

Fetal Alcohol Spectrum Disorder as an Access to Justice Issue

Preface

At its 2010 Canadian Legal Conference, the Canadian Bar Association (CBA) passed a resolution concerning Fetal Alcohol Spectrum Disorder (FASD) in the criminal justice system (Appendix A). This resolution supported the current work on FASD by the Federal Provincial Territorial Ministers Responsible for Justice (FPT Ministers) and urged the Ministers to avoid ongoing criminalization of people with FASD. It also urged them to allocate additional resources to develop policies and solutions relating to FASD as an access to justice issue.

In October 2010, FPT Ministers directed officials to engage with the CBA on FASD as an access to justice issue. An Engagement Strategy was then approved by FPT Deputy Ministers, who directed its FASD Steering Committee to implement the Strategy and report back at the June 2011 Deputies' meeting. The Engagement Strategy included several joint initiatives, including information sharing and education, an on line Professional Development program, and a meeting funded by Justice Canada on March 1, 2011 in conjunction with the 4th International Conference on FASD, in Vancouver BC. At the meeting, representatives from the FPT Steering Committee and the CBA discussed various options to improve access to justice for people with FASD, and jointly suggested ten possible areas for reform.

Meeting with Canadian Bar Association and Federal Provincial Territorial Co-ordinating Committee of Senior Officials (Criminal Justice) Steering Committee on FASD

March 1, 2011 • 10:00am – 5:00pm

Vancouver

Participants

CBA FASD Advisory Committee: Dan MacRury (NS), Corey LaBerge (MB), Fia Jampolsky (YT), Jonathan Rudin (ON), Gaylene Schellenberg (CBA staff) Regrets: David Christie (YT), Rod Snow (CBA President)

FPT Steering Committee Members: Teresa Brown (MB), Marilou Reeve (DOJ Canada), Natasha Phillips (YT), Sherri Lee – (AG/ BC) Janice Laycock (NT), Samantha Hulme (BC).

Chair: Marilou Reeve, Department of Justice Canada

Background

At its 2010 Canadian Legal Conference, the Canadian Bar Association (CBA) passed a resolution concerning Fetal Alcohol Spectrum Disorder (FASD) in the criminal justice system (*Appendix A*). This resolution supported the current work on FASD by the Federal Provincial Territorial Ministers Responsible for Justice (FPT Ministers). It urged them to avoid ongoing criminalization of people with FASD, and to allocate additional resources to develop policies and solutions relating to FASD as an access to justice issue.

In October 2010, FPT Ministers directed officials to engage with the CBA on FASD as an access to justice issue. An Engagement Strategy was then approved by FPT Deputy Ministers in January 2011

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(Appendix B). Deputies supported the Engagement Strategy approach and directed its FASD Steering Committee to implement the Engagement Strategy and report back at the June 2011 Deputies' meeting.

A meeting was convened on March 1, 2010 (Item # 6 of the Engagement Strategy) in conjunction with *The 4th International Conference on FASD*, Vancouver, BC, March 2-5, 2011. Funding was provided by Justice Canada.

Meeting Overview

The CBA FASD Advisory Committee representatives and members of the FPT FASD Steering Committee discussed the complex issues related to access to justice for individuals with FASD in a comprehensive and constructive forum. Participants had extensive experience working on issues relating to FASD, including program and frontline work, as well as policy development and prosecution/defence of individuals with FASD. The group discussed promising practices and the good work that is currently taking place in relation to this issue in some areas.

Participants agreed that individuals with FASD should be assessed and dealt with outside of the criminal justice system whenever possible through health and social services systems with adequate supports.

If individuals with FASD become involved in the criminal justice system, alternative measures/diversion programs should be considered. The realities of the disability of FASD must be balanced with the need for public safety. Social services and agencies outside the criminal justice system play a critical role in responding appropriately to individuals with FASD who become involved in the justice system.

Outcome

Participants at the March 1 meeting suggest that the following measures would improve access to justice for people with FASD:

- 1. Allocate new resources (or re-allocate existing resources as appropriate) for effective programs that avoid the unnecessary criminalization of individuals with FASD (i.e. community alternatives including supportive housing, social services etc.).**
- 2. Explore and develop alternative measures / diversion programs that deal with individuals with FASD who come into conflict with the law, in a timely, effective manner that holds individuals accountable consistent with their degree of responsibility.**
- 3. Educate justice system professionals, including RCMP, police services and probation officers, judges, Crown, defence, court workers, corrections, and victim service workers about FASD and the implications for service provision.**

The possibility of FASD should be considered in deciding on an appropriate justice system response. For example, the Prosecution Policy directives should be changed to require that consideration.

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4. Amend the legislative framework within the *Criminal Code* to more effectively address the unique challenges that FASD presents to the criminal justice system.

The *Youth Criminal Justice Act (YCJA)* provides a legislative framework that could be applied to offenders with special needs such as those with FASD. Some of the sections offering special protections to youth under the *YCJA* that could be added to the *Criminal Code* to accommodate the unique challenges individuals with FASD present to the criminal justice system include:

YCJA s.34 (ordering assessments) A similar provision would allow court ordered assessments of adults that the court believes might be affected by FASD.

YCJA s.25 (right to counsel) Ensuring that counsel are present in encounters with the criminal justice system is critical for people with a diminished cognitive ability, as with FASD.

YCJA s.19 (case conferencing) Case conferencing can be an effective tool to garner collaboration amongst key players, in deciding on an appropriate response in the individual circumstances at an early stage of the criminal justice system process.

5. Address the problems of people affected by FASD through an interdisciplinary/multi-sectoral approach.

Some jurisdictions effectively use collaborative or inter-ministerial approaches between government ministries to share information and coordinate and integrate services. All jurisdictions should consider implementing this approach when addressing the needs of individuals with FASD.

Participants also recommended that a case conferencing provision equivalent to section 19¹ of the *YCJA* should be added to the *Criminal Code* to recognize the diminished capacity of people affected by FASD and the need for an integrated, multi-sectoral approach to addressing the unique challenges.

6. Create legislative authority to allow courts to obtain an accurate assessment of an individual's neurocognitive abilities.

Section 34 of the *YCJA* has been used effectively to order assessments for FASD. The same provision should be added to the *Criminal Code* for adults affected by FASD.

Currently, the courts cannot order assessments for adult accused they believe may have a cognitive deficit unless the accused is considered "unfit to stand trial" or "not criminally responsible by reason of a mental disorder". Part XX.1 of the *Criminal Code*, dealing with mental disorder, is generally not applicable to, or appropriate for individuals with FASD.

In order to more effectively ensure access to justice for individuals with FASD, courts should be able to order an assessment at any stage in the proceedings, and as early as possible in

¹ Section 19 of the *Youth Criminal Justice Act* provides that a conference can be convened by a youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker for the purpose of making a decision under the *Act* (subsection [19\(1\)](#)).

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the judicial process to ensure that any diagnosis is properly considered throughout the individual's involvement with the justice system.

7. Recognize that FASD is a life long disability distinguishable from a mental illness.

The distinction between permanent brain damage and a condition that may change with treatment is critical when considering the appropriate criminal justice system response, including in specialty courts and in sentencing dispositions.

FASD must be considered the primary underlying issue and any mental illnesses then be considered in the context of FASD. FASD is not an illness, but a permanent disability that requires appropriate legal and social accommodations.

8. Allow all sentencing options to be available to judges to allow them to devise just and appropriate dispositions for people affected by FASD.

It is important to remove barriers that constrain the exercise of judicial discretion, including mandatory minimum sentences.

For example, a legislative safety valve (exemption clause) could be added to the *Criminal Code* that would allow judiciary to exercise discretion when sentencing individuals with FASD.

9. Minimize possibilities for people with FASD to accumulate unnecessary Administration of Justice Breaches.

All justice professionals should limit unnecessary conditions (bail conditions, terms of probation, sentencing conditions) to accommodate the cognitive ability of individuals with FASD and avoid the unnecessary accumulation of administration of justice breaches. This is a perfect example of the need for education and the types of policies and directives that can be established by justice agencies for working with individuals with FASD.

10. Review standardized checklists and risk assessment tools used in the Court and Corrections systems to make decisions about individuals to ensure their validity & reliability for persons affected by FASD.

Fetal Alcohol Spectrum Disorder in the Criminal Justice System

WHEREAS a person, whose mother consumed alcohol during a critical development period in her pregnancy, may be born with a permanent organic brain injury which results in a cognitive disorder known as Fetal Alcohol Spectrum Disorder (FASD), a the range of neurological and behavioural challenges that may affect an individual;

WHEREAS disabilities of FASD reflect the underlying brain and central nervous system damage, including impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control;

WHEREAS the nature of behavior resulting from these disabilities means that persons with FASD frequently come into conflict with the law;

L'ensemble des troubles causés par l'alcoolisation fœtale et le système de justice pénale

ATTENDU QU'une personne dont la mère, lors de la grossesse, a consommé de l'alcool au cours d'une phase critique du développement du fœtus, peut souffrir d'une atteinte cérébrale organique permanente qui donne lieu à des troubles cognitifs que l'on regroupe sous le nom « ensemble des troubles causés par l'alcoolisation fœtale » (ETCAF ou TCAF), toute la gamme de troubles neurologiques et de troubles de comportement dont peut souffrir un individu;

ATTENDU QUE les déficiences liées à l'ETCAF sont le reflet de l'atteinte au cerveau et au système nerveux central sous-jacent, et que celles-ci comprennent des dysfonctionnements au niveau mental, des fonctions exécutives faibles, des troubles de la mémoire, un jugement affaibli, une incapacité de maîtriser ses impulsions, de comprendre les conséquences de ses actions et de modifier son comportement;

ATTENDU QUE la nature des comportements qui découlent de l'ETCAF fait en sorte que les personnes qui en souffrent ont souvent des démêlés avec la justice;

WHEREAS the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others;

WHEREAS these normative assumptions and the sentencing principles such as specific and general deterrence are not valid for those with FASD;

WHEREAS sentencing options available to courts are often ineffective in changing the behaviour of those with FASD and those with FASD are frequently repeat offenders;

WHEREAS the approach to offenders with FASD has been inconsistent and some courts have ruled that absolutely no rehabilitative or deterrent purpose is served by incarceration of those with FASD;

WHEREAS those with FASD are entitled under the *Charter of Rights* to substantive and not merely formal equality before and under the criminal law without discrimination on the basis of their disability;

ATTENDU QUE le système de justice pénale est fondé sur un certain nombre d'hypothèses normatives voulant que toute personne agisse de façon volontaire, prenne des décisions éclairées lorsqu'elle commet un crime et tire des enseignements de son propre comportement et de celui des autres;

ATTENDU QUE ces hypothèses normatives et les principes qui sous-tendent la détermination de la peine, telles la dissuasion particulière et la dissuasion générale, ne s'appliquent pas aux personnes souffrant de TCAF;

ATTENDU QUE les choix en matière de détermination de la peine dont disposent les juges sont souvent inefficaces pour ce qui est de changer le comportement de personnes souffrant de TCAF et ces derniers sont souvent des récidivistes;

ATTENDU QUE l'approche adoptée quant aux délinquants souffrant de TCAF n'est pas constante et que certains tribunaux ont statué qu'on ne répond pas aux objectifs visant la réhabilitation et la dissuasion en incarcérant les personnes souffrant de TCAF;

ATTENDU QUE les personnes souffrant de TCAF ont le droit, en vertu de la *Charte des droits*, à l'égalité réelle, par opposition à l'égalité formelle, sous le régime du droit pénal, indépendamment de toute discrimination fondée sur leur déficience;

WHEREAS laws, programs or activities could ameliorate the disadvantages experienced by those with FASD whose behaviour is judged on a standard that they are incapable of meeting because of their disability;

WHEREAS recognizing the forgoing, Federal, Provincial and Territorial Ministers responsible for Justice have established an initiative with respect to access to justice for people with FASD;

BE IT RESOLVED THAT the Canadian Bar Association:

1. support the initiative of Federal, Provincial and Territorial Ministers responsible for Justice with respect to access to justice for people with FASD and urge all levels of government to allocate additional resources for alternatives to the current practice of criminalizing individuals with FASD;
2. urge the federal, territorial and provincial governments to develop policies designed to assist and enhance the lives of those with FASD and to prevent persistent over-representation of FASD affected individuals in the criminal justice system; and

ATTENDU QUE les lois, les programmes et les activités pourraient pallier les inégalités auxquelles font face les personnes souffrant de TCAF, dont le comportement est évalué selon une norme qu'ils sont incapables de respecter en raison de leur déficience;

ATTENDU QUE les ministres de la Justice des paliers fédéral, provinciaux et territoriaux, qui reconnaissant ce qui précède, ont mis en œuvre une initiative en matière d'accès à la justice pour les personnes souffrant de TCAF;

QU'IL SOIT RÉSOLU QUE l'Association du Barreau canadien :

1. appuie l'initiative des ministres de la Justice des gouvernements fédéral, provinciaux et territoriaux en matière d'accès à la justice pour les personnes souffrant de TCAF et exhorte tous les paliers du gouvernement à attribuer des ressources supplémentaires à la mise en œuvre de solutions de rechange pour éliminer la criminalisation de personnes souffrant de TCAF;
2. exhorte les gouvernements fédéral, provinciaux et territoriaux à rédiger des politiques dont l'objet est d'aider les personnes souffrant de TCAF et d'améliorer leur bien-être, ainsi que d'empêcher que ces dernières soient

constamment surreprésentées au sein du système de justice pénale;

3. urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

3. exhorte le gouvernement fédéral à modifier la législation pénale en matière de détermination de la peine afin d'accommoder les personnes souffrant de TCAF.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the Annual Meeting held in Niagara, Ontario August 14-15, 2010

Copie certifiée d'une résolution adoptée, par le Conseil de l'Association du Barreau canadien, lors de son Assemblée annuelle, à Niagara (Ontario) les 14 et 15 août 2010.

**John D.V. Hoyles
Chief Executive Officer/Chef de la direction**