THE CANADIAN BAR ASSOCIATION
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March 5, 2010

Donald H. Burrage, Q.C.
Deputy Minister and Deputy Attorney General
Government of Newfoundland and Labrador
Department of Justice
4th Floor, East Block, Confederation Building
P.O. Box 8700
St. John's, NL A1B 4J6

Dear Deputy Minister,

**Re: Response to synopsis and recommendations of Justice Wells**

Thank you for inviting the Canadian Bar Association's National Criminal Justice Section (CBA Section) to respond to recommendations made by the Honourable Robert Wells Q.C. following his review of the death of an inmate while in custody in a federal penitentiary in St. John's. The CBA Section is comprised of Crown and defence counsel from every region of Canada and the CBA's mandate includes seeking improvement in the law and the administration of justice.

We have considered each of the recommendations in Justice Wells' report. Our comments are based primarily on our experience as criminal lawyers from all parts of the country, but we have also responded to province-specific recommendations with special input from our members from Newfoundland and Labrador.

We recognize that many of our suggestions have resource implications. Serious changes are required to avoid continued use of the criminal justice system to deal with mentally ill people, which is, in our view, a misguided approach that also consumes resources. Instead, both individual rights and public safety would be enhanced by appropriate treatment options and diversion programs for mentally ill individuals who contravene the *Criminal Code*.

From the materials provided, we understand that the inmate had a history of mental illness and prior criminal convictions. He instructed legal aid duty counsel to enter guilty pleas to the charges before the court and did not wish to be remanded for a fitness assessment. He instructed counsel to consent to remand to the penitentiary pending a sentencing hearing. Unfortunately, the inmate died of natural causes while awaiting that hearing.

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**Recommendation #1**

1. **That either by policy or legislation whenever there is a credible suggestion of mental disorder on the part of a person accused of a serious crime, it should be brought to the attention of the Court by the Defence and/or the Crown at the earliest opportunity.**

If counsel is satisfied that a client is fit to stand trial, requiring counsel to then bring evidence of mental disorder "to the attention of the Court..at the earliest opportunity" would go against established case law, principles of fundamental justice and also lawyers' professional obligations to advocate on behalf of their clients. The requirement would also violate soliticor-client confidentiality, a cornerstone of our legal system. Rule IV of the CBA's *Code of Professional Conduct* states that any exceptions must be either authorized by the client, required by law, or otherwise required by that Code. The scope of the public safety exception to that Rule would be unlikely to extend to this situation. We believe if a client is fit to stand trial, the client has the right to decide whether to employ a mental health defence or seek to use mental health issues as mitigating.

The Ontario Court of Appeal found that it is open to a fit accused to decline to raise a "not guilty by reason of insanity" plea in a murder case.[1] This is consistent with the Supreme Court of Canada's decision in *R. v. Swain*,[2] where Lamer C.J. said:

> Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence. The appellant has properly pointed out that an accused will not be in the position of choosing whether to raise the defence of insanity at his or her trial unless he or she is fit to stand trial. If at any time before verdict there is a question as to the accused's ability to conduct his or her defence, the trial judge may direct that the issue of fitness to stand trial be tried before matters proceed further (see *Criminal Code*, s.xx)
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> 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. In *R. v. Chaulk*, *supra*, I indicated that the insanity defence is best characterized as an exemption to criminal liability which is based on an incapacity for criminal intent. In my view, the decision whether or not to raise this exemption as a means of negating criminal culpability is part and parcel of the conduct of an accused's overall defence.

The threshold for "fitness" requires only that an accused possess a limited cognitive capacity, not the ability to determine what is in their best interests. The "limited cognitive

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1 See, *R. v. Gorecki* (No. 1) (1976), 32 C.C.C. (2d) 129 (Ont. C.A.)

2 (1991) 63 C.C.C. (3d) 481 (S.C.C.).

capacity" test was considered in *R. v. Taylor*[3] where the court held that accused have the right to control their own defences, even if not acting in what others would considered to be their best interests.

The accused's right to determine whether to reveal a mental disorder to a court should apply even if the judge accepts a guilty plea. A judge can determine if a person understands the nature and consequences of a plea without asking if the defendant suffers from a mental disorder.

However, given the pressing interest in ensuring that a mentally ill person not be convicted of an offence for which that person is not actually legally guilty, there must be some allowance for a court or the Crown to raise mental health issues even if the defence does not.[4] Section 672.11 of the *Criminal Code* provides a judge with the authority to order an assessment. The assessment can only be ordered if there are reasonable grounds to believe that such evidence is necessary to address the purposes enumerated in the section. Section 672.11 and 672.12 also indicate when the Crown may apply for an assessment, acting pursuant to the public interest.

To allow mentally ill people to fully control their defence and also to recognize the public interest in dealing with mentally ill people appropriately, police forces might develop special protocols for dealing with mentally ill people. For example, this might require the police to include any information they have concerning mental illness in the brief provided to the Crown, which would then allow the Crown to determine if the issue of mental illness should be canvassed in accordance with section 672 and following of the *Criminal Code*. Such information would assist the Crown to consider the illness of the individual in determining how or if to proceed (whether this is an aggravating or mitigating factor) or on sentence.

This would require that police maintain records of mentally ill persons in the criminal justice system, just as they maintain records of previous offenders. Police would also need to be trained to recognize mental health difficulties so that they can make well-informed decisions on whether to direct an accused into the criminal justice or to the provincial/territorial mental health systems.

**Recommendation #2**

**2. That an improved protocol should be formulated by which families should be informed of death or serious injury or illness of an inmate at the Penitentiary.**

As we are unfamiliar with the existing protocol, it is beyond the scope of our expertise to comment as to how this recommendation would be an improvement.

**Recommendation #3**

**3. That the legislative recognition that a significant number of the persons charged with serious crimes are or may be suffering**

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[3] See, *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.).

[4] See: *R. v. Ta* (2002), 164 C.C.C. (3d) 97 (Ont. C.A.).

**from some kind of mental disorder should continue. These disorders range from mild dysfunctionality to severe mental illness. In that regard, I believe the establishment of a Mental Health Court in St. John's in 2005 was a much needed reform which was explained as to its application by the recently issued Practice Note from Provincial Court.**

We support legislative recognition of the interaction between mental illness and criminality. Where mental health courts exist, we suggest that training be offered to Crown Attorneys, defence counsel and judges to ensure that such courts are staffed with people well-informed as to the issues of mental health and the criminal justice system. We suggest too that communication between staff in mental health courts in different jurisdictions be encouraged, to allow them to benefit from each others' knowledge and experiences.

**Recommendation #4**

4. **That if and when a new Penitentiary is built to replace the outmoded Penitentiary which is still in use in St. John's, it should have as part of the facility, a psychiatric wing or unit, fully staffed at all times to diagnose and treat the mentally disordered who so often come into contact with the Criminal Justice System.**

A comprehensive evaluation of the correctional facilities in Newfoundland and Labrador was completed just over a year ago. In October 2008, the NL Department of Justice published a report entitled *Decades of Darkness: Moving Toward the Light*. The report includes recommendations about providing mental health services in correctional facilities in the province. The provincial government has since accepted and acted on some of those recommendations.

The physical condition of the penitentiary in St. John's is a serious problem and has not been addressed.[5] The provincial government has recognized that a new facility is required, and should include a unit for offenders with mental disorders. However no progress is apparent, and we understand that unresolved funding issues between provincial and federal governments are at least in part the explanation.[6]

**Recommendation #5**

5. **That the concept of the Mental Health Court should be expanded to all regions of the Province as rapidly as human resources and finances will permit, and should be able to operate with the assistance of psychiatric units in all regions of the Province, which are reasonably accessible and staffed by qualified mental health professionals. I recognize that such units would have significant costs and cannot be provided instantly. Nevertheless**

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5 http://www.nupge.ca/news_2008/n10oc08a.htm;

6 For a sample of media coverage of this issue, see http://www.cbc.ca/canada/newfoundland-labrador/story/2008/04/04/feds-prison.html

**they should be recognized as a priority to be developed in accordance with an action plan.**

There are different types of Mental Health Courts throughout the country, with various mandates, including:

i) timely and cost effective determination of fitness to stand trial
ii) diversion of offenders with mental health issues from the criminal justice system
iii) providing community support for offenders with mental health issues while awaiting trial or sentencing, and
iv) developing expertise amongst court officials concerning legal issues pertaining to mental health.

Whatever the stated goal of a particular Mental Health Court, we believe that it can provide significantly different and better service than what is currently available only if sufficient resources are available to the court and the offenders who appear there. Further the goal of an individual court will influence the practices and procedures of that court. For example, participation in the mental health court in St. John's is voluntary to safeguard the offender's autonomy and dignity as protected by the Canadian *Charter of Rights and Freedoms*.

The CBA Section is unable to provide a more detailed response without more information, such as the proposed model of the court and the mental health resources to be committed.

**Recommendation #6**

**6. To assist the reader I have reproduced at the end of this report, marked "B", the recent Practice Note to which I have referred. The Practice Note requires, as required by the *Mental Health Care and Treatment Act*, SNL 2006 c M-9.1, that an application for transfer to the Mental Health Court must be made by the accused person. In my opinion persons other than an accused should also be able to make such applications on an accused's behalf.**

The *Mental Health Care and Treatment Act* is provincial legislation primarily addressing involuntary commitment to psychiatric units and the imposition of community treatment orders. The main purpose of the Act is to outline criteria for involuntary admission and treatment, and provide the process and procedures for challenging involuntary admission and treatment. Using the Act to transfer people to mental health court could introduce a coercive criminal law component to legislation that primarily addresses non-criminal issues.

Depending on the mandate of a particular mental health court, amending mental health legislation to allow those other than the accused to apply to transfer to mental health court could also raise jurisdictional concerns and potentially contravene section 7 of the *Charter*. As discussed above, a person fit to stand trial is entitled to decide how to conduct a defence, and neither families nor the state should be authorized to limit that autonomy. However,

section 672.11(b) allows an assessment for those potentially not criminally responsible and the onus is on the party requesting the assessment to show that there are grounds under section 672.12. Section 672.12 (3) also provides some safeguards in this regard.[7]

**Recommendation #7**

**7. I would also recommend that it become a priority that psychiatric units be attached to or within a reasonable distance of all correctional institutions within the Province of Newfoundland and Labrador. I recognize that such a policy would necessitate additional human and financial resources, but I believe that the need exists.**

The CBA Section supports the following recommendation of the Kirby report and quoted in *Decades of Darkness*:

> The Committee has one primary goal for federal offenders – and by extension, for provincial correctional populations – it wants the standard of care for adult mental health within correctional institutions (and in post release settings) raised to be equivalent to that available to "non-offender" members of the general community.

Thank you for considering the views of the CBA Section.

Yours truly,

(*Original signed by Gaylene Schellenberg for Josh Weinstein)*

Josh Weinstein
Chair, National Criminal Justice Section

[7] See also *R. v. Ta*, *supra* note 4 and *R.v. Gorecki*, *supra* note 1.