Annual Report

Review Board under the Involuntary Psychiatric Treatment Act

April 1, 2010- March 31, 2011

NOVA SCOTIA

Annual Report

Review Board under the *Involuntary Psychiatric Treatment Act*
April 1, 2010- March 31, 2011

Introduction

The *Involuntary Psychiatric Treatment Act*, (S.N.S. 2005, c.42) (IPTA) was proclaimed into force on July 3, 2007. It replaced the *Hospitals Act* and established the Review Board under s. 65 of *IPTA*. The Review Board hears and considers applications under *IPTA* for various types of review. A panel of three Review Board members (a lawyer member, a psychiatrist member and a lay member) hears the application and provides written decisions. The Review Board is presently comprised of ten lawyers, seven psychiatrists and eight lay members.

This Annual Report is presented in three parts. Part I provides a detailed look at the types of reviews which the Review Board may be asked to perform. Part II presents the statistics and trends of the Board's operation during the period from April 1, 2010 – March 31, 2011. In Part III, issues of ongoing concern to the Review Board are discussed.

Part I Types of Review

(i) Review of Status

The most common type of review is a review of a patient's status as an involuntary patient. The Review Board reviews the decision of the treating psychiatrist that the person in the psychiatric facility should be held as an involuntary patient. A person may be held under involuntary status if they meet the criteria under s.17 of the *Act*.

The criteria for involuntary status are:

(a) has a mental disorder
(b) is in need of psychiatric treatment in the facility
(c) as a result of mental disorder
    (i) is threatening or attempting to cause serious harm to self or has recently done so, has recently caused serious harm to self, is seriously harming or is threatening serious harm towards another or has recently done so, or
    (ii) is likely to suffer serious physical impairment or serious mental deterioration, or both;
(d) is not suitable for inpatient admission as a voluntary patient; and
(e) as a result of the mental disorder, does not have capacity to make admission and treatment decisions.

With respect to capacity, the test is whether the patient fully appreciates:

(a) the nature of the condition for which treatment is proposed;
(b) the nature and purpose of the specific treatment;
(c) the risks and benefits involved in undergoing specific treatment; and
(d) the risks and benefits in not undergoing the specific treatment.
Also, whether the patient's mental disorder affects his or her ability to fully appreciate the consequences of making the treatment decision.

A review of a patient's status is most often triggered by a request from the patient but a review may also be requested by the substitute decision maker (SDM), the hospital or the Review Board itself.

Additionally, under the Section 37 of the *Act*, the Review Board is required to review the file of each person detained under a Declaration of Involuntary Admission 60 days after the initial declaration and at the end of the 6th, 12th, 18th and 24 month stage and every twelve months thereafter. This must be done regardless of whether the patient wants the review or not. In fact, the patient is deemed to have made a request for review. These are referred to as "automatic" reviews.

In the period April 1, 2010 to March 31, 2011 the Review Board received one hundred and thirty-three (133) requests for review. Requests, for these purposes, include automatic requests. The details of these requests are discussed below in Part II.

(ii) *Has the substitute decision maker rendered a capable informed consent?*

Under s. 42(1), the Review Board can also review the decision of a substitute decision maker (SDM) if asked by a psychiatrist or a patient to do so.

The test for whether or not the SDM made a capable, informed consent or refusal is that the decision must be made in accordance with the patient's "prior capable informed expressed wishes" or in the absence of this (or if this would endanger the patient or another person) that the decision be in the patient's "best interests".

In the period April 1, 2010 – March 31, 2011 the Review Board received two (2) applications for a review of a SDM decision. In both these cases, the hearings were adjourned and the patients were later made voluntary.

(iii) Review of Community Treatment Orders (CTO)

In the period from April 1, 2010 to March 31, 2011 there were thirty-six (36) Community Treatment Orders (CTOs) filed with the Review Board.

A patient or the SDM may apply under s. 58(1) for a review of whether or not the criteria for granting or renewing a CTO have been met. Automatic reviews of CTOs also occur on the 1st renewal and every 2nd renewal thereafter. Again, patients are deemed to have requested a review under the *Act*.

Criteria for CTOs (s.47)

Prior to issuing a CTO, a psychiatrist must have examined the patient in the last 72 hours and be of the view that:

> (i) the person has a mental disorder for which the person is in need of treatment or care and supervision in the community (and it can be provided),
>
> (ii) the person as a result of the mental disorder,
>
> (A) is threatening or attempting to cause serious harm to self or has recently done so, is seriously harming or is threatening serious harm towards another or has recently done so, or

(B) is likely to suffer serious physical impairment or serious mental deterioration, or both,

(iii) as a result of the mental disorder, the person does not have full capacity to make treatment decisions.

With respect to capacity, the psychiatrist must consider whether patient fully appreciates: the nature of the condition for which treatment is proposed; the nature and purpose of the specific treatment; the risks and benefits involved in undergoing specific treatment; and the risks and benefits in not undergoing the specific treatment. Also, whether the patient's mental disorder affects ability to fully appreciate the consequences of making the treatment decision. (s.18).]

(iv) during the immediately preceding 2 year period, the person

(A) has been detained in a psychiatric facility for a total of 60 days or longer,

(B) has been detained in a psychiatric facility on two or more separate occasions, or

(C) has previously been the subject of a community treatment order, and

(v) the services that the person requires in order to reside in the community

(A) exist in the community,

(B) are available to the person, and

(C) will be provided to the person.

At the conclusion of a CTO review, the Review Board may either revoke the CTO and allow the person to live in the community without being subject to the CTO or it may refuse to do so.

In the period April 1, 2010 – March 31, 2011 the Review Board received twenty (20) requests for a review of a CTO renewal. In sixteen (16) of these instances the requests were "automatic". Of the twenty (20) cases, three (3) patients were made voluntary before a hearing, sixteen (16) community treatment orders were upheld and one hearing was canceled. It is important to note that in numerous cases, the patient did not object to being on the community treatment order.

(iv) Review of Leave Certificates

Leave Certificates or Certificates of Leave are similar to CTOs but are time limited (six months only) and they are non-renewable. They also do not require any prior involuntary hospitalizations. During the period April 1, 2010 - March 31, 2011 only two (2) Leave Certificates were filed with the Review Board.

The Review Board may be asked to review the status of a patient who is on a Certificate of Leave. Since a person on a Certificate of Leave is still an involuntary patient, the automatic review provisions of the *Act* still apply. As stated above, if a patient has been involuntary for sixty (60) days they are deemed to have requested a review. This is true even of they have left the hospital under a Certificate of Leave. After a hearing, the Review Board may revoke the Certificate of Leave and allow the patient to live in the community without being subject to the Certificate, or may refuse to do so.

Additionally, if a psychiatrist has canceled a Certificate of Leave, the Review Board may be asked to review it. A psychiatrist may cancel the Certificate of Leave if:

(a) the patient's condition presents a danger to the patient or others; or
(b) the patient failed to report as required. (s.44(1)).

The outcome of a hearing to review a cancellation of a Certificate of Leave is that the Review Board may confirm the cancellation or it may refuse to do so.

To date the Review Board has not been asked to review the cancellation of a Certificate of Leave.

(v) Review of competency to administer estate under Hospitals Act

The *Involuntary Psychiatric Treatment Act* replaces and repeals most portions of the *Hospitals Act* relevant to the Review Board. The Board does, however, retain its review powers under s.58 (1) which authorizes the Review Board to review a declaration of competency for involuntary patients who have been found incompetent to manage their own estate.

The Review Board has never been asked to conduct this type of review under the *Hospitals Act*.

Part II Statistics and Trends

a) Introduction

During the period of operation from April 1, 2010 to March 31, 2011 the Review Board received one hundred and thirty-three (133) requests for review under the *Act*. This includes thirty (30) "automatic" requests under s.37 of the *Act*. The total number of hearings held between April 1, 2010 and March 31, 2011 was fifty-three (53).

b) Outcomes of Requests

One hundred and thirty-three (133) requests for review were made from April 1, 2010 to March 31, 2011. Sixty-two (62) patients had their status changed to voluntary before the hearing. Ten (10) patients cancelled their request, two (2) patients were placed on community treatment orders, one (1) request for review was denied and five (5) hearings were adjourned.

Of the fifty-three (53) hearings which were held between April 1, 2010 and March 31, 2011, thirty (30) patients had their status as involuntary patients upheld by the Review Board. Ten (10) patients had their status changed to voluntary and seven (7) hearings were adjourned. Thirteen of the hearings pertained to reviews of community treatment orders.

c) Community Treatment Orders and Leave Certificates

Psychiatric facilities are required to file Community Treatment Orders and Leave Certificates with the Review Board. During the period April 1, 2010- March 31, 2011, thirty-six (36) community treatment orders and two (2) leave certificates were filed with the Review Board. In terms of district, twenty-eight (28) of the CTOs were from Capital District Health, six (6) were from Cape Breton, one (1) was from the IWK and one (1) was from Yarmouth Regional Hospital. For the Leave Certificates, both were from South Shore Health.

d) Legal Representation

As discussed above, one hundred and thirty-three requests (133) for review were made from April 1, 2010 to March 31, 2011. Legal representation occurred in seventy-seven (77) of the requests. This accounts for fifty-eight (58) percent of the cases. When it comes to the hearings themselves, the percentage of patients with legal representation increases. Fifty-three (53) hearings were held and patients were represented in thirty-four (34) of the cases. This means that sixty-two (62) percent of patients who appear before the Review Board have legal representation.

e) Length of Time to Schedule a Hearing

The Review Board is required to hold a hearing within twenty-one (21) days of receiving a request pursuant to s. 68 of IPTA. For this fiscal year the average wait time between a request and a hearing was eighteen (18) days.

Part III Comments

The Review Board has now completed its third full year under IPTA. In previous Annual Reports, areas of concern to the Board included: training; community supports; obligations of the district health authorities to provide timely information to involuntary patients; conflict of interest for panel members; and the appropriate response for patients who choose not to attend hearings. These matters continue to be of concern and they are worth re-iterating:

Continuing Need for Further Training and Education

Even though the Act has been in effect since July 2007 there continues to be a need for ongoing education and training about the *Act.* This is particularly so for new psychiatrists who are unfamiliar with the tests for involuntary status or the appropriate use of Community Treatment Orders and Certificates of Leave. It is clear that on-going education and training is needed to make people aware of the changes and the implications the new legislation has for the individuals whose rights are affected by it. Again, the Review Board would be willing to facilitate this learning and participate in the process.

Increased Community Supports

It bears repeating that the requirement for increased community supports such as appropriate housing and outreach continues to be an urgent issue in light of the new tools which allow for treatment in the community under the new legislation. If the Legislature has deemed it appropriate to include community treatment options they should be available to involuntary patients throughout the province who satisfy the legislative criteria. The Review Board recommends that this be examined more fully and that funding be provided to allow treatment in the communities in which people live. Furthermore, more co-ordination and co-operation is needed between the departments of Health and Community Services in order to better address the housing needs of involuntary patients seeking placement in the community.

The Review Board is aware of situations where involuntary patients are being housed in psychiatric facilities because supportive housing is unavailable to them. Often, to the dismay of family members, the patients have their status changed to voluntary during the wait for placement and consequently no longer meet the criteria for community treatment orders.

Timely Information to Involuntary Patients

There is a great deal of disparity among the district health authorities in terms of the information which is being provided to involuntary patients. Section 26 of the *Act* requires that the hospital tell involuntary patients and their substitute decision

makers (in writing) that, among other things, they have the right to apply to the Review Board for a review of the patient's status and the right to retain and instruct counsel without delay. This information is to be provided whenever there is a change in a patient's status. Similarly, the facility is obliged to notify the Patient's Rights Service of changes in status so that a patient rights advisor can visit the patient and advise them of their rights under the *Act*. Some district health authorities are not making patients aware of these rights and the Department of Health needs to ensure compliance with the *Act.*

Clarification around Conflict of Interest

This issue was canvassed in previous Annual Reports but, to date, has not been addressed. The *Act* says that efforts should be made to ensure that one of the psychiatrists appointed to the Review Board has a specialization in adolescent psychiatry. Section 67(1), however, states that a Review Board member is not eligible to sit on a panel if he or she is an "officer, employee or staff member of the psychiatric facility" where the patient is being treated. The difficulty this creates is that most (if not all) adolescent psychiatrists in Nova Scotia will be employees of the IWK. They will not, however, necessarily work on the in-patient unit in the IWK. If the desire is to have an adolescent psychiatrist on the panels at the IWK, the legislation should be amended to allow an adolescent psychiatrist who is not working on the same unit (and who has not treated the patient) hear such reviews.

Patients Who Choose Not to Attend Hearings

Again, this issue was addressed in previous reports. Under section 71(2) of *IPTA* where the patient is unable or unwilling to attend a hearing and has not appointed someone to act on the patient's behalf, the Review Board shall appoint a representative to attend the hearing and act on behalf of the patient. The question which has arisen for the Review Board is who should be appointed? The substitute decision maker is a party to the hearing and is often not necessarily the person to best represent the patient. Lawyers will only represent clients if they are able to receive instructions and will not represent a patient if the patient does not wish to participate. This leaves the patient rights advisors who do not, at present, have the mandate to perform such duties.

The Review Board is of the view that in the absence of advocates who can represent involuntary patients that the patient rights advisors be alerted to this responsibility and trained to represent these patients.

"Voluntary but Incapable" Patients

The Review Board has serious concerns about the rights of voluntary patient who have been deemed incapable of consenting to treatment. Assessments of the

capability of a voluntary patient to consent to treatment or the appointment of a substitute decision-maker are carried out pursuant to the relevant provisions of the *Hospitals Act*. The *Hospitals Act* lacks the same procedural safeguards for rights advice which is contained in the *Involuntary Psychiatric Treatment Act*.

The Review Board is aware of situations where patients who were scheduled for Review Board hearings as involuntary patients have had their status changed to voluntary but incapable immediately prior to the hearing date. The patient's only recourse for review in this situation would be an application to the Supreme Court pursuant to s. 58(2) of the *Hospitals Act*:

> (2) A declaration of capacity for a patient in a hospital or a psychiatric facility or a declaration of competency for a patient in a hospital or a voluntary patient may be reviewed by the Supreme Court of Nova Scotia (Family Division) or by the Family Court where there is no Supreme Court (Family Division).

The Review Board believes that it is the most appropriate body to be responsible for this type of review. Review Board hearings can be set down more quickly than a Court application and the Board has the expertise and experience to review capacity issues. The Review Board is always comprised of three members, one of whom is a psychiatrist and these types of reviews were routinely conducted by the Board under the Hospitals Act prior to the passage of the Involuntary Psychiatric Treatment Act. Furthermore, the Review Board has jurisdiction to review declarations of competency for involuntary patients pursuant to subsection 58(1) of the *Hospitals Act* and it should also be able to review declarations of incapacity pursuant to s. 58(2).

Conclusion

With the third full year of operation under the *Involuntary Psychiatric Treatment Act* the Review Board has addressing concerns around setting matters down for review as expeditiously as possible and ensures that involuntary patients receive hearings and decisions in a timely manner. This has occasionally been challenging due to issues around the timely release of information about patients' status from hospitals. The number of requests for review has remained similar to the previous year but the number of hearings pertaining to community treatment orders has increased significantly.

Approximately sixty-two (62) percent of involuntary patients were represented by legal counsel at their hearings this year and it is expected that this will also increase over the next year through the ongoing efforts of Nova Scotia Legal Aid.