BRITISH COLUMBIA | Prosecution Service

Media Statement

September 14, 2017 17-18

No Crown Appeal of Schoenborn High-Risk Accused Ruling

Victoria - The BC Prosecution Service (BCPS) announced today that it will not file an appeal from the decision of the BC Supreme Court dismissing the Crown's application to have Allan Dwayne Schoenborn designated a high-risk accused (HRA) pursuant to the *Criminal Code* section 672.64. The BC Supreme Court dismissed the Crown's HRA application on August 31, 2017.

In February 2010, a BC Supreme Court judge found that Allan Schoenborn committed the first-degree murders of his three children. However, he ruled that Mr. Schoenborn was not criminally responsible on account of a mental disorder (NCR). Since that time, Mr. Schoenborn has been detained at the Forensic Psychiatric Hospital in Port Coquitlam by annual order of the British Columbia Review Board. In May 2015, the Review Board renewed Mr. Schoenborn's detention for another 12 months, but authorized escorted access to the community at the discretion of the Director of the Hospital. On September 4, 2015, the BCPS announced that it had filed an application under section 672.64(1) of the *Criminal Code* to have Allan Dwayne Schoenborn found a high-risk accused. The effect of such a finding would be some restrictions on outings and potential limits on the frequency of Review Board hearings.

After a thorough review of the Court's Reasons, the BCPS has concluded there is no likelihood that it would succeed in an appeal of the court's decision. Accordingly, the BCPS will not file an appeal in this matter.

The BCPS appreciates that the case involving Mr. Schoenborn has attracted considerable public attention since 2008, including this latest disposition by the Court. The BCPS also understands the terrible impact that this case has had, and continues to have, on the family of the victims, 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.

Media Contact: Dan McLaughlin
Communications Counsel
Daniel.McLaughlin@gov.bc.ca
250.387.5169

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Clear Statement 17-18

On August 31, 2017 the BC Supreme Court concluded that Allan Dwayne Schoenborn does not meet the criteria for a high risk accused (HRA) designation pursuant to section 672.64 of the *Criminal Code*: *R. v. Schoenborn,* 2017 BCSC 1556. This statement explains the decision of the BCPS not to pursue an appeal of this decision.

Background

On February 22, 2010, Allan Schoenborn was found by a criminal trial judge to be not criminally responsible on account of a mental disorder for the murder of his three children. The judge was satisfied, on a balance of probabilities, that at the time Mr. 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 a mental disorder (NCR) was entered in February 2010. Since then, by order of the Review Board, Mr. Schoenborn has been detained in custody at the Forensic Psychiatric Hospital (the Hospital).

At present, Mr. Schoenborn's status as an NCR accused is subject to yearly review by the Review Board to determine whether he should continue to be detained in the Hospital.

In the last disposition released by the Review Board in May 2015, the Board ordered that Mr. Schoenborn be detained in custody at the Hospital for another 12 months. However, the Board also authorized the Director of the Hospital, at his discretion, to allow Mr. Schoenborn limited, escorted access to the community, despite Crown Counsel's opposition to escorted absences. To date no escorted absences have been granted by the Director.

The BCPS did not appeal the Review Board's decision to permit escorted absences, having concluded after a thorough assessment that there was not a sufficient legal basis on which to file an appeal. A Clear Statement explaining this decision was released by the Branch on June 12, 2015.

Mr. Schoenborn's current Review Board hearing commenced in the spring of 2017. It is scheduled to continue in November 2017.

The Application for a "High-Risk" Finding

In July 2014, the *Criminal Code* was amended to enable a finding of "high-risk accused" for adult persons who have been found NCR for a prescribed serious personal injury offence. The Crown bears the onus of proving that the test is met. To succeed on an application, the Crown must establish either:

- that there is a substantial likelihood an accused will use violence that could endanger the life or safety of another person; or,

- that the offences the accused committed were of such a brutal nature, they indicate a risk of grave physical or psychological harm to others (section 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 mental condition of the NCR accused at the time of the application, the past and expected course of his treatment, and the opinions of experts who have examined the accused (section 672.64(2)).

Where a court determines that a "high-risk" finding is warranted, it must order that the NCR accused be detained in custody in a hospital (section 672.64(3)). However, notwithstanding this provision, a "high-risk" finding does not mean that an NCR accused is never allowed to leave the hospital. The July 2014 amendments to the *Criminal Code* contemplate the possibility of limited escorted absences in the community, even with a "high-risk" finding. Such absences must be:

- for medical reasons, or,
- for any purpose that is necessary for treatment, if the accused is escorted by a person who is authorized by the person in charge of the hospital (section 672.64(3)(a)).

A "high-risk" finding permits the Review Board to extend the period between reviews to up to 36 months, rather than annually. However, this extended period is not automatic upon a "high-risk" finding. It is available only where

- the NCR accused consents; or,
- the Review Board is satisfied that his condition is not likely to improve, and detention remains necessary for the period of the extension (s 672.81(1.31) and (1.32)).

The Jurisdiction to File an Appeal

A decision with respect to an HRA finding can be appealed to the Court of Appeal for British Columbia under section 672.64(4) and 672.72 of the *Criminal Code*.

However, before filing an appeal, the BCPS 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 lower Court's disposition only where the Appeal 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 the lower court's error did not lead to a substantial wrong or miscarriage of justice: section 672.78(2)(b).

This is a stringent test. The Supreme Court of Canada has ruled that where a 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". An appeal of the decision to dismiss the Crown's HRA application is limited to questions of law or mixed law and fact (section 672.72). The Court of Appeal will generally defer to the factual findings of the lower court absent them being unreasonable (section 672.78). It is also not the role of an appeal court to "re-weigh" the evidence: *R. v. Owen*, 2003 SCC 33. This standard of appellate review is binding across Canada.

The Crown's Review of the Schoenborn Disposition

The Crown filed its HRA application on September 4, 2015. A preliminary ruling upholding the retrospective application of these provisions to the accused was made on December 2, 2015. The hearing of the substantive application commenced on May 2, 2016, occupied 46 court days over a 16-month period, and concluded on August 31, 2017. A team of three Crown Counsel presented a full and thorough case. In total 10 expert witnesses, called on behalf of both Crown and defense, testified about the risk posed.

The decision to deny the Crown's HRA application has been thoroughly reviewed by senior counsel at Criminal Appeals and Special Prosecutions, who are unanimous that there is no legal basis for an appeal in this matter.

The BCPS 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,
- constitutes a miscarriage of justice.

While not the result the Crown was seeking, the HRA ruling is detailed and deals comprehensively with the evidence and all the major issues raised by the parties. Specifically, the court found that while Mr. Schoenborn represented a sufficient risk for the Review Board to detain him in custody (section 672.54), the higher level of risk needed to designate him a HRA (section 672.64) was not made out. This was the first authoritative judgment interpreting the HRA provisions. The Crown is unable to say that the legal standard of higher risk articulated by the court is clearly incorrect.

Overall, the ruling is mostly a factual determination (involving the weighing of various expert reports and other evidence) which would be entitled to significant deference by an appellate court and would be unlikely to be overturned on appeal.

Although reasonable persons may disagree on the appropriateness the court's decision it was a decision open to the court to make. Crown Counsel saw the evidence differently, but this does not mean that the court's assessment of the evidence was unreasonable within the meaning of the law, or unsupported by expert reports or testimony.

The negative HRA finding does not alter the ongoing process before the Review Board. The last Review Board disposition in 2015 granted the Director of Forensic Psychiatric Hospital discretion to permit escorted outings. None have yet been granted.

Without a HRA designation, the Review Board will continue to hold annual reviews of Mr. Schoenborn's status. The Crown will continue to appear at those reviews and advocate for the public interest to be served. The next Review Board hearing is on November 10, 2017, at which it will be open to the Crown continue to oppose escorted day passes.