

# APPENDIX C:

## Nova Scotia Department of Justice: Joint Review of East Coast Forensics' Community Access Privileges

### 1) TERMS OF REFERENCE

In the terms of reference dated May 17, 2012, for the joint review of East Coast Forensics' (ECFH) community access privileges, the Department of Justice responsibilities were set out as follows:

**The Department of Justice shall:**

- **Engage in a review of the policies and procedures of the NS *Criminal Code* Review Board.**
- **Compare the policies and procedures of the NS *Criminal Code* Review Board with other jurisdictions in Canada.**

In the course of its work, the Department of Justice reviewed:

- the process outlined in Part XX.1 of the *Criminal Code*;
- leading jurisprudence and statutory interpretation of relevant *Criminal Code* provisions;
- *Criminal Code* Review Board procedures in Nova Scotia and other Canadian provinces and territories;
- minutes of meetings between the Nova Scotia *Criminal Code* Review Board, representatives from ECFH, CDHA and legal counsel; and
- a sample of *Criminal Code* Review Board decisions from Nova Scotia, Manitoba, British Columbia and Ontario, including the decisions respecting Mr. Andre Denny.

The *Criminal Code* lays out the process to be followed by Review Boards. Based on the review, the Department of Justice is satisfied that the Nova Scotia *Criminal Code* Review Board followed the procedures mandated by the *Criminal Code* in the matters before it respecting Mr. Denny.

The Department of Justice did not intend to impact or become involved with matters respecting the ongoing criminal charges against Mr. Denny in the course of its review.

## **2) OVERVIEW/BACKGROUND**

### **PART XX.1 OF THE CRIMINAL CODE**

Criminal law is a matter of federal jurisdiction pursuant to subsection 91(27) of the *Constitution Act, 1867*. Part XX.1 of the federal *Criminal Code* addresses how persons who suffer from a mental disorder are dealt with in the criminal justice system and the Review Board system that is charged with making or reviewing dispositions concerning any accused found not criminally responsible by reason of mental disorder (NCR) or unfit to stand trial (UST).

Section 2 of the *Criminal Code* defines “mental disorder” as a disease of the mind. Subject to the legal requirements set out in the *Criminal Code*, an accused person may be found by a court to be NCR or UST.

### **NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISORDER**

In order to be found guilty of an offence, an accused person has to have the capacity to appreciate and understand that their behaviour was wrong. Section 16 of the *Criminal Code* states:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Persons found to be NCR by a court are directed to a provincial or territorial Review Board established under Section 672.38 of the *Criminal Code*.

For accused found to be NCR, under section 672.54 of the *Criminal Code*, there are three dispositions available to a court or Review Board:

- Absolute discharge (person is free to go)
- Conditional discharge (person may live in the community or hospital, subject to the conditions or restrictions set by the Review Board)
- Detain in custody in a hospital (person is detained in a hospital, subject to the conditions or restrictions set by the Review Board)

Section 672.54 of the *Criminal Code* requires that the Review Board make a disposition that is the least onerous and least restrictive to the accused considering the following factors:

- the need to protect the public
- mental condition of the accused

- reintegration of the accused into society
- other needs of the accused

## **UNFIT TO STAND TRIAL**

If an accused person who suffers from a mental disorder is not able to take part in the legal proceedings, they may be determined UST. Section 2 of the Criminal Code defines UST as:

*unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to*

- understand the nature or object of the proceedings,
- understand the possible consequences of the proceedings, or
- communicate with counsel.

Accused persons found UST by a court are also directed to a provincial or territorial Review Board established under Section 672.38 of the *Criminal Code*.

The dispositions available for an accused found UST are:

- conditional discharge
- detention order

It is not an option for a Review Board to order an absolute discharge for a person found UST, and as a result, those found UST remain under the jurisdiction of the Review Board until the accused is deemed fit to stand trial or until the charges are stayed or withdrawn.

## **REVIEW BOARDS**

Each province and territory must establish a Review Board under Section 672.38 of the *Criminal Code*. Review Boards must have no less than five members, who are appointed by the Governor in Council of each province and territory. Each Review Board must have at least one member who is practising psychiatry in the province/territory and the chairperson of the Board must be a judge or a person who is qualified to be a judge. Review Boards are expert tribunals that make and review dispositions concerning any accused that has been found NCR or UST.

Review Boards must follow the processes and requirements set out in the *Criminal Code*. Under clause 672.44(3) of the *Criminal Code*, the federal Governor in Council may make rules of practice and procedure for Review Boards (no such rules of practice and procedure have been made to date). A Review Board may, subject to the approval of the

lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board. No such rules have been made in Nova Scotia to date.

#### **OVERVIEW OF PROCESS IN THE *CRIMINAL CODE***

A court can make an Assessment Order at any time to assess the mental condition of an accused. If a person is determined to be NCR or UST, the court can either make a disposition at that time and refer the matter to the Review Board for monitoring, or send the matter to the provincial/territorial Review Board for a disposition.

Once a person is found NCR or UST, the Review Board must have a disposition hearing within 45 days, unless the person has been released into the community on a conditional discharge by the court, in which case a disposition hearing must be held by the Review Board within 90 days. Parties to a Review Board proceeding normally include the accused and defence counsel, the Crown, and the hospital responsible for the person's treatment.

Once a disposition has been made for those found NCR or UST, Section 672.72 of the *Criminal Code* creates a right of appeal of a Review Board decision for any party on questions of law, fact, or mixed fact and law to the court of appeal of the province. This must be filed within 15 days of the disposition decision.

The Review Board must conduct a review hearing every 12 months after making a disposition other than an absolute discharge. This takes place every year for as long as the person is subject to the jurisdiction of the Review Board, to review any disposition that has been made in respect of an accused, and modify the disposition or conditions if warranted. The Review Board may conduct a review hearing at any time on its own motion, or at the request of the accused or any other party.

A review hearing must also be held if requested by the hospital, if the person in charge of the hospital has increased the restrictions on the liberty of the accused for longer than seven days. The Review Board must also conduct a hearing if an accused person has failed to comply with the disposition or a condition of the disposition (breach hearing).

#### **DELEGATION TO PERSON IN CHARGE OF HOSPITAL**

If a person receives a conditional discharge or is detained in hospital, Section 672.56 of the *Criminal Code* authorizes the Review Board to delegate to the person in charge of the hospital the authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in the Review Board disposition. Any direction made by the person in charge of the hospital is deemed to be a disposition made by the Review Board.

If a restriction on the liberty of the accused by the person in charge of the hospital lasts for more than seven days, notice must be given to the Review Board.

### **3) NOVA SCOTIA *CRIMINAL CODE* REVIEW BOARD MEMBERSHIP**

All members on NSCCRB have been appointed for a term of three years. The current membership of the NSCCRB is as follows:

<b>Name</b>	<b>Profession</b>
Peter Lederman QC	Lawyer – Chairperson
Dr. Syde Ahktar	Psychiatrist
Dena Bryan	Lawyer
David Gruchy	Retired Justice
William (Bill) Kilfoil	Retired teacher
Dr. Brian McCormick	Psychologist
Dr. Michael Teehan	Psychiatrist
Walter Thompson QC	Lawyer

### **4) POLICIES AND PROCEDURES OF THE NSCCRB**

The procedure for disposition hearings of Review Boards is set out in Section 672.5 of the *Criminal Code*, and all Review Boards, including the NSCCRB, must follow the processes, procedures and requirements in the Code. The *Criminal Code* states in clause 672.5(2) that the hearing may be conducted in as informal a manner as is appropriate in the circumstances.

Under clause 672.44(3) of the *Criminal Code*, the federal Governor in Council may make rules of practice and procedure for Review Boards. No such federal rules of practice and procedure have been made to date. Under clause 672.44(1) of the *Criminal Code*, a Review Board may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board. These rules would be in addition to the procedure set out in Section 672.5 of the *Criminal Code*. The NSCCRB has not made such rules providing for the practice and procedure before it.

## 5) POLICIES AND PROCEDURES OF REVIEW BOARDS IN OTHER CANADIAN JURISDICTIONS

As noted above, Review Boards in all provinces and territories must follow the procedures outlined in the *Criminal Code*. In addition to those requirements, a Review Board may make rules providing for the practice and procedure before the Review Board, subject to the approval of the lieutenant governor in council of the province.

Only two provinces in Canada have made rules under clause 672.44(1) of the *Criminal Code*: British Columbia and Ontario. The guidelines in both of these provinces are procedural in nature, and do not derogate from the requirements in the *Criminal Code*.

The British Columbia Review Board Procedural Guidelines at Hearings, dated December 2009, cover such things as: Types of Hearings and Scheduling; Adjournments; Continuations; Notice of Hearings; Written/Physical Evidence; Counsel; Subpoenas; Cross-Examination of Witnesses; Lengthy Hearings; Adding or Designating Parties; Excluding Members of the Public; Conduct of Hearings; Alternative Hearing Procedures; Dispositions; and Reasons for Disposition.

The Ontario Review Board Rules of Procedure cover such things as: Practice Directions; Effect of Non-Compliance; Language; Time; Motions; Response to Notice; Time and Place of Hearing; Constitutional Issues; Transfer Requests from one Hospital to Another; Unfit Accused; Expert Evidence, Documents and Authorities; Review Board files; Counsel; Lengthy Hearings; Pre-hearing Conferences; Rescheduling of Hearings; Early Reviews; Adjournment Requests; Witness Fees; Dispositions and Reasons; and Appeals.

All other Review Boards in Canada, including the NSCCRB, operate solely under the procedures in the *Criminal Code*, and do not have prescribed rules providing for practice and procedures that have been approved by their respective lieutenant governors in council. Although such rules are procedural in nature and do not impact any of the substantive rights of the accused, for transparency and consistency, the Department of Justice recommends:

### RECOMMENDATION # 1

*That the NSCCRB develop rules providing for the practice and procedure before the Review Board for consideration and approval of the lieutenant governor in council of the province, as set out in Subsection 672.44(1) of the Criminal Code.*

## 6) REVIEW OF REVIEW BOARD DECISIONS

Although not required as part of the Terms of Reference, the Department of Justice looked at decisions from some other provinces to see if there are any major similarities or differences in how the NSCCRB makes its decisions compared to other Review Boards. Decisions from Nova Scotia, Manitoba, British Columbia, and Ontario were reviewed. All Review Boards issue an order, which sets out the disposition under the *Criminal Code* (absolute discharge, conditional discharge, detain in hospital, and any conditions). In addition to the order, written decisions/reasons set out the rationale for the order.

Since Review Board decisions are merely a summary of the evidence before the Boards, it is difficult to say with certainty if exactly the same reasoning goes into each decision. The review did show that some Boards appear to provide a more in-depth explanation of the evidence considered; however, it is clear from all of the decisions that the Review Boards in the jurisdictions sampled, including the NSCCRB, place emphasis on the same types of considerations and rely on the relevant provisions of the *Criminal Code* and case law to satisfy the legal mandate. All Boards consider recommendations from treatment teams and medical professionals.

Since clear reasons lend transparency to the system and increase public confidence as well as confidence of parties before the Review Board, the Department of Justice recommends:

### RECOMMENDATION #2

*That the NSCCRB prepare detailed written reasons for each disposition order, and that the NSCCRB develop criteria for its decisions, including key facts, evidence, issues and reasoning related to the Review Board's legal mandate.*

## 7) MEETINGS AND BEST PRACTICES

### QUARTERLY MEETINGS

As part of its review, the Department of Justice found that the NSCCRB has developed the practice of meeting on a quarterly basis with representatives of the ECFH, CDHA, and legal counsel that appear regularly before the Board. The Department of Justice reviewed the minutes of these meetings since 2008.

Although it is intended that such meetings take place on a quarterly basis, it appears that they have occurred at most two times per year since 2008.

The minutes illustrate that these meetings are a good forum to discuss best practices and any issues or concerns related to proceedings and treatment of accused persons under the jurisdiction of the NSCCRB. For example, through the review it was learned that unescorted community access passes are being issued to NCRs to allow them to smoke because smoking is prohibited on hospital grounds and in the facility. This issue has been previously raised by the CCRB at the joint meeting and remains outstanding. Therefore, the Department of Justice recommends:

**RECOMMENDATION #3**

*That the NSCCRB meet at least quarterly with representatives from CDHA, ECFH, and legal counsel representatives who appear regularly before the Board.*

**LIAISON WITH OTHER REVIEW BOARDS**

As part of the Department of Justice review, the Deputy Minister of Justice met with the Chairperson of the NSCCRB. At this meeting the Chairperson advised that he attends yearly meetings with Chairs of the Review Boards in the other provinces and territories.

Since Review Boards established under the *Criminal Code* deal with many of the same issues and have the same legal mandate, it is imperative that there be communication for consistency and to ensure best practices are adopted in Nova Scotia. The Department of Justice recommends:

**RECOMMENDATION #4**

*That the Chair of the NSCCRB liaise regularly with Chairs of Review Boards in other provinces and territories to discuss issues and best practices.*

**COMMUNICATION WITH GOVERNMENT, ECFH AND CDHA**

This review has identified the interconnected nature of dispositions made by the NSCCRB and the treatment, services and recommendations of health professionals and treatment teams at the ECFH and CDHA, which receive guidance from the Department of Health and Wellness. Communication between the NSCCRB, the Departments of Justice and Health and Wellness, as well as ECFH and CDHA would assist in a more global approach to the various pieces that must come together. The Department of Justice recommends:

**RECOMMENDATION #5**

*That an annual meeting take place with the Chair of the NSCCRB, the Deputy Minister of Justice, the Deputy Minister of Health and Wellness, CDHA, and the ECFH.*

## 8) ONGOING WORK

Federal, provincial and territorial Ministers responsible for Justice and Public Safety have agreed to explore the issue of protection of the public as the paramount consideration in *Criminal Code* Review Board decisions regarding persons found not criminally responsible due to mental disorder. Nova Scotia is participating in that work.

## 9) SUMMARY OF RECOMMENDATIONS

As a result of the review, the Department of Justice makes the following recommendations:

1. That the NSCCRB develop rules providing for the practice and procedure before the Review Board for consideration and approval of the lieutenant governor in council of the province, as set out in Subsection 672.44(1) of the *Criminal Code*.
2. That the NSCCRB prepare detailed written reasons for each disposition order, and that the NSCCRB develop criteria for its decisions, including key facts, evidence, issues and reasoning related to the Review Board's legal mandate.
3. That the NSCCRB meet at least quarterly with representatives from CDHA, ECFH, and legal counsel representatives who appear regularly before the Board.
4. That the Chair of the NSCCRB liaise regularly with Chairs of Review Boards in other provinces and territories to discuss issues and best practices.
5. That an annual meeting take place with the Chair of the NSCCRB, the Deputy Minister of Justice, the Deputy Minister of Health and Wellness, CDHA, and the ECFH.