



September 20, 2010

The Honourable Rob Nicholson, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister:

Re: Fetal Alcohol Spectrum Disorder and the Criminal Justice System

I am writing to follow up on our recent discussions in Niagara regarding individuals with Fetal Alcohol Spectrum Disorder (FASD).

As you rightly acknowledged, FASD is a big problem in the criminal justice system. I want to personally commend you for your leadership on this issue and your commitment to make it a priority agenda item at Federal/Provincial/Territorial Justice Ministers' meetings. The search for solutions will not be easy and may not be popular, but I am confident that together we can do better if we remain committed and persevere.

The Canadian Bar Association resolution supports the initiative of the FPT Justice Ministers on FASD to date, and urges governments to dedicate resources and develop programs and policies to assist and enhance the lives of people with FASD (Resolution 10-02-A, attached). In addition, the CBA resolution urges your government to amend criminal sentencing laws to accommodate the disability of those with FASD.

FASD impacts far too many people in Canada. Children of mothers who consume alcohol during pregnancy may be born with this organic brain injury that brings with it a range of neurological and behavioural challenges. The permanent damage caused can include impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behaviour, inability to understand consequences of actions and inability to control behaviour. Predictably, as a result, people with FASD frequently come in conflict with the criminal law.

Canada's criminal justice system is based on assumptions about individual choice and responsibility for decisions to commit criminal acts. Sentencing principles in the *Criminal Code* include general and specific deterrence, premised on the idea that people will modify their behaviour based on the justice system's response to their own crimes or those of others. These assumptions are inappropriate and ineffective in either responding to, or controlling the behaviour of people with FASD. The very nature of the disorder is such that individuals who suffer from it have limited ability to control impulses or learn from their own or others' experiences. As a result, imposing on individuals with FASD the same criminal consequences as everyone else fails to recognize, let alone accommodate, their disability.

In closing, I urge you to continue your leadership on the search for alternatives to the current practice of criminalizing individuals with FASD. The CBA will certainly assist as we are able.

Yours truly,

(original signed by Rod Snow)

Rod Snow

cc: Provincial and Territorial Justice Ministers

Encl.

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**



September 20, 2010

The Honourable Michael de Jong
Ministry of Attorney General – British Columbia

The Honourable Don Morgan, Q.C.
Minister of Justice and Attorney General – Saskatchewan

The Honourable Chris Bentley
Attorney General – Ontario

The Honourable Bernard LeBlanc
Minister of Justice – New Brunswick

The Honourable Doug Currie
Attorney General – Prince Edward Island

The Honourable Felix Collins
Minister of Justice and Attorney General – Newfoundland
& Labrador

The Honourable Ross Landry
Attorney General and Minister of Justice – Nova Scotia

The Honourable Alison Redford
Minister of Justice and Attorney General – Alberta

The Honourable Kathleen Weil
Minister of Justice and Attorney General - Quebec

The Honourable Marian Horne
Minister of Justice – Yukon

The Honourable Keith Peterson
Minister of Justice - Nunavut

The Honourable Jackson Lafferty
Minister of Justice – Northwest Territories

The Honourable Andrew Swan
Minister of Justice and Attorney General –
Manitoba

Dear Ministers:

Re: Fetal Alcohol Spectrum Disorder and the Criminal Justice System

I am writing to urge action to address the situation of individuals with Fetal Alcohol Spectrum Disorder (FASD) in Canada. In August 2010, the Canadian Bar Association indicated its support of the initiative of the Federal, Provincial and Territorial (FPT) Justice Ministers on FASD to date, and urged FPT governments to dedicate resources and develop programs and policies to assist and enhance the lives of people with FASD (Resolution 10-02-A, attached). In addition, the CBA urged the Federal Minister of Justice to amend criminal sentencing laws to recognize that FASD is a disability.

FASD impacts far too many people in Canada. Children of mothers who consume alcohol during pregnancy may be born with this organic brain injury that brings with it a range of neurological and behavioural challenges. The permanent damage caused can include impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behaviour, inability to understand consequences of actions and inability to control behaviour. Predictably, as a result, people with FASD frequently come in conflict with the criminal law.

Canada's criminal justice system is based on assumptions about individual choice and responsibility for decisions to commit criminal acts. Sentencing principles in the *Criminal Code* include general and specific deterrence, premised on the idea that people will modify their behaviour based on the justice system's response to their own crimes or those of others. These assumptions are inappropriate and ineffective in either responding to, or controlling the behaviour of people with FASD. The very nature of the disorder is such that individuals who suffer from it have limited ability to control impulses or

learn from their own or others' experiences. As a result, imposing on individuals with FASD the same criminal consequences as everyone else fails to recognize, let alone accommodate, their disability.

We respectfully urge you to take prompt action to develop alternatives to the current practice of criminalizing individuals with FASD, and to instead respond to a health and social issue that requires government action to assist and enhance the lives of people with the disorder. The CBA would be pleased to assist in whatever way we can.

Yours truly,

(original signed by Rod Snow)

Rod Snow

cc: The Honourable Rob Nicholson, P.C., Q.C., M.P.

Encl.

Addressees:

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The Honourable Doug Currie
Attorney General
Department of Justice and Public Safety
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The Honourable Marian Horne
Minister of Justice
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The Honourable Ross Landry
Attorney General and Minister of
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The Honourable Kathleen Weil
Minister of Justice and Attorney General
Ministère de la Justice
Édifice Louis-Philippe-Pigeon
1200, route de l'Église, 9e étage
Québec, QC G1V 4M1

Fetal Alcohol Spectrum Disorder in the Criminal Justice System

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constamment surreprésentées au sein du système de justice pénale;

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