

# Addiction as a Sentencing Factor

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# Plan for the Lecture

1. **The Big Questions and Themes**
2. **The Broader Context**
3. **The Easy Cases: Drug Offences**
  - (a) Connection to Offence
  - (b) Impact on Moral Blameworthiness
  - (c) Impact on Rehabilitation
  - (d) Availability of Non-Custodial Penalty for Trafficking
  - (e) Mitigation in the Fentanyl Context
4. **Critical Thoughts + The Hard Cases**

## 1. The Big Questions and Themes

Punishing involuntary actions is “unjust because it conflicts with the assumption in criminal law that individuals are autonomous and freely choosing agents” It is unjust to penalize an individual whose “will was constrained by some external force.” *R v Ruzic*, 2001 SCC 24

Criminal law is concerned with accountability for “conduct undertaken as free agents.”  
*R v Brown*, 2022 SCC 18

Gap between formal commitments and reality of what criminal law does?



Most concerns about the possible degrees of responsibility must get sorted out at sentencing.

For sentencing law purposes, it is widely accepted that addiction can be relevant to the “degree of responsibility” part of the proportionality equation.

But many questions remain.



# 1. The Big Questions and Themes

## *Why is addiction mitigating?*

- On the theory that it reflects a state of compromised volition given the biological and behavioural dimension of dependence?

## **Does the addiction have to *cause* the offence to be mitigating?**

- Does the addiction have to lead to the offence in a direct way, or is it more generally mitigating as a personal circumstances of the offender?

## **Can addiction ever be aggravating?**

- Where the symptoms of the addiction cause harm or the risk of harm to others, can addiction press in the direction of sentencing severity?

## **How does the offender's rehabilitative potential affect the answers to these questions?**

## 2. The Broader Context

### **My focus today:**

- Drug offences: with arguments focused on moral blameworthiness and the aim of rehabilitation.

### **More marginal and difficult scenarios:**

- Behavioural addictions like gambling, pornography.
- Rise of co-occurring disorders: may raise fitness / NCRMD, focus is on whether drug use is catalyst or cause of mental illness.
- Substance use disorders and violent offences: is the substance use mitigating or, potentially, aggravating?

## **Declining possession and minor matters in some regions:**

- Problem Solving Courts in many regions bring restorative justice approach, largely for less serious property, possession or disorder offences associated with addiction.
- 2022 reforms to the CDSA direct enhanced diversion for possession.
- Brief BC experiment with decriminalization for possession of illicit drugs.
- These factors shape what turns up at sentencing.

## **Recognition of mental illness and substance disorder overlap in context of bail:**

- *R v. Zora* directs judges to be wary of abstinence conditions where accused cannot possibly abide; avoid “criminalizing” symptoms of mental illness, which may include substance use disorder. (2020 SCC 14, paras 92, 97)

# 3. The Easy Cases: Drug Offence

## (a) Connection to Offence

**Merely asserting the presence of addiction as a general background factor or motivator is not enough.**

Counsel needs to point to information that confirms the addiction and shows its temporal and causal link to the offence.

“for mental health issues and addiction to be considered as mitigating factors, there must be some connection between those matters and the criminal conduct at issue” *R v Barham*, 2014 ONCA 797

**Judges tend to look for tight causal and temporal link between active addiction and drug offending.**

[32] The evidence does not, however, make out a connection which would mitigate the sentence. ...The fact that he continued to traffic heroin even when he was in treatment and receiving methadone defeats any suggestion that his trafficking was materially connected to his addiction: *R v. Cinelli*, 2018 ONCSC 4983

[44] The extent of his addiction, at the time of the offences, is not at all clear, and I can see no connection between the trafficking and the addiction: *R v Kehoe*, 2020 ONSC 6249

(b) Impact on Moral Blameworthiness

**Widespread judicial recognition that addiction can reduce the degree of responsibility associated with the commission of an offence.**

*R v. Azeez*, 2014 ONCJ 31 (Justice Melvyn Green)

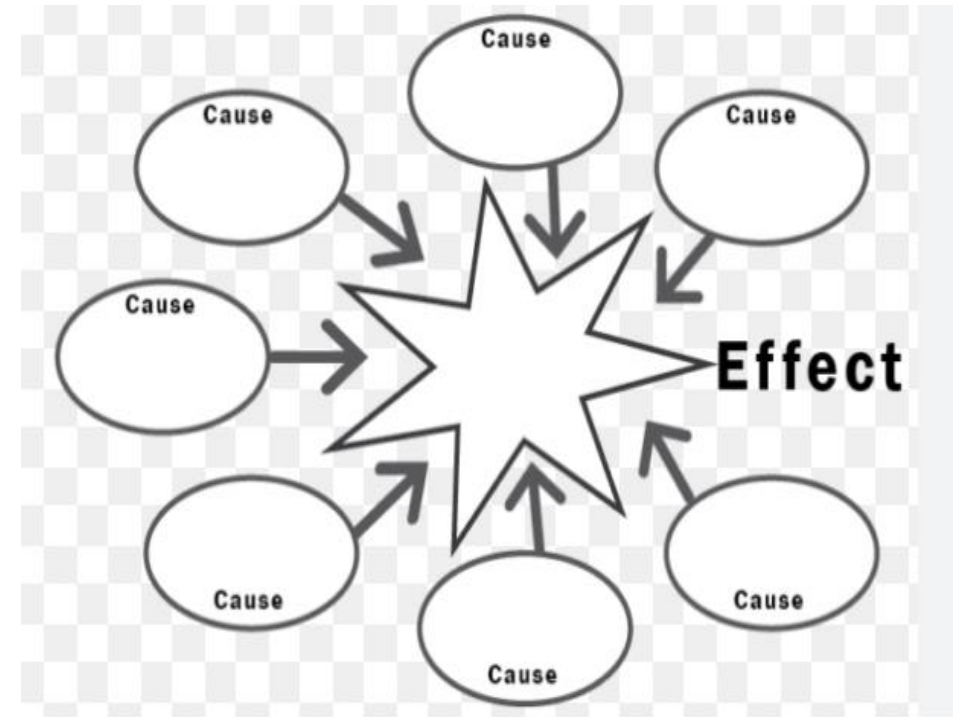
[25] Addicts are neurologically rewired by their dependence... They do not have the same degree of moral liberty as those who deal drugs for purely commercial motives, and, as courts have long recognized, their moral blameworthiness is accordingly attenuated.

*R v. Lloyd*, 2016 SCC 13

- 1-year trafficking mandatory could apply to the following reasonable hypothetical: “an addict who is charged for sharing a small amount of drugs with a friend or spouse.”
- Clearly, addiction is the kind of mitigating personal circumstance that can be part of the proportionality equation.

**One condition: some judges seem to require that addiction be the *exclusive* contributor to the offence, in order for it to reduce moral blameworthiness.**

If offence committed to feed addiction, not because of greed or to gain a benefit, that attenuates moral culpability: *R v Raposo*, 2024 ONCJ 384 at paras 10, 33.



## (c) Impact on Rehabilitation

**Widespread judicial recognition that addiction may justify greater emphasis on rehabilitation.**

Key factual issue: whether the offender can show evidence of a sufficient commitment to and prospect of rehabilitation.



# Language of test to show rehabilitative potential is not settled

## **Evidence should demonstrate:**

- “Reasonable possibility” of success: *R v. Preston*, 1990 CanLII 576 (BCCA)
- “Significant, real and ongoing efforts”: *R. v. Marchese*, 2015 ONCJ 126
- Attempts to “engage seriously”: *R v. Hanna*, 2024 ONCA 911
- “Significant strides to overcome”: *R. v. Hastings*, 2024 ONSC 6328
- They “want to and will participate in their rehabilitation”: *R v. Norn*, 2024 ONSC 6370
- More than “uncertain” rehabilitative potential: *R v. Cinelli*, 2018 ONSC 4983

# Significance of post-offence conduct

Norn, 19, supplied fentanyl to 18 year-old friend who died.

Extensive evidence of Norn's own addiction struggles, little ability for loving family to find effective help.

Defence seeking CSO for manslaughter, well litigated.

Court imposed six years for manslaughter.

Difficult to show rehabilitative potential given post-offence pre-sentencing conduct:

- (1) Overdosed while on bail
- (2) Arrested for trafficking, with 10.6g of fentanyl, after conviction while awaiting sentencing.

*R v. Norn*, 2024 ONSC 6370

# Rehabilitation may require multiple attempts

“... to expect a perfect result would be unrealistic, for it seems unlikely that a pattern of conduct and a lifestyle that has persisted for over 20 years can be changed overnight. There are bound to be relapses on the long road to recovery from any substance addiction.”

*R v. Preston*, 1990 CanLII 576, BCCA



# Rehabilitation may require multiple attempts

*R v Greene* [2002] OJ No 5976 ONCA (Justice Marc Rosenberg)

[5] The appellant is addicted to cocaine and has been for a very long time. It is unrealistic to expect that he will succeed at overcoming that addiction either on the first or second attempt or even after many attempts. ...

[6] The courts must not be overly critical of an offender in the position of this appellant. What is important is that he has made and continues to make efforts at curbing his addiction. A recent report from The John Howard Society of Canada suggests there is some reason for optimism.

[7] As to the record; as we have said, the record is appalling. However, this was a relatively minor offence and resulted in no property loss to the victim....

# Evidence of participation in drug court program

Crown argues that all offenders who fail the drug treatment program should be treated as if they had not attempted it.

ABCA does not agree:

[35] This Court has said that unsuccessful participation in a drug treatment program “does not automatically entitle an accused to some type of sentencing discount in and of itself”... But equally important, positive efforts to comply, even though unsuccessful, are relevant in sentencing.

*R v McDonald*, 2015 ABCA 108

# Relation between deterrence + rehabilitation

*R v McDonald*, 2015 ABCA 108

[26] Individual deterrence is largely premised on the extent to which an offender possesses, at the relevant time, the capacity for rational cost-benefit analysis of future actions. Related to this is whether the life options for the offender are such that the desire to avoid imprisonment would stop the offending....

[27] The objective of rehabilitation still remains even where an offender's lengthy criminal history, coupled with a durable addiction, means the hope of effective rehabilitation may be fading... Depending on the circumstances, deterrence may yield to a reasonable chance of rehabilitation, particularly in the context of certain property offences.... For an offender seized by addictions, the offender may, as part of the rehabilitative process, need and benefit from training or treatment that helps the offender acquire or improve the means to live in society in a law-abiding manner..., "where rehabilitation is possible, the long term interests of society are better protected by [ensuring] that an offender's underlying problems, which prompted his deviant behaviour, are corrected".

## (d) Availability of non-custodial sentence

### Possession

- Consensus that addiction highly relevant to assessing whether non-custodial penalty appropriate, when amount at issue plainly for personal use.
- S. 10.1 and 10.2 of *CDSA*
  - problematic substance use is “primarily a health and social issue.”
  - Directs that possession charges should only be laid where warnings, referrals or other alternative measures are not appropriate.

### Trafficking

- Ongoing debate re relevance of addiction to presumption of imprisonment for trafficking in serious drugs.



# Addiction or Profit?

## Trafficking cases turn on attempt to draw addiction v. profit / commercial motive

- Whether involvement animated by need to finance drug dependency or engage in entrepreneurial enterprise: *R v. Azeez*, 2014 ONCJ at para. 3
- Whether amounts that exceed personal use are sold to acquire funds for further drug purchases: *R v. Truong*, 2019 ONCA 364, para. 6
- Whether sales are at a “subsistence level”: *R v. Nuzioato*, 2021 ONCA 300, para. 4
- Distinction can be hard to draw: *R v. Thomas*, 2016 ONSC 7792, paras. 22-25

## *Parranto* on “exceptional circumstances”

Longstanding notion that “exceptional circumstances” required to avoid custody for trafficking serious drugs.

R v. *Parranto*, 2021 SCC 46, held that appellate courts should not “artificially constrain sentencing judges’ ability to impose a proportionate sentence by requiring ‘exceptional circumstances’ when departing from a range” (para. 40)

- Exceptional circumstances no longer required to depart from a sentencing range.
- There is no longer “space to interpret” sentencing ranges “as binding *in any sense*” (para. 36)

**The term “exceptional circumstances” is now simply a generalized description of the type of circumstances that justify imposing a sentence outside a conventional range.**

*R v. Pike*, 2024 ONCA 608 (Chief Justice Tulloch)

- “Exceptional circumstances” properly seen as shorthand for personal circumstances and mitigating factors that are sufficiently compelling to make a conditional sentence appropriate.
- The task is not to pigeonhole cases into “ill-defined exceptional circumstance categories” (para. 182). The task, rather, is to impose a proportionate sentence.

# “exceptional circumstances” live on

*R v. Pawar*, 2024 ONSC 261, reviews mitigating circumstances that constitute “exceptional circumstances” to justify a suspended sentence:

- Rehabilitation after arrest
- Guilty plea to trafficking in cocaine
- Guilty plea to trafficking in MDMA
- Small amounts of drugs, post-conviction sobriety and no prior convictions for some of the accused
- No related record, rehabilitation, youthful offender
- Guilty plea, no criminal record, good prospects for rehabilitation

[citations at para. 40 of *Pawar*]

# Expert witness on addiction and the drug trade

Offender promised \$1500 to sell \$200,000 worth of heroin (possession of 673 grams).  
Crown accepts “low man on trafficking hierarchy”, but seeks five years.

Expert witness Dr. Small, associate professor in the Faculty of Health Sciences at SFU, research scientist at the BC Center on Substance Abuse:

- (1) Offender met criteria in the DSM manual to qualify as suffering from a moderate or severe stimulant use disorder at the time of arrest
- (2) Dynamics of the drug trade: unequal relationships between drug dealers and drug dependent customers, inherently exploitative, impairs ability of addict to decline trafficking requests

*R. c. Salem*, 2021 QCCQ 3624

# Impact of expert evidence: a decision attentive to realities of illicit drug trade

[67] Imposing a stiff penalty on the addict-trafficker who is caught will not serve to deter similarly placed individuals. Like the disposable henchmen in a Bond movie, the low-level trafficking addict is easily replaced by a host of other addicts who will sell drugs to support their habit.

[68] In the illicit drug trade, drug addicts are shamelessly exploited by their dealers. Because of their addiction, they are easily manipulated into assuming the most visible and dangerous roles. Yet, they get paid the least for taking the highest risks. The little money they make is eventually funnelled back to the dealer from whom they purchase their drugs. In the end of the day, the hapless addicts only serve as cannon fodder to distance and insulate the real profiteers from police detection.

[69] Instead of focusing on deterrence as the dominant principle in sentencing the addict (who is at the bottom rung of the trafficking hierarchy), courts should prioritize treatment and rehabilitation. The offender in the present matter has made important strides in his rehabilitation. Prison would only compromise his reinsertion into society.

*R. c. Salem*, 2021 QCCQ 3624; (CSO subsequently available due to *Criminal Code* amendment, Crown agrees TJ would have imposed CSO, CSO substituted in *R. c. Salem*, 2023 QCCA 469)

# Lack of evidence of victimization

Justice Marc Rosenberg:

[31] ... in many cases persons convicted of drug offences are themselves victims of the drug culture and dependent upon drugs as addicts or users.... The respondent was not an addict trafficker. What he did, he did purely for personal gain. He was not a victim of the drug culture. Rather, by bringing the drugs into Canada he was contributing to the problem, to the extent of drugs having a street value of \$600,000.

*R. v. H.(C.N.)*, 2002 CanLII 7751 (ONCA)

## (e) Mitigating factors in fentanyl trafficking?

On the dangers of fentanyl trafficking, see Justice Moldaver's concurring opinion in *R v. Parranto*, 2021 SCC 46, paras. 93-100.

But sentencing remains an individual task. *R v. El-Azrak*, 2023 ONCA 440, Associate Chief Justice Fairburn reduced a fentanyl trafficking sentence on the basis of “extreme and unique collateral circumstances.” (para. 105)

## 4. Critical Thoughts + The Hard Cases

(1) Causal connection between addiction and offence, or addiction as sole cause of the offence?

- While a causal nexus seems fair, should an offender have to show that addiction is the sole, exclusive contributor to the offence?
- Mental health and *Gladue* factors do not function this way: a nexus or link is required, but not to the exclusion of other contributing factors.

## **(2) Is there a bright line between dependency-sustaining crimes and profit-oriented crimes?**

- Caselaw suggests that moral blameworthiness only attenuated if crimes committed, particularly trafficking, at subsistence level to sustain personal use.
- In some cases, this may neglect the context of poverty, uncertainty and instability many drug users live in, where criminal activity must feed both powerful habit and provide for material needs.
- Risk of poverty penalty?

### **(3) Rehabilitative potential is a separate question from the offender's degree of responsibility for the offence.**

- Caselaw suggests that addiction can impact the sentence only where rehabilitative potential is strong. Risk that addiction less likely to be mitigating in cases where intensity of the disorder is highest?
- Perhaps rehabilitative potential is best understood as separate from whether the offence is committed with diminished personal responsibility.
- Perhaps evidence of rehabilitative efforts, periods of abstinence or moderation, and sincere amenability to participation in programs, should bear on the purposes the sentence can plausibly pursue and the principle of restraint.

**(4) Beware the potential flip from mitigating to aggravating.**

- In cases involving violence, decision-makers might deny addiction as mitigating and might appear to flip to aggravating.
- Where substance use caused a serious violent offence and is not under control, the concern is the risk of repetition.
- Perhaps this is best described not as “aggravating” generally but as a concern with specific deterrence and rehabilitation, with both factors pushing in the direction of severity.

## **The Hard Cases**

In the large number of sexual assault cases involving intoxication, where alcohol may have caused the accused to proceed in the face of no-consent, can the alcohol be mitigating in terms of moral blameworthiness? Or might it be aggravating?

Do we apply the same principles from the drug offence context, looking for addiction as causally linked to the offence and rehabilitative potential?

Are there principled or practical reasons to deny the relevance of intoxication to the issue of diminished responsibility in sexual assault?