MEDIA STATEMENT
CRIMINAL JUSTICE BRANCH

June 12, 2015 15-10

No Crown Appeal from Review Board's Disposition on Schoenborn

Victoria – The Criminal Justice Branch, Ministry of Justice (the "Branch"), announced today that it will not file an appeal from the decision of the British Columbia Review Board to allow Allan Dwayne Schoenborn to have "escorted access to the community".

On May 29, 2015, the Review Board ordered that Mr. Schoenborn be detained in custody at the Forensic Psychiatric Hospital in Port Coquitlam for another 12 months, but also authorized the Director of the Hospital, at his discretion, to grant Schoenborn "escorted access to the community, having regard to his mental condition and the risk he poses to himself and others". Crown Counsel opposed a term allowing for escorted access.

A Review Board disposition can be appealed to the Court of Appeal for British Columbia under section 672.72(1) of the *Criminal Code.* After a thorough review of the Board's *Reasons,* as well as the evidence that was before the Board for consideration, the Branch has concluded there is no likelihood that it can meet the legal requirements for appellate intervention. Accordingly, an appeal will not be filed on behalf of the Crown.

The Branch appreciates that the case involving Schoenborn has attracted considerable public attention since 2008, including this latest disposition by the Review Board. The Branch also understands the terrible impact that this case has had, and continues to have on the victim and her family members, and the importance of providing a full explanation of the legal conclusions reached by Crown Counsel. In light of these circumstances, the Branch considers it in the public interest to issue a Clear Statement explaining its decision to not file an appeal. The Clear Statement is attached.

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Clear Statement **15-10**

On May 29, 2015, the British Columbia Review Board ordered that Allan Dwayne Schoenborn be "detained in custody and reside in the Forensic Psychiatric Hospital" in Port Coquitlam, until further review within 12 months. However, the Board also ordered that at the discretion of the Hospital's Director, Schoenborn "may have escorted access to the community, having regard to his mental condition and the risk he poses to himself and others".

The Criminal Justice Branch, Ministry of Justice (the "Branch"), announced today that it will not file an appeal from the Review Board's disposition.

The Branch appreciates that the case involving Schoenborn has attracted considerable public attention since 2008, including this latest disposition by the Review Board. The Branch also understands the terrible impact that this case has had, and continues to have on the victim and her family members, and the importance of providing a full explanation of the legal conclusions reached by Crown Counsel. In light of these circumstances, the Branch considers it in the public interest to issue a Clear Statement explaining its decision to not file an appeal.

Background to Review Board Disposition

On February 22, 2010, Allan Schoenborn was found by a criminal trial judge to be Not Criminally Responsible on Account of Mental Disorder for the murder of his three children. The judge was satisfied, on a balance of probabilities, that at the time Schoenborn committed the offences, he was suffering from a mental disorder that rendered him incapable of appreciating the nature and quality of his actions, or from knowing that they were wrong.

The offences occurred in April 2008. A verdict of Not Criminally Responsible on Account of Mental Disorder (NCR) was entered in February 2010. Since then, by order of the Review Board, Schoenborn has been detained in custody at the Forensic Psychiatric Hospital (the "Hospital").

At present, Schoenborn's status as a NCR accused is subject to a yearly review under the *Criminal Code of Canada* to determine whether he should continue to be detained in the Hospital: s. 672.81(1). Schoenborn had his most recent Review Board hearing over a number of days in February and April 2015.

On May 29, 2015, the Review Board released its disposition. The Board ordered that Schoenborn be detained in custody at the Hospital for another 12 months. However, the Board also authorized the Director of the Hospital to allow Schoenborn limited, escorted access to the community. In doing so, the Board imposed a number of conditions, including that Schoenborn:

- not acquire, possess or use any firearm, explosive or offensive weapon;
- not use alcohol or any drugs except as approved by a medical practitioner;
- have no direct, or indirect contact, with a number of named individuals; and,
- that he keep the peace and be of good behaviour.

Crown Counsel appeared at the Review Board hearing on behalf of the Attorney General for British Columbia and opposed escorted access to the community.

The Jurisdiction to File an Appeal

A disposition by the Review Board can be appealed to the Court of Appeal for British Columbia under section 672.72(1) of the *Criminal Code.*

However, before filing an appeal, the Criminal Justice Branch must be satisfied that the Crown has an appropriate legal basis on which to establish that appellate intervention is warranted. Section 672.78(1) of the *Criminal Code* authorizes a Court of Appeal to set aside a Review Board's disposition only where the Court is first satisfied, on the whole of the record before it, that:

- the disposition is unreasonable or cannot be supported by the evidence;
- the disposition is based on a wrong decision on a question of law; or,
- there was a miscarriage of justice.

Even where the Crown can point to a legal error, an appeal will not necessarily succeed. Under the *Criminal Code,* a Court of Appeal can still dismiss a Crown appeal if it finds that a Review Board's error did not lead to a substantial wrong or miscarriage of justice: s. 672.78(2)(b).

This is a stringent test. The fact that the British Columbia Review Board did not decide the Schoenborn disposition in favour of the Crown's position does not mean there is an appropriate legal basis for an appeal.

The Review Board is a specialized administrative tribunal. When standing in review of this tribunal, the Court of Appeal is required, by law, to show deference to the Board's familiarity with NCR accused persons, and its expertise in assessing whether the mental condition of a particular individual renders him a significant threat to the public: *Staetter v. British Columbia,* 2015 BCCA 63. The Supreme Court of Canada has ruled that where a Review Board's disposition is one that "could reasonably be the subject of disagreement" among persons who are "properly informed of the facts and instructed on the applicable law", an appellate court "should in general decline to intervene". It is not the role of an appeal court to "re-weigh" the evidence that was before the Review Board: *R. v. Owen,* 2003 SCC 33. This standard of appellate review is binding across Canada.

The Crown's Review of the Schoenborn Disposition

The Review Board's decision to authorize escorted access to the community for Schoenborn has been thoroughly reviewed by three senior Crown Counsel with extensive appellate experience. In addition to analyzing the *Reasons for Disposition* that was produced by the Board, these prosecutors reviewed:

- victim impact statements from the mother of the children, outlining the devastating impact that Schoenborn's offences have had on her and her family members, as well as her continued fear of Schoenborn;
- a complete transcript of the four day proceeding before the Review Board, including the testimony of the expert medical witnesses that appeared before the Board;
- a January 2015 written report from Schoenborn's current treating psychiatrist;
- the criminal record of Schoenborn; and,
- case law from the Supreme Court of Canada on the legal principles that must guide a Review Board's analysis for the purpose of a disposition and any subsequent review.

During the course of their review, the appellate prosecutors also consulted with Crown Counsel who appeared on behalf of the Attorney General at the 2015 hearing.

In light of the information, in its entirety, and the law governing appeals from a Review Board disposition, the Criminal Justice Branch has concluded there is no likelihood it can establish within the meaning of the *Criminal Code,* that the Schoenborn disposition:

- is unreasonable or cannot be supported by the evidence;
- is based on a wrong decision on a question of law; or,

- there was a miscarriage of justice.

Although reasonable persons may disagree on the appropriateness of escorted access to the community for Schoenborn, it was open to the Review Board to grant this condition in light of the evidence that was before it. Crown Counsel saw the evidence differently, but this does not mean that the Review Board's assessment of the evidence was unreasonable within the meaning of the law, or unsupported by expert reports or testimony.

The Board heard from Schoenborn's treating psychiatrist, his psychologist and his case manager, all of whom supported escorted access. This evidence was accepted by the Board as professional and credible, notwithstanding extensive cross-examination by Crown Counsel. There was no expert evidence before the Board that provided a contrary assessment of Schoenborn's risk if he were permitted escorted community access. Within this context, and based on the Board's specialized expertise with NCR accused, an appellate court would likely defer to the Review Board's findings. In these matters, the record on appeal will typically consist of the same evidentiary foundation that was before the Review Board. Appellate courts take the position that the tribunal of first instance is usually in the best position to assess the evidence, because its members are the persons who actually heard directly from the witnesses, including their cross-examination. The Crown thoroughly tested the evidence that was led at the Review Board hearing, and was able to put its own evidence forward.

The Review Board also heard evidence about the process by which escorted access is granted by the Hospital. According to this evidence, the Director only exercises discretion in favour of escorted access after a very thorough assessment has occurred involving the NCR accused person's treatment team, as well as others. This assessment pays serious attention to public safety. According to the witness who testified on this point, the detailed planning and risk mitigation strategies that are put in place by the Hospital for the purpose of escorted access has meant that in the past 6 years, there have been no escapes by patients who were subject to escort.

The evidence led before the Review Board made clear that authorizing escorted access, at the discretion of the Hospital's Director, does not mean that escorted access *must* occur. Instead, it will only happen for a particular NCR accused once a determination has been made by the Hospital that escorted access is appropriate in the circumstances as they exist at the relevant time, the Hospital's detailed process of risk assessment has been employed, and an appropriate plan has been put in place to properly supervise the NCR accused during any escorted access. The evidence before the Review Board was that in Schoenborn's case, a considerable period of time may elapse from the May 2015 ruling before escorted access is formally proposed.

The Supreme Court of Canada has held that even where a Review Board concludes that a particular NCR accused poses a significant threat to the safety of the public, justifying his continued detention in a hospital, the Board must nonetheless fashion a disposition for the accused that is the "least onerous and least restrictive" to him: *R. v. Owen,* 2003 SCC 33. In its May 2015 ruling, the Review Board explained its view that the federal government's enactment of the *Not Criminally Responsible Reform Act (Bill C-14)* has not changed this governing principle. Crown Counsel argued to the contrary, but the Review Board did not accept the Crown's position. In light of the relevant case law, as it currently exists, and the material that was before the Review Board in the Schoenborn case, the Criminal Justice Branch has concluded there is not a sufficient legal and evidentiary basis in this particular case from which to challenge this determination on appeal.

The Review Board correctly noted in its *Reasons* that when *Bill C-14* was under consideration by Parliament, the then Attorney General and Minister of Justice for Canada stated on the

record that the 2014 amendments to the *Criminal Code* were not intended to eliminate the requirement that a Review Board's disposition be the "least onerous and least restrictive".[1]

Next Steps in the Schoenborn Case

The Criminal Justice Branch has concluded there is not a sufficient legal basis on which to file an appeal from the Review Board's disposition. Accordingly, no appeal will be filed on behalf of the Crown.

This means that in the absence of an intervening circumstance, Schoenborn's continued detention in the Hospital will next be reviewed by the Review Board within 12 months of May 29, 2015. During the course of this period, the Director of the Hospital will have the authority to grant Schoenborn escorted access to the community in accordance with the Hospital's standardized practice, should he determine it appropriate to do so. As noted, escorted access is not mandated. It may only be granted once the Director approves of it, and in accordance with the Hospital's practice, after an assessment of the risk has been completed.

On an entirely separate issue, the Branch is in the process of deciding whether to exercise the Crown's discretion before the next Review Board hearing to initiate an application in the British Columbia Supreme Court to have Schoenborn designated a "high-risk accused" under section 672.64(1) of the *Criminal Code.* This is a new designation resulting from *Bill C-14* (the legislation came into effect in July 2014), and is available for adult NCR accused persons who have committed serious personal injury offences. A "high-risk" finding can only be made when a court is satisfied that:

- there is a substantial likelihood that the NCR accused will use violence that could endanger the life or safety of another person; or,
- the offence(s) committed by the NCR accused were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person: s. 672.64(1), *Criminal Code.*

Factors that a court is obliged to consider in deciding whether someone meets the test for "high-risk" include (but are not limited to), the current mental condition of the NCR accused, the past and expected course of his treatment, and the opinions of experts who have examined the accused: s. 672.64(2).

For a variety of practical and procedural reasons, the Branch determined it was appropriate to let the most recent Review Board hearing run its course before going on to assess whether it was necessary, and appropriate, to seek a "high-risk accused" designation in relation to Schoenborn.

In light of the Review Board's decision, and having regard to the applicable legal framework and Branch policy, the Branch will now thoroughly review the Schoenborn matter to make a determination on whether there is a sufficient legal and evidentiary basis on which to initiate an application under section 672.64(1). The analysis is complex and it will take some time to complete. The Branch will make this determination on behalf of the Attorney General independent from government, the Review Board, the victim of the offences, and Schoenborn. In light of the public profile of the Schoenborn case, once the Branch has reached its determination, it will issue a Clear Statement advising of the result unless, based on material developments since today's date, the Branch has reason to believe doing so would not be in the public interest.

[1] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 3, Evidence – February 27, 2014.

It should be noted that contrary to information that has been publicly reported in relation to the Schoenborn case, even if the Crown makes this application; section 672.64(1) of the *Criminal Code* is found to apply; and Schoenborn is found to be a "high-risk accused", this would not mean that he would automatically be detained in a hospital for 3 years before the Review Board could again review his disposition status, or that there would be no legal authority to grant him escorted access to the community.

Under the *Bill C-14* amendments to the *Criminal Code,* a "high-risk" finding allows for the time period before another Review Board hearing to be extended to a maximum of 36 months only if certain circumstances have first been met: ss. 672.81(1.31) and (1.32). Also, the *Bill C-14* amendments still allow for escorted absences from a hospital for "medical reasons or for any purpose that is necessary for the accused's treatment", as long as "a structured plan has been prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public": s. 672.64(3).

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