

## "Ambiguous Crossroads": Persons with Mental Health Problems and the Criminal Justice System



FRIDAY, FEBRUARY 1, 2013

Schulich School of Law, Dalhousie University  
Halifax, Nova Scotia

This conference is intended to bring together many of the actors responsible for ensuring equitable treatment for persons with mental health problems who come into contact with the criminal justice system. As many challenging cases have revealed and as the ratification by Canada of the Convention on the Rights of Persons with Disabilities mandates, this is a time for change. Persons with lived experience and their advocates, police officers, lawyers and judges, among others, will collaborate to present and discuss the latest developments and preferred practices at the often difficult intersection of criminal justice and mental health. The goals of the conference include updating attendees, fostering discussion and enabling participants to emerge with better tools and timmer links to other justice, health and social service professionals and to the community.

# Role Expectations for Crown and Defence Counsel

## **INTRODUCTION**

This session will provide information, best practices and issues for how Crown and Defence respond to accused struggling with mental illness in the criminal justice system.

It is about creating "better options".

The "better options" theme comes from the Report of the Fatality Inquiry into the Death of Howard Hyde:

*At an immediate, fundamental level, what Mr. Hyde needed was human contact, reassurance and kindness...what Mr. Hyde needed in a more comprehensive sense were better options from the mental health and criminal justice systems.*

## **CONTEXT**

The Front End:

- Persons with mental illness have three times as many interactions with police as the general population ("*mental illness and police interactions in a mid-size Canadian city*" (2009) 28 Canadian Journal Community Mental Health 50).

- "The vast majority of people living with mental health problems and illnesses are not involved with the criminal justice system. In fact, they are more likely to be victims of violence than perpetrators. Nevertheless, they are over-represented in the criminal justice system" (Changing Directions, Changing Lives: The Mental Health Strategy for Canada).
- Duty Counsel from Nova Scotia Legal Aid and Legal Aid Ontario estimate that some 30-40% of criminally accused persons accessing their services have mental illness. If addictions are included, the number jumps to 80%.

### The Back End:

- "Thirty-nine percent of the federal offender population were **diagnosed** with some kind of mental illness" (Howard Sapers, Correctional Investigator of Canada, speaking notes before Parliament of Canada Standing Committee on Public Safety 2009).

## **THIS SESSION**

This session deals with the middle: considerations for Crown and Defence Counsel.

The session will be divided into three areas:

- Fitness and NCR considerations
- Mental Health Court
- Review Board, NCR

Following this introduction, you will see summary notes for each of the three sessions. I also recommend to you an article "*The Responsible Approach to the Issue of Criminal Responsibility*" by Anita Szigeti and Jill Presser, *For the Defence*, Vol. 3, No.5.

Your panelists are:

- Mark Heerma (Public Prosecution Service)
- James A. Van Wart (Public Prosecution)
- Roger Burrell (Nova Scotia Legal Aid)
- Constance MacIsaac (Nova Scotia Legal Aid)

We need to get away from the revolving door approach to mentally ill accused. If I had to choose a theme song lyric it would be:

*Spinning wheel got to go round,  
you got no money, and you got no home,  
spinning wheel, spinning all alone.*

On January 23<sup>rd</sup>, 2013, David Clayton-Thomas (lead singer for Blood, Sweat & Tears) wrote an article in The Globe and Mail.

*I'm not an expert in the criminal justice system. Just a product of it. The story of Ashley Smith, the teenager who strangled herself in her prison cell as guards watched, has prompted me to speak out. But for fortune, that could have been me.*

*At 15, I ran away from a brutally abusive father. Homeless, freezing, I broke into office buildings for a place to sleep. It was a relief to be arrested....*

*I was just one of thousands of lost, homeless kids – kids you see on the street every day. I was not beyond redemption; they just treated me as if I was....*

*...Clearly, the vicious cycle of recidivism is alive and well. A staggering 90 per cent of young offenders sent to prison reoffend within two years...*

*...More and more prisoners show up with mental illnesses. They don't get better in jail. They get worse.*

*...Music saved me... At the age of 21, two convictions under my belt, I walked out of Millbrook prison with 20 bucks in my pocket, a mail-order guitar and the dream of becoming of blues singer.*

Karen Hudson, QC (Nova Scotia Legal Aid Commission)  
Panel Chair

## FITNESS TO STAND TRIAL

### Why Should Courts Consider Fitness?

- Fitness is rooted in notions of fairness; notably, it is unfair to try an accused in his absence, be that physical or mental.

### Applicable *Criminal Code* Sections

- Section 2, “unfit to stand trial” and “mental disorder”
- ss. 672.1 – 672.33 – various *Criminal Code* provisions which address fitness, including when assessment orders may be ordered, the presumption of fitness, when a fitness hearing may be ordered, and the ramifications of a finding of fitness or unfitness.

### The Test for Fitness?

- “The Limited Cognitive Capacity Test”, aka, the “Taylor test”. Fitness only requires a rudimentary understanding of the judicial process. Knowledge of who the parties are, what their roles are, what the charges entail, what the jeopardy that they face is, etc. [***R. v. Taylor (1992), 11 O.R. (3d) 323 (C.A)*** as affirmed by the ***R. v. Whittle, [1994] 2 S.C.R. 914.***]
- “Accordingly, provided the accused possesses this limited capacity, it is not a prerequisite that he or she be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves her interests” *Whittle*, para. 33.

### Appreciating the Policy-Laden Nature of the Test for Fitness

- The test for fitness is properly viewed as an attempt to mediate a clash of numerous policy considerations: for e.g., autonomy, the timely conduct of criminal proceeding, society’s interests in having matters adjudicated, avoiding paternalism, avoiding having an accused “caught” in the fitness regime, etc.

### The Right to Control Your Defence

- “Thus, an accused who has not been found unfit to stand trial must be considered capable of conducting his or her own defence... An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf, and what witnesses to call. This is a reflection of our society's traditional respect for individual autonomy within an adversarial system” ***R. v. Swain, [1991] 1 S.C.R. 933*** at paras. 35 & 36.

Issue: "Gray -Area Defendants"/"Borderline-Fit Accused"

- Accused was "totally incapable" ... "incapable of defending himself fully and effectively" – ***R. v. Ryan, 2012 NLCA 9***
  - Unfair trial resulted and a new trial should be ordered (Amicus Curiae ) [Note dissent]
- ***Indiana v. Edwards 554 U.S.S.C. (2008)*** – Competency to represent yourself is a higher threshold than competency to stand trial.
  - Court may impose counsel to protect fair trial and "affirm dignity" of the accused.

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

### Criminal Code Provisions

- S. 16(1) -- “incapable of appreciating the nature and quality of the act or omission”; or  
    -- “knowing that it was wrong”
- S. 16(2),(3) – presumption of criminal responsibility and burden of proof
- S. 2 -- “mental disorder”  
  
    R. v. Cooper [1980] 1 S.C.R. 1149: broad scope of legal concept  
    – “impairment of human mind and its functioning”  
    R. v. Bouchard-Lebrun 2011 SCC 58, paragraphs 58 – 65 --  
    “legal concept within a medical dimension”; “continually evolving”
- S. 672.34 -- rendering a verdict
- S. 672.54 -- determining a disposition

### Procedure

- R. v. Swain [1991] 1 S.C.R. 933  
    -- Crown has to prove the substance of the case before S. 16 issues permitted.  
  
    -- Crown may only raise S. 16 if accused puts his criminal intent in issue.
- Ss. 672.11(b), 672.12(1),(3) – Court Ordered Assessments

### Ethical Considerations/Competency of Counsel Issues

- Taking instructions – pitfalls illustrated in three recent cases:  
    R. v. Guidolin, 2011 ONCA 264 – efficient process of case upon counsel’s perceived interests/needs of accused;  
  
    R. v. Szostak, 2012 ONCA 53 -- defence counsel’s walk on the tightrope of competency between obligations to the court and obligations to the client;  
  
    R. v. Ellis, 2012 ONCA 906 – competency of counsel in N.C.R. hearing

- Duty to inform client in uncertain world of psychiatric diagnosis/treatment: "what should I do?"
- Limits of retainer

# Mental Health Court Program Overview

The Nova Scotia Mental Health Court Program is a voluntary offender-based program for adults (persons 18 years of age and older) who have been charged with a criminal offence and have a mental disorder but are competent to participate in the criminal justice system. For this program, "**mental disorder**" means a recognized, significant and persistent mental illness. Examples of a significant mental illness include schizophrenia or other psychotic disorders, bi-polar disorders, major depression, or other mental illnesses that affect or impair judgement.

The Mental Health Court will consider individuals with developmental delay, organic (acquired) brain injury or head trauma, on a case by case basis. Also considered will be individuals with co-occurring mental health and substance use disorders where the mental disorder is the primary disorder.

## **What are the requirements?**

- That an accused has been charged with an offence under the Criminal Code of Canada and/or the Controlled Drugs and Substances Act and the charges are within the jurisdiction of the Provincial Court and either have occurred in the Halifax Regional Municipality (HRM) or have been transferred there from another area of the Province because the accused has a substantial connection to the HRM. In the opinion of the Crown Attorney there must also be a reasonable prospect of conviction should the matter proceed to trial;
- That the accused has a mental disorder as defined above;
- There must be a connection between the criminal behaviour and the mental disorder. This means that there is a reasonable probability the mental disorder played a significant role in the commission of the offence(s);
- That the accused voluntarily undergo a clinical screening to determine whether a mental disorder is present and what, if any, affect the disorder had in the commission of the offence;
- That the accused must acknowledge responsibility for the act or omission that forms the basis for the offence(s) that is/are alleged to have occurred;
- That the Crown Attorney for the Nova Scotia Mental Health Court consents to the accused's participation.



## *Nova Scotia's Mental Health Court Program*

### **The Mental Health Court Team**

A Judge of the Provincial Court presides over the Nova Scotia Mental Health Court.

The Mental Health Court Team consists of a Crown Attorney, a Defence Counsel (N.S. Legal Aid), a Probation officer and two Mental Health Clinicians. Private Defence Counsel can also appear in the Court on behalf of an accused.

Each member has a role to play in ensuring the administration of justice, public safety, the development of individualized support plans, case co-ordination and to facilitate access to mental health and community services for the participant.

### **What is the process?**

The Mental Health Court Program consists of four phases. Each phase involves court processes and requires the participant to attend court and to comply with court orders and directions.

- Appearance Phase
- Screening Phase
- Assessment Phase
- Program Phase

#### **• Appearance Phase**

An accused may be identified as a potential participant for the Mental Health Court Program upon their first appearance in Court (arraignment) or at a subsequent appearance. Identification of a potential participant can originate from a number of sources including, but not limited to, the accused themselves, the Crown Attorney, Defence Counsel, Sheriff Services, Police Agencies, Probation Services, community service providers, and/or the Judge.

### **Referral**

The identification of a potential participant for the Nova Scotia Mental Health Court is to be communicated to the Judge presiding in the 'originating' court through the Crown Attorney or Defence Counsel, and the presiding Judge may refer the matter to the Nova Scotia Mental Health Court.

A matter can be transferred to the Nova Scotia Mental Health Court for a screening to determine eligibility at any time in the judicial process, if the accused has been identified as having a mental disorder or presents as exhibiting signs of a mental disorder and is prepared to accept responsibility for their actions or omissions.



## *Nova Scotia's Mental Health Court Program*

The accused will be given a court date for the Nova Scotia Mental Health Court and an information brochure about the Court.

The presiding Judge will make the formal referral to the Nova Scotia Mental Health Court, and the referral will be endorsed on the back of the Information by the presiding judge.

The matter will be adjourned for about two weeks from the Originating Court into the Nova Scotia Mental Health Court.

### **Adjournment**

During this time the accused person will have an opportunity to meet with a Legal Aid Lawyer (or private counsel) for the purpose of obtaining additional information on the requirements for participation in the Nova Scotia Mental Health Court including but not limited to, the voluntary component of the program, the necessity of consent forms and releases to allow the Nova Scotia Mental Health Court Team access to criminal and medical records, and the screening to determine eligibility.

### **Documents**

The Nova Scotia Mental Health Court Program requires that information about participants be collected and shared throughout the entire court process.

Information will be shared in a way that protects participants' confidentiality rights as clients of the mental health system, their constitutional rights as accused persons, and solicitor client privilege.

To comply with confidentiality requirements, the Nova Scotia Mental Health Program ensures that participants provide their written consent to release information.

### **• Screening Phase**

This Phase starts with an accused's first appearance in the Nova Scotia Mental Health Court. At this time, the Judge will ask the accused if they want to continue in the Nova Scotia Mental Health Court Program and if they have met with counsel. If they have not met with counsel, and are consenting to continue in this phase, time will be provided to allow the accused to meet with either the Legal Aid lawyer or private counsel. The matter will be adjourned for about two weeks.

If the accused does not wish to continue in the Nova Scotia Mental Health Court Program, the matter will be adjourned back into the Originating Court.

If the accused is represented by a lawyer and has previously received information about the requirements, consent forms will be signed, and arrangements will be made through



## *Nova Scotia's Mental Health Court Program*

the Nova Scotia Mental Health Court Program administrative assistant to set up a time with a Team clinician to start the screening process.

The assessment serves as both a screening tool for eligibility and the basis of an individualized Support Plan for participation in the Nova Scotia Mental Health Court Program.

Once the screening is completed the Crown Attorney and Defence Counsel meet to review the matter and determine whether the accused meets the eligibility criteria for the Nova Scotia Mental Health Court NS MHC Program. The Crown Attorney has the authority to determine that the accused is not a suitable candidate for the Nova Scotia Mental Health Court NS MHC, and if this happens, the matter will be returned to the Originating Court.

If the accused is considered eligible for the Nova Scotia Mental Health Court Program they will appear in the Nova Scotia Mental Health Court at which time the Judge will ask if the accused person is agreeing to voluntarily participate in the Nova Scotia Mental Health Court. It is at this stage that the individual accused is invited to become a participant in the Program.

The matter is adjourned to allow for an assessment of the participant's needs.

If the Mental Health Court Judge finds that the accused is not a suitable candidate, or the accused decides that he or she does not want to participate in the Nova Scotia Mental Health Court the matter will be adjourned to the Originating Court. An accused will be offered an exit interview with the mental health clinician to provide information and assist them in making application and referral to community-based programs/services..

### • **Assessment Phase**

It is at this Phase that the accused will sign the Participation Agreement and meet with a Nova Scotia Mental Health Court Clinician to complete their assessment of needs. Consent must be informed and voluntary.

### • **Program Phase**

It is at this Phase that a Support Plan is created and follow-up appointments are made with a Nova Scotia Mental Health Court Clinician.

### **Frequency**

A participant's attendance in the Nova Scotia Mental Health Court will be decided by the Judge based, in part, upon recommendations of the Nova Scotia Mental Health Court



## *Nova Scotia's Mental Health Court Program*

Program Team. The frequency of court appearances may fluctuate depending on the complexity of the Support Plan and the participant's progress.

### **Outstanding and Subsequent Charges**

There is no limit to the number of charges that will be dealt with for any given participant, subject to an overriding public safety concern that may be raised by the Crown Attorney.

Any offences committed by a participant while they are involved in the Program will not automatically lead to expulsion from the Program. All new charges will be reviewed and screened on a case by case basis..

### **Breach and Sanction**

The Undertaking, or Order of Release, will not provide details of the Support Plan but will contain other conditions of release that in the event of a breach will be dealt with by the Police and the Crown Attorney in the normal course. However, where possible, any additional charges may be transferred to the Nova Scotia Mental Health Court if they meet the eligibility criteria and the participant consents.

The consequences of a failure to adhere to the Support Plan may result in the participant being ordered by the Judge to return to Nova Scotia Mental Health Court and have additional conditions and/or sanctions imposed.

Sanction for breaches may include, but are not limited to:

- an increase of frequency in court appearances;
- closer supervision;
- a change in curfew and/or reporting requirements to Probation;
- a change in the Support Plan;
- termination from the Mental Health Court; and
- in rare circumstances, may result in a period of detention.

Disposition may include but is not limited to:

- Crown Attorney withdrawing the charge or charges completely;
- Absolute or Conditional Discharge;
- Probation;
- Community Service;
- Fine;
- Peace Bond;
- Conditional Sentence or
- A period of detention.

## Mission Statement

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### **Mission Statement:**

The mission of the Mental Health Court is to enhance public safety and improve the mental health and quality of life of persons with mental disorders, which have contributed to their involvement in the criminal justice system, by assisting them to access treatment and service.

Court participants, in accepting responsibility for their actions which lead to criminal offending, agree to adhere to recommended treatment and supports, enabling them to make positive changes in their lives.

### **The Goals of the Mental Health Court include:**

Reducing the involvement of persons with mental disorders in the criminal justice system thereby addressing public safety concerns;

Improving health outcomes and quality of life of persons living with mental disorders by increasing their capacity to successfully live in the community; and

Facilitating access to mental health and social services/supports by connecting, or reconnecting, participants with needed services/supports

### **Underlying Principles:**

**Safety and security** are key considerations for all Courts. Balancing public safety and security with the needs of the court participant is the first priority of services and supports.

**Timeliness of Assessments** is essential to the well being of the court participant.

**Confidentiality:** Mental Health Court processes require that considerable information about participants be collected and shared at all points of the court process, from the initial screening to the eligibility determination and throughout the entire period of judicial supervision.

Information shall be shared in a way that protects participants' confidentiality rights as mental health clients and their constitutional rights as defendants, including their right to solicitor-client privilege.

To comply with confidentiality requirements, the Mental Health Court Program assures that the court participants provide their written consent to release information on a form that specifically identifies what information will be released and the parties to whom it will be released.

**Informed decision-making:** The participant will be provided with all the information necessary to make informed decisions through the process.

**Accessible and appropriate services:** The Mental Health Court team will facilitate the delivery of appropriate services and supports.

*Nova Scotia's Mental Health Court Program*

**Service collaboration:** The Mental Health Court team will encourage collaboration amongst service providers, government departments and community partners in identifying services and supports that are accessible, linked, and coordinated across, and within, the mental health, criminal justice and broader social service systems. Formal partnerships with service providers will be developed whenever possible.

**Recovery focused:** The recovery approach underlies the delivery of mental health services and supports and emphasizes client choice, flexibility in services, individualized supports, and the importance of peers, families, significant others and communities in supporting people with mental health needs. Such an approach also considers the impact of factors such as poverty, poor housing, unemployment and stigmatization.

**Education and support:** Education and support are available to address the needs of the court participants, their families and other social supports and service providers. Public education is also important to address public awareness and acceptance of individuals with mental health needs involved with the criminal justice system.

**Evaluation:** Timely monitoring of court processes and participants' outcomes are essential to ensure that the Mental Health Court Program is responding appropriately to persons with mental disorders.

## **WHAT HAPPENS TO THE ACCUSED FOLLOWING VERDICTS OR FINDINGS OF NCR-MD?**

### **Relevant Provisions**

672.-672.95

### **Timing of Disposition Hearings**

- Within 90 days where a Court has made a disposition other than an absolute discharge;
- As soon as practicable, but not later than 45 days where the Court does not make a disposition;
- 'Exceptional circumstances' may warrant an extension of time up to a maximum of 90 days;
- Adjournments can be made by the Review Board for up to 30 days.

### **Nature of Hearings**

The hearings are to be non-adversarial and the Review Board's role is inquisitorial.

### **Evidence at Hearings**

- Hospital Report
- Risk Appraisal
- Clinical Record
- Evidence relating to index offence
- Allegations of criminal behaviour
- Victim Impact Statement

### **Types Dispositions**

- Absolute Discharge
- Conditional Discharge
- Hospital Detention Order (requires a warrant of committal)

Dispositions must be the least onerous and least restrictive to the accused. This is governs the hospital's implementation of an accused's passes and privileges into the community.

Dispositions require consideration of: the need to protect the public from dangerous persons; the mental condition of the accused; the reintegration of the accused into society; the other needs of the accused.

Is there a positive finding on the whole of the evidence the accused constitutes a "significant threat to the safety of the public". Significant threat means a real risk of physical or psychological harm to members of the public from conduct that is criminal in nature. The harm must go beyond what is trivial or annoying.

*Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 2 SCR 625

## **Best Practices**

Provide notice to counsel at the review Board that an individual will be detained at ECFH as either unfit or NCRMD.

Explicitly set out the facts of the index offence for which the individual has been found NCRMD. If the Defence and Crown cannot agree on the facts, run a hearing on the facts. Findings of fact are essential in cases where there is dispute as to whether the index offence was 'violent'.

## **Issues**

Exceptional circumstances: limitations on the ability of the hospital to obtain information and prepare reports for hearings in a timely manner affects the ability to hold hearings within the requisite period and the Board's inquisitorial role poses a duty to obtain all necessary information- result is that first hearings or dispositions are delayed.

Content of reports: does it provide a non-biased representation of evidence obtained by the hospital or does it only include information which supports the recommendations made by the hospital.

Timeliness of hospital reports: Code doesn't set out a timeline in which reports must be received. Here is NS 10 days it the goal but reports are often late for a variety of reasons which can directly affect an accused full answer and defence and may require the defence requesting an adjournment the result being a prolonged restriction on liberty.