

BC Review Board Proceedings – Part II

PRACTICING BEFORE THE BC REVIEW BOARD (SKILLS FOR LAWYERS)

NOVEMBER 22, 2022

Forensic Psychiatric Services – An Overview

REVIEW BOARD WEBINAR #2 – SKILLS FOR LAWYERS

NOVEMBER 22, 2022

PETER PARNELL, FPS

What do we do?

FPS provides specialized hospital and community-based assessment, treatment and clinical case management services for adults with mental illness who are in conflict with the law.

Forensic Health System Patient Journey



Forensic Psychiatric Hospital (FPH)



F.P.H. Clinical Areas

Security based model to clinical areas

- A1 –
- A2 – Assessment / Psychiatric Intensive care
- A3 – Neuropsychiatry / Developmental Delay
- A4 – Severe Psychosis / IMU
- Elm N & S – Intensive Rehabilitation
- Dogwood East – Women's Program
- Dogwood West – Geriatric / Medically Frail
- Hawthorne – Pre Discharge

Patient Pathways

Movement through the hospital based on clinical progress

- Psychiatric / Psychological treatment
- Counselling therapies – Substance use, illness management, social skills, family therapy
- Allied therapies – O.T. Vocational, Leisure, woodshop, greenhouse
- Reconnect with community
- Guided by Review Board disposition and reasons

Programs & Privileges

Committee to assist Person In Charge with decisions on patient access to areas of FPH and the community

Patients access “Privilege” levels – now passes

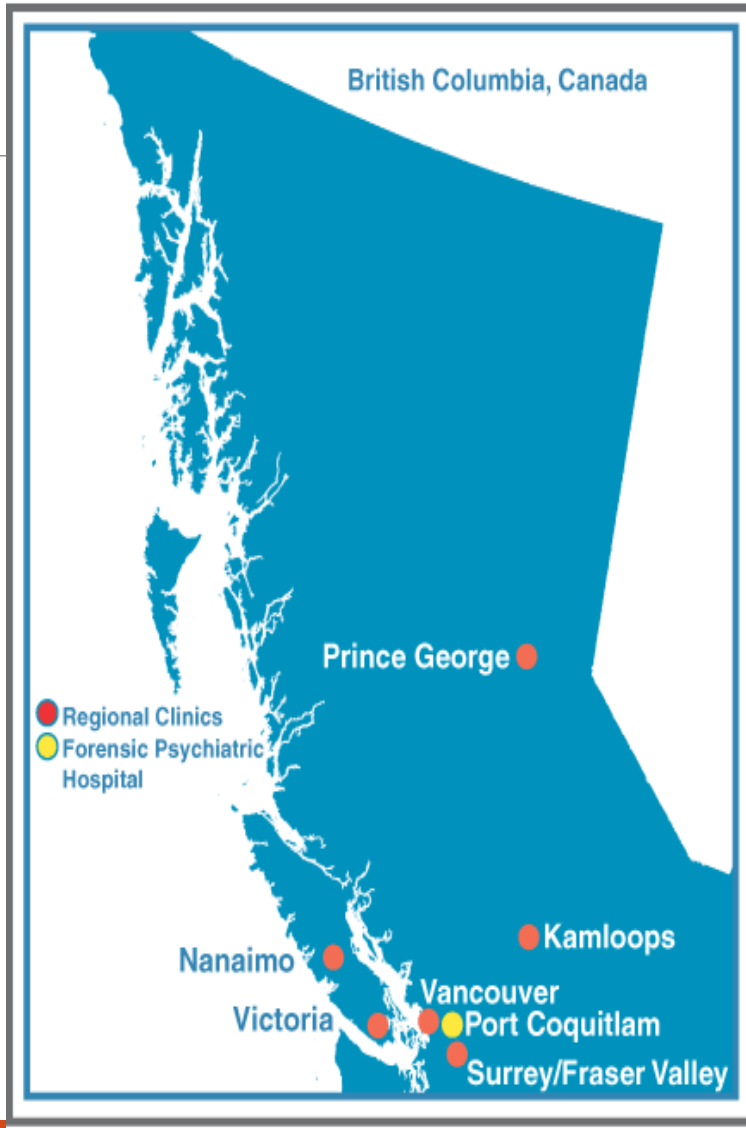
Levels 0 – 6

1 -3 inside FPH – secure area, escort numbers

SSCO

4 – 6 – In community – risk of U.A. – don’t worry about news stories!

Forensic Psychiatric Regional Clinics



Regional Community Clinics

Vancouver

Surrey/Fraser Valley

Kamloops

Kelowna

Prince George

Victoria

Nanaimo

Satellite offices operate out of Dawson Creek, Williams Lake, Vernon, Kelowna, Penticton, Nelson, Castlegar, Campbell River, Courtenay, Port Alberni and Duncan

Each serves a macro-regional area



FPSC Regional Program Services

- Court assessments
 - Not Criminally Responsible due to Mental Disorder/Unfit
 - Clinical Case Management
 - Overnight Assessment Services
 - Release Orders/Bail
 - Forensic Liaison
 - Forensic Sexual Offence Program
 - Probation Referrals
-

Assessment and/or treatment and clinical case management for individuals permitted by court and BC Review Board orders to live in the community while requiring specialized forensic psychiatric expertise and support



Return to F.P.H.

Based on risk to public, not necessarily certifiability

Direct Back – arranged by F.P.S. – geographical difficulties

Breach – Court ordered – detained until next Board



Hearing Considerations

Dedicated space at F.P.H.

Maintain security – patient, staff, Board members, witnesses, attendees

Public access

Media interest



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Follow us:



Review Board – Panel Perspective

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NOVEMBER 22, 2022

HONOURABLE JUDGE J. THRELFALL (RETIRED), ALT.CHAIR

Fitness



- S. 2 Definition
- Threshold for fitness is low but.....
- Operative time frame = time of the fitness hearing (not time of the offence)
- Once found unfit at Court, presumed to be Unfit at the Board unless presumption rebutted
- Limited Cognitive Capacity test: what the proceedings are about, how they might affect him and capable of communicating with counsel.
- R. v. Whittle, [1994] 2 S.C.R. 914,
- R. v. Taylor, (1992) 77 C.C.C. (3d) 551

Fitness = Fairness

R. v. Kampos, 2018 BCSC 2206 (unfit); 2020 BCSC 1437 (unfit); 2021 BCSC 460 (fit)

2020 BCSC 1437, para 24:

[24]... “an accused must be mentally fit to stand trial in order to ensure that the trial meets minimum standards of fairness and accords with principles of fundamental justice” ...

2021 BCSC 460 para 13:

[13] With respect to the third component of the definition of “unfit to stand trial” ... namely, the ability to “communicate with counsel”, as set out in *Taylor*, the focus is on the accused’s ability to conduct a defence, communicate with and instruct counsel, and whether that ability is impaired by reason of his mental disorder. As *Taylor* reminds us, the inquiry is not concerned with whether the accused has an amicable or trusting relationship with his counsel, or whether the accused makes decisions which are ultimately in his own best interests (*Taylor*, at 564).



Fitness

Two views of the same issue

Court vs. Review Board

Adjournments vs. Extensions

“**Adjournment**” and “**Extension**” have specific meanings for the Review Board.

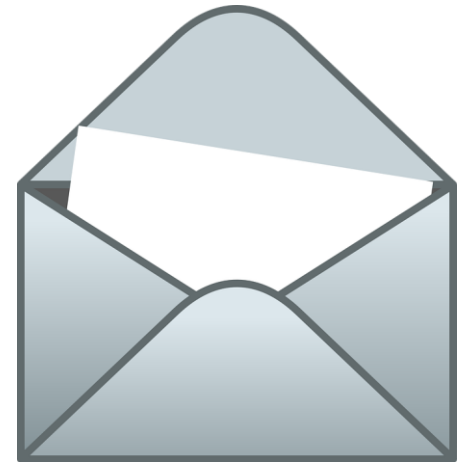
The Board *may* grant an **adjournment** of **up to 30 days** to ensure relevant information is available or for any other sufficient reason: s. 672.5(13.1)

Initial hearings cannot be adjourned.

An ‘**Extension**’ is an extension of the disposition from the last hearing: s.672.81(1.1)

An extension requires the consent of the accused as represented by counsel, and consent from the Attorney General. A disposition may not be extended beyond 24 months (e.g. 12 month order from hearing + 12 month extension= 24 months)

Email: BCRBRegistry@gov.bc.ca



What does a Hearing look like?



- Introduction of Parties
- Order of proceedings set out
- Exhibits are Marked
- Opening Positions are given by the parties
 - 1) significant threat? 2) disposition
- Director's Evidence called
- Crown's evidence called
- Defence Evidence called
- Closing Submissions



Preparing and Conducting Hearings



Know thy client.



Prepare thy client (and witnesses)



Anticipating Board options (including conditions)



Planning for the Disposition you consider possible or are recommending to the Board



Case Law or no case law? www.bcrb.ca

What do the Hearings look like when...

- The Parties agree on a disposition?
 - How much detail needs to be elicited from the witnesses if the risk assessment and plan is thorough?
- The Accused asks for a “Paper Hearing”?

Defence Counsel

REPRESENTING THE INTERESTS OF THE ACCUSED

DANTE ABBEY

A solid green horizontal bar at the bottom of the page.

Dante Abbey

Supervising Lawyer

Mental Health Law
Program

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**Community Legal
Assistance Society**

Defence Counsel

- Differences from general defence practice
- Working with clients living with mental disorders
- Preparation and process
- Section 672.54 factors and developing a case
- Hearing practice

Differences from Criminal Practice

The BC Review Board is an inquisitorial administrative tribunal under its enabling legislation.

- Multiple parties
- Broader conception of acceptable evidence
- Inquisitorial, not adversarial
- Annual review of dispositions
- Unique clients

Different Standards of Evidence



What's with all the hearsay?!

Administrative tribunals have the ability to accept a broader range of evidence than the Courts.

Breadth of admissibility is not unlimited - evidence should be relevant and reliable.

Counsel will be much more likely to succeed in challenging evidence by arguing irrelevance, demonstrating unreliability.

Less rigorous evidence may be given less weight rather than excluded outright.

Inquisitorial Board

CC s. 672.43 –

Includes powers from the *Inquiries Act*

Review Board may seek out the evidence it needs to make or review a disposition.

Not restricted to the evidence brought by the parties.

Panel members may ask questions of any witnesses.

Review Board may compel witnesses to appear, testify, or provide evidence in written form.

Annual Review of Dispositions

Aside from absolute discharges, dispositions are not 'final'.

A longer view may be necessary.

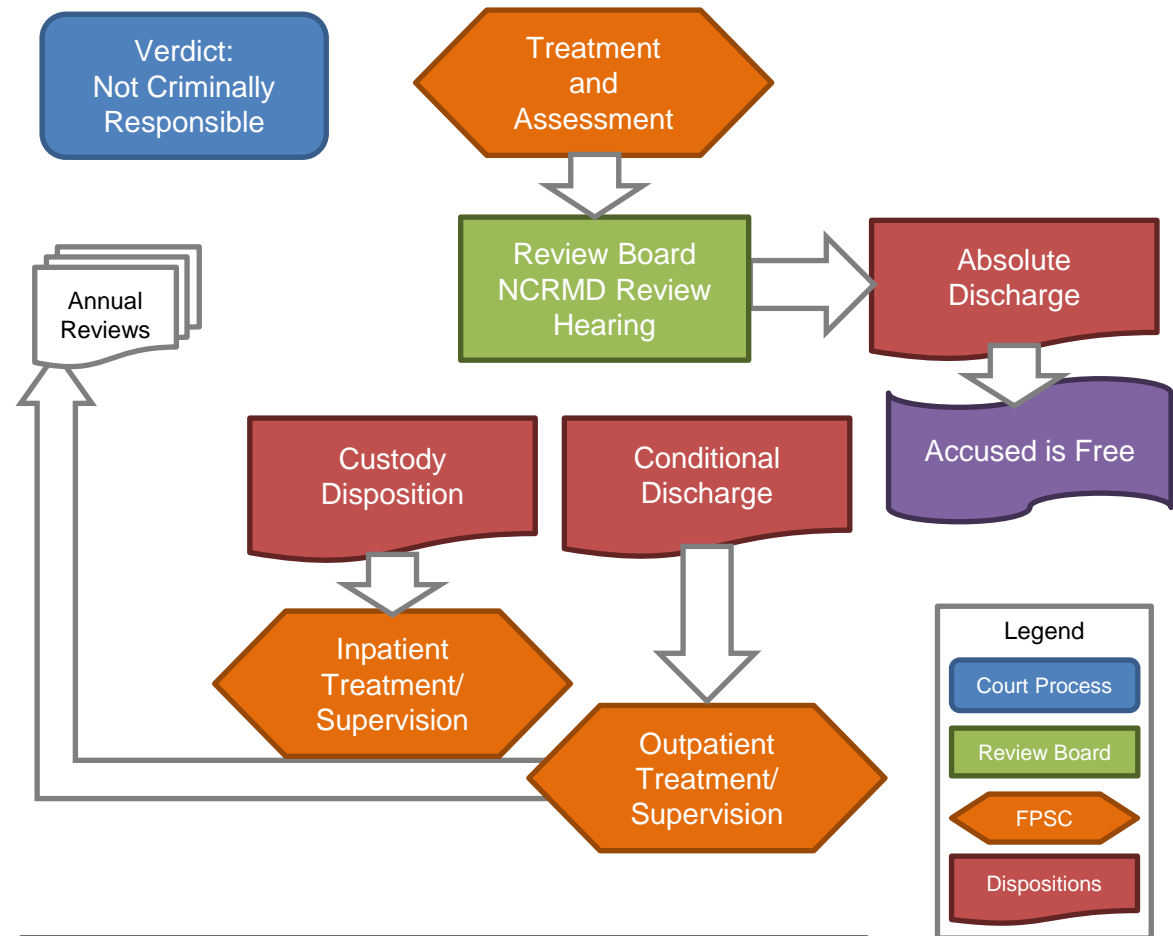


Figure 1: BC Review Board NCRMD Disposition Hearings

Getting to Know Your Client

Clients will present across a wide range of ability.

Client-Centered Approach

Examine and avoid implicit biases.

Active and reflective listening.

Look for possible accommodations.

Verify and corroborate information.

Seek witnesses.

Have patience.

Build rapport.



Preparing for Hearing

What underpins the current risk assessment?

What is the client's perspective?

- Multiple meetings
- Review most recent psychiatric report, Review Board liaison report, and any other key documents with the client
- Events may be one-off or part of a pattern
- There may be alternative perspectives, or even disagreements among forensic staff
- Prepare client to answer questions.

Preparing the Client

BC Review Board's practice is to ask questions of the client.

May decline to answer questions, but consider impact on case.

Pros:

- May be client's only opportunity to make a case for an alternative to the forensic plan
- May be client's only opportunity to present a different perspective on events or plans
- May be client's only opportunity to speak to their own insight or try to establish their credibility

Cons:

- Stressful, emotional, difficult experience
- Client risks being misunderstood
- Client may testify poorly

Preparing the Client

Clients in most cases will benefit from being prepared to answer questions.

- Encourage clients to clarify anything they didn't understand
- Recognize that the hearing could be emotionally difficult and reassure client that you will seek breaks and pauses as necessary
- Encourage clients to take the time they need to process emotions and think about their answers
- Short, simple, straight to the point

Insight

How well does the client understand their needs and/or risk?

Insight into the mental disorder and/or substance use disorder is not a necessary legal element

– but it helps.

Look for indications of full or partial insight, even when clients are unable to communicate well:

- Cooperation with treatment
- Consistent abstinence
- Rapport with treatment team
- Attitudes
- Behaviours

Building a Case

672.54 factors:

- Protection of the public
- Mental condition of the accused
- Reintegration
- Other needs

What informs the opinion on risk?

What mitigates the identified risk?

What can the accused do?

What can support the accused?

What resources are available?

What time is necessary?

Preparation and Process

What's going on?

What's come before?

Where will we go?

Disposition Information

- Primary documentary resource
- May be voluminous – may include many years of reports, decisions, and other evidence.

Key documents

- Court documents, RTCC, admissions of fact, and initial psychiatric assessments
- Neuropsychological, psychological, and social work reports
- Review Board decisions

Expected additions:

- Most recent psychiatric report
- Review Board Liaison report



Discharge Plans

A realistic plan includes:

- Treatment
- Housing
- Sobriety, if necessary
- Supports – professional, familial, informal
- Mechanisms to avoid deterioration

Presenting the plan:

- Client evidence
- Witnesses
- Documentary evidence
- Collateral through forensics

Structured and Supported Placements

A few intensive support programs available through government programs or otherwise:

- Community Living BC
- Acquired Brain Injury Programs

Forensics usually applying for these programs and making referrals, but progress can be slow.

Counsel may play a role in bringing roadblocks and solutions to the attention of the Review Board.

May cause the Review Board to order additional inquiries or seek additional information

Representing Clients at Hearing

- Opening Statements
- Cross-Examination
- Direct Examination
- Closing Statements



Opening Statements

Provides the Review Board with a concise roadmap of the issues being raised.

Consider counselling a client to provide you with alternative instructions if there are multiple possible avenues.

Cross-Examination

Treating psychiatrist is likely the primary subject of cross-examination. Attacking the basis for the opinion is usually more effective than the opinion itself.

- Is there overlooked evidence that may influence interpretation?
- Are there other sources of collateral information that might discredit sources being relied upon?
- Is there evidence of other causes for behaviour or symptoms that might point to other diagnoses?
- Are there other supports that could replace or supplement forensic supports?

Review Board Liaison Report

Provides a summary of nursing notes or other medical chart information.

- Treating psychiatrist should be familiar with the contents of the report
- RB Liaison will likely only be able to answer questions related to general hospital policy or what sources they pulled the information from.
- RB Liaison will not be able to answer questions on the clinical significance of anything reported, or even the veracity of the reported information.

Direct cross-examination on RB Liaison report to the psychiatrist.

Presenting the Client's Evidence

Important to guide client through their evidence, even if the argument is weak.

- Diagnosis
- Treatment and proposed treatment plans
- Housing and supports in the community
- Improvements in insight or attitudes
- Improvements in abstinence and drug treatment
- Client's evidence on specified recent events
- Remorse and the index offence

Presenting Witnesses

Most defence witnesses are likely to be family or close friends offering to support clients, but competing experts or service providers are not unknown.

- Family may be helpful in speaking to discharge plans, or refuting events or concerns recorded as historical factors.
- Family may also be helpful in speaking to clinical improvement, or helping to identify warning signs of decompensation.
- Family may also be willing to make contact with Forensics and offer to become a more useful resource in the future.

Fitness Hearings

“Fitness questions” in three styles

- ‘Academic’ questions
- ‘Hypothetical’ questions
- ‘Life Experience’ questions

Fitness Hearings

'Academic' style questions are typically fine for clients who have recovered most function and may also have the benefit of some education on the subject.

Be careful about 'parroting'.

'Academic' questions:

- Who is in charge of the Court?
- What do they decide?
- What does defence lawyer/Crown do?
- When a person is asked how they plead, what can they say?
- What does it mean to plead guilty or not guilty?
- What happens after a verdict of guilty/not guilty?
- What are some examples of evidence?
- What does a witness do?
- Why does the witness swear an oath?
- What is perjury and its consequences?
- Are you able/willing to talk to a lawyer?

Fitness Hearings

‘Hypothetical’ questions allow someone who might struggle with the abstract concepts of Court or be distracted by their own situation.

May not be able to address all aspects of Court.

“Let’s say Bob goes into a store, punches the clerk and takes money out of the till. Then an officer shows up and arrests him.”

- What would Bob be charged with?
- How would Bob plead?
- If Charlie was arrested by mistake, what would Charlie plead?
- What could be used as evidence against Bob?
- Who could be a witness in this case?
- Who could help Bob in court?

And so on.

Fitness Hearings

‘Life Experience’ questions may be a concrete way to tie abstract Court concepts to concrete life experiences.

- Have you watched any court dramas?
- Have you watched Judge Judy?
- What was the story about?
- Who were the characters?
- What did they do in Court?
- Do you have someone to help you like Cousin Vinnie does?

It’s still important to try to tie these concrete experiences to what the client expects to happen in Court – if they are unable to connect it to their own life, it may not be helpful.

Closing Submissions

Closing submissions your opportunity to draw the Review Board's attention to the elements of your case.

- Walk the Review Board through any helpful evidence or admissions from the expert; I find it helpful to draw direct links to the 672.54 factors as much as possible, especially with respect to risk mitigation.
- Reference to *Winko* and other seminal cases for general propositions is not usually necessary, but don't be afraid to bring precedent on specific points.

CLAS Funders



Crown

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LYLE HILLABY, REVIEW BOARD CROWN COUNSEL, BC PROSECUTION SERVICE

The Parties – What's in a Name?

- Accused
- The Hospital Director
- The BC Attorney General

Attorney General: At Hearings

- In starting position: Lead the treating psychiatrist
- Other hospital witnesses: Don't waste time
- Crown evidence: Rare, often a psychiatrist



Crown Questions at Hearings

- Psychiatrist: Key witness as risk is the only issue
- Case Manager: Often more knowledgeable of accused than the doctor
- Psychologist: Ask psychiatrists views of psychological consultations



Crown Questions at Hearings (Cont'd)

- Accused: well or ill
- Agreeable or protesting treatment



Crown Questions at Hearings (Cont'd)

- Board Liaisons: few questions
- Social worker: few questions
- Psychologist: plan questions



Fitness Questions at Board

- UNFIT is a *protection* for the accused
- UNFIT is a medical matter
- The Crown's interest is returning the accused to court sound



Fitness Questions at Board (cont'd)

- Defer to the accused's (patient's) counsel on this issue



Fitness Questions at Board (cont'd)

- Chronically UNFIT: must be monitored by Crown re S.O.P.



Fitness Questions at Board (cont'd)

- Standard cases concern treatable illness
- Focus is on medical prognosis



Fitness Questions at Board (cont'd)

- Of doctor: assist with weight of evidence
- Of accused: ill or well



NCR Questions at Hearings

- Key focus: Risk evidence



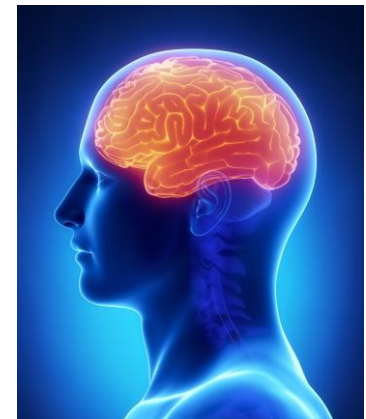
NCR Questions (cont'd)

- Test for Absolute Discharge = file closing



NCR Questions (cont'd)

- S. 16 Test of jurisdiction Entry: Mental *Disorder*
- S. 672.54 Test for file closure: Mental *condition*



Appeals

- Available to accused as of right
- Stats: BC two to four per annum



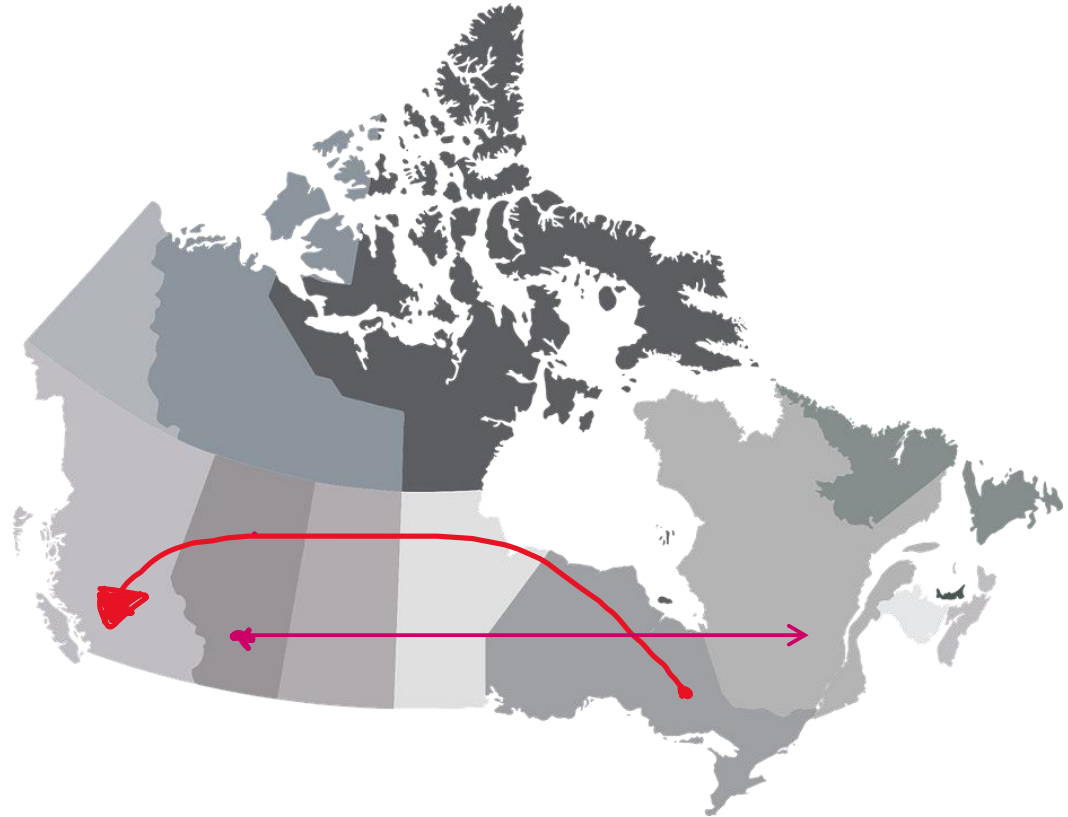
Dual Status

- NCRMD or UNFIT (*plus*)
- Convicted: jail sentence



Interprovincial Transfer (IPT)

- Political level transfers: Attorney General jurisdictions



Counsel for the Director

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DEBORAH LOVETT, K.C.

Orders/hearings out of the Ordinary



- **Fit but Fragile**” orders (section 672.29; *Evers v. British Columbia (Adult Forensic Psychiatric Services)*, 2009 BCCA 560)
- Restriction of Liberties hearings (**ROL**) (ss 672.56, 672.81(2.1), 672.91)
- Placement decisions (**dual status** offenders) (672.1(1), 672.67, 672.68)
- Patients who are absent without leave (**AWOL**) at time of Review Board hearing (section 672.9; *Re Wheeler* (June 1, 2022))
- Delayed dispositions (*John v. British Columbia (Director, Adult Forensic Psychiatric Services)*, 2008 BCCA 265)

Orders out of the Ordinary (cont'd)



- International travel
- Deportation/removal orders
- Requests for victim notification of community access
- **Initial** Review Board disposition hearings and requested adjournments (*Re Froeschle* (July 12, 2022); *Evers*)

Legal Issues / Considerations

NCR and unfit assessments under section 672.11 of the Criminal Code (and other court ordered assessments):

- *R. v. Boisvert*, 2012 BCSC 2252
- *R. v. Jerome*, 2019 BCSC 1353
- *R. v. Rindero*, 2004 BCSC 735
- *R v. Gray*, 2002 BCSC 1192
- *R. v. Creighton*, 2002 BCSC 1190



Relevance of principles taken from those cases to Review Board proceedings.

Appeals from Review Board decisions

Processes and Practice

- Filing deadlines
- Expedited process
- What constitutes the record and process leading to Court of Appeal hearing
- PHCs
- Transcripts



Appeals from Review Board decisions (cont'd)

Evidence and Legal

- Grounds for appeal and standard of review (sections 672.72, 672.28; *R. v. Owen*, 2003 SCC 33 at paras. 31-37; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, *Staetter v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2013 BCCA 307 at paras. 13-14; *Fines v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2018 BCCA 261 at para. 5.
- Fresh evidence applications (s. 672.73(2); *R v. Owen*, at paras. 16-17, 48-51, 54).
- Discretionary powers of Court of Appeal to suspend dispositions (section 672.76; *Staetter v. British Columbia (Adult Forensic Psychiatric Services)*, 2019 BCCA 337)



Appeals from Review Board decisions

- Court appointed counsel for unrepresented appellants (section 684; *Gibson v. British Columbia (Adult Forensic Psychiatric Services)*, 2021 BCCA 202).



Questions &
Thank you
