N/A	Discharge with fewer restrictive conditions	38, 44, 50	2
17.	**R. v. Macdonald**	2018 BCCA 102	Appeal case for relief from two consecutive sentences for crimes associated with credit card fraud, theft of a motor vehicle, and robbery	Appeal dismissed	N/A	5, 17	4
18.	R. v. Boudreau	2018 NBCA 14	Application for leave to appeal sentence for a home invasion with possession of a gun	Application dismissed	N/A	14, 16	1
19.	Vrantisidis, Re	2018 CarswellOnt 3015	NCR on charge of dangerous operation of a motor vehicle; disposition	Significant threat to society	Discharged on conditions	16-23, 32	2
20.	Burke, Re	2018 CarswellOnt 2992	NCR on charges of aggravated assault, robbery, escape from lawful custody; disposition	Significant threat	Discharged on conditions	29	1
21.	R. v. Wright	2018 BCSC 237	Convicted of sexual assault; sentencing	N/A	Indeterminate	15, 20	0
22.	Abdikarim,	2018 CarswellOnt	NCR on charges of	No change to	N/A	25, 26	1

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	Re	2520	robbery and theft; disposition	previous disposition			
23.	Brownlee, Re	2018 CarswellOnt 2521	NCR on charges of operating a vehicle while impaired and disqualified, dangerous operation of a motor vehicle and probation violation; disposition	Significant threat to society; transferred to rehabilitation unit	N/A	11-12	0
24.	R. v. Shevchenko	2018 ABCA 31	Shevchenko plead guilty in 2015 to three counts of aggravate assault, robbery, dangerous operation of a motor vehicle; appeal to reduce sentence	Appeal allowed	Reduced from 8 to 2 years less 1 day	33, 35	3
25.	R. v. Coussons	2018 ONSC 628	Convicted of second degree murder; sentencing	N/A	Life	40, 53	2
26.	R. V. Manyshots	2018 ABPC 17	Convicted of kidnapping, sexual assault causing bodily harm and robbery; sentencing	N/A	12 years	44, 53, 64, 80, 104, 107	1
27.	R. v. Roberts	2018 ABPC 13	Convicted of	N/A	5 years	3, 4	0

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			aggravated assault and aggravated sexual assault; sentencing				
28.	R. v. Kebokee	2018 ONCJ 173	Convicted of a variety of sex offences – victim was 13 years old; Crown applied for dangerous offender status	Declared dangerous offender	N/A	58, 152-153	0
29.	Reynolds, Re	2018 CarswellOnt 1156	NCR for assault causing bodily harm; disposition	No changes to current disposition	N/A	17, 21, 31	0
30.	R. v. Doolan	2018 BCPC 28	Convicted of manslaughter; sentencing	N/A	3 years	37, 42, 51-53	2, 3
31.	R. v. Ciolli	2018 BCPC 3	Convicted of uttering threats to cause bodily harm; sentencing	NA	3 days (credit for time served), plus 3 years probation	16	0
32.	**R. v. Smith**	2017 BCSC 2513	Convicted of manslaughter; sentencing	N/A	3 years and 2 months	22-31, 47, 53, 55-56,	4, 2, 3
33.	Shiryaev, Re	2017 CarswellOnt 20223	NCR on account of mental disorder on charges of sexual assault, theft, assault with a weapon and probation violations;	Significant threat to society; no changes to current disposition	N/A	18-21, 27,	2

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			disposition				
34.	R. v. Greig	2017 ABPC 302	Convicted of sexual assault and forcible confinement; sentencing/application for either dangerous offender or long-term offender designation	Not declared a dangerous offender	43.5 months, plus 10 year supervision order	84, 127, 130	1
35.	Barrett, Re	2017 CarswellOnt 18652	NCR on charges of sexual assault and forcible conferment; disposition	Conditional discharge	N/A	9-12, 15	0
36.	R. v. Boalag	2017 CarswellNfld 430	Convicted of an assortment of charges related to a violent sexual assault; Crown applied for dangerous offender status	Declared a dangerous offender	Concurrent indeterminate sentences	54, 58, 63, 75, 102, 104, 159	1
37.	R. v. Gallagher	2017 ONSC 6250	Convicted of a number of sexual assault and voyeurism offences; sentencing	N/A	42 months	42, 67, 71, 85	3
38.	D. (T.), Re	2017 CarswellOnt 16825	NCR on account of mental disorder on charges of criminal harassment; disposition	No changes to current disposition	N/A	9, 14, 16, 21-22	2

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39.	Pratt, Re	2017 CarswellOnt 15927	NCR on account of mental disorder on a charge of aggravated assault; disposition	Absolutely discharged	N/A	3	0
40.	Barns, Re	2017 CarswellOnt 15914	NCR on account of mental disorder for charges of indecent acts and sexual assault; disposition	Current disposition remains in place subject to a number of privileges	N/A	22	0
41.	**R. v. Baldwin**	2017 ONSC 5040	Convicted of manslaughter; sentencing	N/A	4 years	23, 27, 29, 33, 40	4, 2, 3
42.	McCaul, Re	2017 CarswellOnt 14544	Not guilty by reason of insanity on charge of murder; disposition	Current disposition remains place with additional modifications to permit travel within Ontario and deletion of alcohol prohibition	N/A	18, 19	0
43.	**R. v. Courtoreille**	2017 ABPC 231	Convicted of break and enter and sexual assault; sentencing	N/A	10 years	17-20, 25, 30, 28, 38, 71, 83	4, 3
44.	R. v. Leer	2017 BCPC 235	Convicted of causing	N/A	2 years, plus 3	17, 28	0

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			damage by fire to the townhouse complex that she and her mother were living in; sentencing		years probation		
45.	**R. v. Avadluk**	2017 NWTSC 51	Convicted of sexual assault in 2014; Crown applied for dangerous offender status	Declared dangerous offender	Indeterminate terms of custody	18, 21, 34, 41, 47, 50, 52, 56, 87, 101, 110	4, 3
46.	**R. v. States**	2017 ONSC 4023	Convicted of aggravated assault and assault with a weapon; Crown applied for dangerous offender status	Not declared a dangerous offender	Long term supervision order with various conditions	35-43, 45, 48, 188, 201-203, 340, 345-346	4, 3
47.	R. v. Okemow	2017 MPQB 118	Convicted of aggravated assault and assault causing bodily harm; Crown applied to have him declared a dangerous offender	Declared a dangerous offender	Indeterminate sentence	35, 42, 55, 63	1
48.	Magare, Re	2017 CarswellOnt 8440	NCR on account of mental disorder on charges of assault, uttering threats, resisting arrest and assaulting a peace	Significant risk to society; no changes to previous disposition	N/A	14, 24	2

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			officer; disposition				
49.	Kotecha, Re	2017 CarswellOnt 7789	Declared unfit to stand trial on charges of robbery; hearing to determine subsequent fitness for trial	Declared unfit to stand trial	N/A	16	0
50.	R. v. Ryan	2017 CarswellOnt 9672	Convicted of sexual assault, criminal harassment, uttering threats and break and enter charges in 2013; Crown applied for dangerous offender status	Declared a dangerous offender	N/A	50, 69-70, 112, 128, 133, 186-187, 206, 240, 263	2
51.	R. v. Jacque Alain d'Eon	2017 NSPC 22	Convicted of making child pornography and possessing child pornography	N/A	42 months minus credit for time served (501 days)	11, 20, 27-28, 43, 84	2
52.	Gonczi, Re	2017 CarswellOnt 5196	NCR on account of mental disorder on charges of sexual assault, indecent act and criminal harassment; disposition	No changes to current disposition	N/A	15	0
53.	R. v. Schwarz	2017 ABQB 224	Convicted of causing accident resulting in	N/A	2.5 years	20	0

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			the death of an eleven year old girl while his blood alcohol concentration exceeded 80 milligrams of alcohol in 100 milometers of blood; sentencing				
54.	R. v. Willett	2017 ABPC 68	Convicted for assault causing bodily harm; sentencing	N/A	Conditional discharge	42-43, 71	1
55.	Reynolds, Re	2017 CarswellOnt 2819	NCR on account of mental disorder for assault causing bodily harm; disposition	No changes to current disposition	N/A	11, 17, 35	2
56.	R. v. Larson	2017 ABQB 79	Convicted of manslaughter in 2014; sentencing	N/A	710 days	15	0
57.	**R. v. Powder**	2017 NWTTC 4	Convicted of impaired driving and driving while disqualified; sentencing	N/A	11.5 months	18-19, 23-25, 32-33, 37, 42, 44, 46, 51	4, 3
58.	**R. v. Hemmerling**	2017 BCPC 10	Convicted of arson; sentencing	N/A	2 years less 1 day	25-26, 31, 63-65, 69	4, 3
59.	R. v. L. (J.)	2016 ABPC 299	Two men convicted of manslaughter; sentencing	N/A	1-1.5 years	35	0

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60.	R. v. Enright	2017 ABQB 10	Convicted of manslaughter; sentencing	N/A	10 years minus credit for 295 days served	14, 48	1
61.	R. v. Clarke	2016 ABPC 255	Convicted of break and enter in 2015; sentencing	N/A	60 days, plus 1 year probation	45-47, 55	1
62.	D. (T.), Re	2016 CarswellOnt 17975	NCR on account of mental disorder on charge of criminal harassment; disposition	No changes to current disposition	N/A	9, 14, 18	2
63.	McCaul, Re	2016 CarswellOnt 16002	Not guilty by reason of insanity on charge of murder; disposition	Significant threat to society; no changes to current disposition	N/A	11, 13, 18-19, 29	1
64.	Julien, Re	2016 CarswellOnt 14172	NCR on account of mental disorder on charges of assault and uttering threats to cause death/bodily harm; disposition	No longer a significant threat to society	Absolutely discharged	9, 15	1
65.	R. v. Dowdell	2016 CarswellOnt 21728	Convicted of second degree murder; sentencing	N/A	Life imprisonment	29, 37, 45	1
66.	R. v.	2016 ABPC 173	Convicted of	N/A	5 months, minus	16-17, 21,	1

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	Mackenzie		mischief, hate crime, probation violation; sentencing		credit for time served (released)	54, 56	
67.	Hassan, Re	2016 CarswellOnt 10480	NCR on account of mental disorder on charges of disarming a peace officer, assault causing bodily harm and aggravated assault; disposition	N/A	Absolutely discharged	11, 13	0
68.	R. v. Wakefield	2016 ABQB 354	Two convictions for second degree murder; sentencing	N/A	Life	14, 28, 33, 35, 37, 75, 89	2
69.	R. v. P. (J.V.)	2016 YKTC 34	Youth convicted of manslaughter; sentencing	N/A	2 years intensive rehabilitative custody, plus 1 year under community supervision	26, 29, 36, 53	3
70.	Wodajo, Re	2016 CarswellOnt 9418	NCR on account of mental disorder to five charges of sexual assault; disposition	No changes to current disposition	N/A	13	0
71.	R. v. Denny	2016 NSPC 25	Convicted of refusal to comply with breath demands; sentencing	N/A	2 days	7, 21	1
72.	R. v. Piapot	2016 SKPC 38	Convicted of assault	Declared a	60 months	10-11, 29,	1

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			and assault with a weapon (motor vehicle); sentencing and Crown applied to remand accused for assessment regarding dangerous offender status	long-term offender		31	
73.	R. v. Cosman	2016 ABQB 170	Convicted of various sexual assault charges in 2014; Crown applied for dangerous offender status	Declared a dangerous offender	Indeterminate sentence	50, 71, 76, 98, 106, 112	2
74.	R. v. Miller	2016 ABPC 59	Convicted of sexual assault in 2014; Crown applied for dangerous offender status	Declared a dangerous offender	Indeterminate sentence	23, 64	0
75.	R. v. Boone	2016 CarswellOnt 3487	Convicted of 3 counts of murder, aggravated sexual assault, and administering a noxious thing (semen infected with HIV); Crown applied for long term offender status	Declared a long term offender; must register with the National Sex Offender Registry for life	N/A	120, 126, 140, 148	1
76.	R. v. Gardner	2016 ONCJ 45	Convicted of	Declared a	810 days,	42, 48, 68,	1

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			aggravated assault; Crown applied for dangerous offender status and indeterminate period of incarceration	dangerous offender	followed by long term supervision order of 10 years	78, 87, 98	
77.	**R. v. Jones**	2015 NSPC 87	Convicted of impaired driving; sentencing	N/A	120 days	15, 17-20, 22-23, 42-43, 45, 61, 63, 71	4
78.	R. v. McDonald	2015 BCSC 2088	Acquitted of first degree murder but convicted of manslaughter; Crown applied for dangerous offender status	Declared a dangerous offender	Indeterminate	73, 197, 200-201, 206, 230	1
79.	Mihaljevich, Re	2015 CarswellOnt 17379	NCR on account of mental disorder for criminal harassment and probation violations; disposition	No changes to current disposition	N/A	12-13	0
80.	Durette, Re	2015 CarswellOnt 17083	NCR on account of mental disorder on charges of assault, assaulting a peace officer and uttering threats to cause death; disposition	Significant threat to society; no changes to current disposition	N/A	8	0

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81.	R. v. Madood	2015 ABQB 611	Charged with second degree murder and possession of weapon for dangerous purpose; trial	Guilty of manslaughter; not guilty of possession of a weapon for dangerous purpose	N/A	35, 43, 45, 48, 72, 91, 132-134, 146	1
82.	R. v. S. (C.A.)	2015 BCPC 241	Convicted of sexual interference and gross indecency charges; sentencing	N/A	42 months	67	0
83.	Smart, Re	2015 CarswellOnt 13439	NCR on account of mental disorder for probation violation; disposition	No changes to current disposition	N/A	12, 14	1
84.	**R. v. MacDonald**	2015 NSPC 56	Convicted of driving with excessive blood alcohol level, driving while prohibited and refusing to comply with roadside screening demand; sentencing	N/A	360 days	22-23, 47	4, 3
85.	Abera, Re	2015 CarswellOnt 11888	NCR on account of mental disorder on charge of assault with a weapon; disposition	Detention in forensic unit for indeterminate period	N/A	14, 22	1

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86.	R. v. Z. (G.C.)	2015 BCSC 1596	Hearing considered issues related to whether or not accused was criminally responsible for second degree murder by reason of mental disorder	Criminally responsible	N/A	47-48, 57	1
87.	R. v. Farouk	2015 ONSC 4257	Convicted of a number of violent sexual assault charges; sentencing and Crown applied for dangerous offender status	Declared a dangerous offender	8 years and 7.5 months	30, 35, 111-113, 163, 190-192, 342, 442, 449	1
88.	Jeanveau, Re	2015 CarswellOnt 9707	NCR for theft, break and enter, dangerous operation of a motor vehicle, possession of weapon obtained by commission of offence; disposition	No changes to current disposition	N/A	4, 11	2
89.	R. v. P. (A.)	2015 ABPC 120	Convicted of invitation to sexual touching, incest, uttering threats to police officer; sentencing	N/A	11 years, plus 10 year long term supervision order	7	0
90.	R. v. Alcorn	2015 ABCA 182	Convicted of cruelty	Leave to	N/A	8, 15, 22,	1

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			to animal, assault; appeal from sentence	appeal sentence granted		34	
91.	Reynolds, Re	2015 CarswellOnt 7796	NCR on account of mental disorder for assault causing bodily harm; disposition	No changes to current disposition	N/A	9, 16, 29	1
92.	R. v. R. (D.)	2015 SKQB 157	Youth convicted of two counts of second degree murder; sentencing	N/A	Life	54, 62, 71, 86	1
93.	R. v. Rabut	2015 ABPC 114	Charged with aggravated assault; trial	Not guilty	N/A	12, 33, 48, 52, 67-68, 89	1
94.	R. v. S. (D.J.)	2015 BCCA 111	Convicted of sexual assault; appeal of sentence	Appeal allowed	Indeterminate	8-9, 16	0
95.	R. v. Aulotte	2015 ABPC 37	Convicted of aggravated assault; Crown applied for dangerous offender status	Declared dangerous offender	N/A	11, 23, 36, 51, 90, 168-169, 171, 203, 282-284, 286-287	2
96.	R. v. McTurk	2015 ONCJ 63	Convicted of a number of charges related to creation and possession of child	Declared a long term offender	2 years 1 day, plus 10 year long term offender designation	26, 29-30, 33, 64	1

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			pornography; Crown applied for long term offender status				
97.	Burke, Re	2015 CarswellOnt 490	NCR on account of mental disorder on charges of escape from custody, aggravated assault, assault and robbery; disposition	Community placement with conditions	N/A	10, 27	2
98.	R. v. Clarke	2014 SKQB 420	Convicted of sexual assault; Crown applied for dangerous offender status	Declared a dangerous offender	Indeterminate period	13, 30, 43, 49, 60	3
99.	Doane, Re	2014 CarswellOnt 16498	NCR on account of mental disorder for assaulting a peace officer; disposition	Significant threat to society; no changes to current disposition	N/A	8, 14, 17	0
100.	R. v. McLaughlin	2014 ONSC 6537	Convicted of over 70 offences, including kidnapping, sexual assault and uttering threats to kill; Crown applied for dangerous offender status	Declared a dangerous offender	Indeterminate period	42, 70, 82, 94, 104	0

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