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**Restorative Boards of Inquiry:
Fostering Dignity and Respectful, Responsible Relationships
Draft Framework and Procedures
April, 2012**

The Human Rights Commission seeks to further human rights by promoting relationships based on dignity, respect, equality and fairness. The Commission also concerns itself with the impact these relationships have on society. It seeks to foster responsible relationships through dispute resolution and other ways.

Relationships in conflict sometimes result in allegations of discrimination, triggering a complaint under the Nova Scotia *Human Right Act*.¹ This complaint creates an opportunity to address individual conflicts and to examine a) the larger societal influences on the conflict and b) how these influences impact the systems we set up to relate to each other.

The restorative board of inquiry model, outlined here, seeks to foster respectful, equal,² and responsible relationships as it addresses complaints. These objectives are met by parties involved being empowered to work collaboratively. Some of the benefits of the restorative approach are: emotional closure, the process creates reduced conflict between the parties thereby lessening harms throughout the process of resolving the complaint, a better opportunity to have the other party meaningfully understand one's harm, a greater possibility of the other party meaningfully taking responsibility for the harm, as appropriate. A restorative board of inquiry necessarily considers the public interest by its inclusion of community members in participation circles and the inquiry.

Goals

The goals of restorative board of inquiry are:

- 1) To create processes to address the harms surrounding complaints in a way that upholds dignity and enhances respectful, responsible relationships;
- 2) To create complaint outcomes and resolutions that address the past harms;
- 3) To generate future solutions to prevent the circumstances of the complaint occurring again;
- 4) To allow both parties to reintegrate or strengthen connections with their communities. Successful integration, in turn, reduces the likelihood of

¹ *Human Rights Act*, R.S., c. 214, s. 34(1) [the Act].

² See Llewellyn, Jennifer, "A Relational Vision of Justice" in Restorative Justice Week 2011, Re-visioning Justice handout, Correctional Service Canada in which she discusses "equality of relationship" which she defines as a "relationship in which the parties accord on another equal respect, concern and dignity." The Nova Scotia Human Rights Commission acknowledges Jennifer Llewellyn for her generosity in assisting with the integration of the restorative processes into the work it does. She has also provided invaluable and extensive feedback on this framework document.

further harms flowing from the circumstances of the complaint or the adjudication process itself.

Overview of Process

Both parties are introduced to a restorative approach through the investigation program at the Commission called the restorative resolution conferencing approach. This restorative approach would continue when complaints are referred to a board of inquiry. Up to this point, the parties have been prepared to talk with one another in a process that reflects the values of the relationships we strive for, that is, respectful, fair and equal relationships. If the parties are unable to reach agreement to resolve the issues, and the Commission agrees they require more assistance, a board of inquiry may be appointed.

After the appointment of a restorative board of inquiry, the board of inquiry restorative facilitator meets with the complainants and the respondents to introduce them to the process.³ The goals of the process for the parties are not to find blame and fault but to focus on consequences and harm. This includes our responsibilities to work/interact with one another in ways that do not cause further harms. The parties also work to narrow and clarify the issues at stake and the context and facts upon which they can agree and for those they cannot.

The restorative board of inquiry process has two stages, although restorative processes discussed in this framework do not dictate a particular program or blueprint for every case. Each process is responsive and adjusted to meet the unique needs of each complaint. This framework is meant as a guide for board adjudicators (chairs) and restorative facilitators. These processes can be adapted, for example, with more or fewer meetings in both stage one and at the board of inquiry, stage two. The breadth and causes of the harms will dictate the number of conversations required to prepare parties before they are brought together with others.

³Speaking to the restorative facilitator or the board chair throughout the process is voluntary. If a party does not wish to participate in meetings with the restorative facilitator in stage one, then the facilitator works with the other groups to prepare them for the restorative board of inquiry. Ultimately the parties to the complaint have to participate physically in the board of inquiry process selected by the board chair.

Engagement of the parties at this stage, though, can frequently be done with their consent. The parties consent to the process more readily when the facilitator engages the party empathetically about their harms. Most parties are willing to discuss their harms. (The complainant's harm is usually fairly well articulated in the complaint form. The respondent, however, frequently also reports harm created by the incident or the complaint, itself.)

If all the parties agree to participate in the first stage, most complaints can be resolved in the first stage. In the first stage the restorative facilitator conducts meetings with complainants, respondents and secondary (and possibly tertiary) stakeholders.

The facilitator is not a mediator. Settlement is not the goal, although resolution is an outcome that frequently comes by creating a process that allows the participants to relate to each other in new respectful, responsible ways. The facilitator creates an opportunity for the parties to explore what they value in relationships, to create opportunities to act in these ways. The experience allows participants to explore what happened and to work on solutions to prevent the harms from occurring again.

The facilitator meets with these parties separately and then together. Through these meetings, both the complainant and the respondent are invited to explore the harms that have been experienced related to the complaint. They are also invited to explore how to address these harms in a manner that is satisfactory for everyone.

At the end of the first stage with the restorative board of inquiry facilitator, there are a number of possibilities for resolving the complaint. The complainant and respondent may agree to a resolution. This resolution may or may not acknowledge a contravention of the Act, although it fully disposes of the complaint. If it is resolved, the board chair is invited into a circle to hear the resolutions and to conclude the inquiry.⁴

If there is no resolution or a partial resolution, then the unresolved portion continues to stage two. In the second stage, the board chair and restorative facilitator conduct a restorative board of inquiry involving all these parties. The process may create an agreed resolution.

Alternatively, a determination by the board chair may be required on what happened. After this is determined, the board chair can again invite the parties to discuss what needs to happen next. Then, if needed, the board chair can make a determination on what solutions are helpful in repairing harms and preventing future harms that are covered by the Act. Even where such assistance is needed and a determination is made, the participants might still have concerns to discuss.

⁴ Section 34(5), the Act.

For example, the board chair may have provided a remedy, but the parties need to discuss issues of implementation or how they will be affected by the determinations. Other parties, including the board chair and facilitator, may respond in a ways that are helpful in assisting the party with any transitions.

STAGE ONE

After investigation restorative processes at the Commission, the parties may determine they cannot come to an agreement on their issues. The Commission may agree there needs to be further assistance provided to the parties. This assistance may include determining for them areas where agreement on what happened (facts or interpretation of facts) is essential.⁵

The Commission is also a party after the appointment of a board of inquiry.⁶ The Commission brings the public interest perspective to the inquiry. It can be of assistance by providing a broader context for the harms by inviting community members to participate and it can offer solutions that consider systemic needs.

The Commission assigns a restorative facilitator as the board of inquiry is appointed. S/he is responsible for the complaint throughout stage one and assists the board chair with the restorative board of inquiry, stage two. This trained facilitator may be from the Commission. Depending on its importance to the issues, the aboriginal facilitator may be drawn from the Mi'kmaq Legal Support Network, or an African Nova Scotian facilitator drawn from other restorative agencies in the province.

Contracting to Engage Stage One

At the beginning of stage one, the restorative facilitator establishes whether or not the complainant and respondent want to be involved in this part of the process.⁷ The board chair can be involved in shaping the process but not in a way that might affect impartiality. For example, the board chair initially may decide the general model of resolution adopted by the board of inquiry in consultation with the parties

⁵ When the Commission determines that “having regard to all the circumstances of the complaint” and the matter “warrants a board of inquiry,” the Commission appoints one, *Boards of Inquiry Regulations*, O.I.C. 91-1222 (October 15, 1991), N.S. Reg.221/91, s.1. See also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* 2012 SCC 10 for consideration of this section of the Act.

⁶ Section 33, the Act.

⁷ The board chair has final determination of how any of these processes are undertaken. See *Prassad v Canada (Minister of Employment and Immigration)* [1989] 1 SCR 560 and see also *Universal Workers Union v. Ontario Human Rights Commission*, 2006 CanLII 126 (ON SCDC): ‘A Tribunal is the master of its own process, but only to the limits of natural justice and procedural fairness.’

and the restorative facilitator.

If a restorative approach is selected, the restorative facilitator is then involved gathering information by contacting the parties and other community members. This information is used to decide who should be involved in which circles and in what sequence prior to the restorative board of inquiry circle, where all the parties meet.

The first meetings are with the parties most directly involved, the parties to the complaint. All meetings in this round are held separately with the parties, but it includes their support people (lawyers, co-workers, spouses).

This meeting allows the restorative facilitator to:

- make preliminary inquiries about their harms;
- provide the information on the restorative approach to addressing human rights complaints;
- explain/confirm the process is open and transparent and that each side will be engaged in a similar way;
- canvas and address issues of power and safety;⁸
- seek their consent to the process;
- gather information on who else was affected or who needs to be involved to address the issues and move forward.

Round One Participation Circles, Primary Parties

This restorative circle is held separately with each of the parties to the complaint and with those close to them (i.e., supporters). Depending on the parties interests and concerns, the Commission may attend these initial meetings or may engage one of their own with the facilitator. These separate circles with primary stakeholders can run parallel to each other. The restorative facilitator asks what happened, what are the underlying issues to any given incident.

The circle format without a table is selected since it discourages the physical creation of “sides.” This open positioning of the parties avoids an oppositional setting that can come from being seated behind and on opposite sides of a

⁸ The involvement of support communities can very important in terms of balancing the power and creating safety for the parties. For example, they can assist in articulating the circumstances that can lead to harms in ways the parties may not be able.

boardroom table.

These series of meetings ultimately prepare all of the parties to participate in encounter meetings with others involved in the conflict. The facilitator covers the following in the circle of participants:

a) Discussion regarding the talking piece:

- This piece – a feather, rock, stick or other piece – is held by the speaker.
- No one is invited to speak when someone else has the piece.
- No one has to speak if they do not wish to.

After the introduction, typically the person to the right of the facilitator is provided the piece. The piece is then handed to the next person on their right after they are finished speaking, and it proceeds around the circle.⁹

b) The facilitator then asks the following questions:

- What happened?
- How were you affected, what was hard for you?
- What circumstances or factors contributed to what happened?
- Who else was affected or involved?

Round Two Participation Circles, Secondary Parties

Based on the information gained from the meeting from the first round, in terms of who else was affected, secondary stakeholders are then brought into the process in round two. These secondary participants impacted by the case also have a stake in the solutions, although they are not named on the complaint form.

The facilitator asks them the same questions in a restorative circle(s), which prepares them for further meetings:

- What happened?
- How were you affected, what was hard for you?

⁹ The talking piece formalizes permission to speak. This opportunity to speak acknowledges the power of the speaker. This attention to the speaker can amplify the disclosure and enhance the reflective process. Everyone will have her or his turn around the circle. It also models respect for one another in the process.

- What circumstances or factors contributed to what happened?
- Who else was affected or involved?

Round Three Participation Circle: Meeting between Primary Parties

When solutions are being sought, normally, primary and secondary parties are brought together. There are occasions, however, when specific issues need to be clarified between only the parties, which would be a third round. If not, this round may collapse into the fourth round, below. This third round may also involve community members who have a stake in the outcome, it depends on the complexity of the issues.

The facilitator asks these participants the same questions in the same restorative circle:

- How were you affected?
- What circumstances or factors contributed to what happened?
- Who needs to be involved to address the issues?
- What solutions could in future prevent these harm and make things right?

Round Four: Meeting between all Stakeholders, The Plan

The fourth round brings all the parties together from the first three rounds. The goal is to establish a plan (agreement) which will help the parties establish or re-establish relationships that reflect respect and values underlying human rights. Some of these values are respect, dignity, responsibility and equality.¹⁰

- What happened
- How were you affected or harmed by the events that occurred?
- What circumstances or factors contributed to the harm?
- What solutions could in future prevent these harms from happening again?

AGREEMENT

These rounds of discussion result in agreement by all present or a resolution of some issues and agreement of what issues remain unresolved. These unresolved issues then are forwarded to the restorative board of inquiry, if they relate to issues of the complaint.

¹⁰ See Llewellyn, Jennifer, “Restorative Justice: Thinking Relationally about Justice,” BOOK TITLE? Chapter 4, p. 93 for discussion of these values as relational and as necessary for our well-being, rather than just rational conceptual ideals.

Confirming Agreement

The restorative facilitator confirms the common agreement between the parties in terms of:

- the harms;
- the circumstances that lead to the harms;
- solutions to prevent further harms, and
- repairing past harms as well as what roles and commitments participants make to them.

These agreements are drafted into a written settlement agreement. If the parties agree that some implementation of the resolution is required before the settlement is affirmed by the board chair, the final approval of the board chair may be delayed until the terms have been implemented. The implementation process can also provide opportunities for the parties to work together, enhancing the relationships started by this restorative process.

When these issues are fully implemented, the parties come together in a final circle to discuss progress with the facilitator and board chair. The board chair then concludes the inquiry.

If there are outstanding issues to be resolved, the facilitator confirms these issues in writing with the parties. The facilitator will then refer the matter to a restorative board of inquiry. The facilitator will confirm agreement regarding which community members and other interested parties should attend the restorative board of inquiry circle, as a participant. (The inquiry is public so anyone can attend and be a part of the larger peripheral circle.)

Any lack of agreement about who those participants should be will be discussed with the board chair, who may need to make the determination. The facilitator will assist the board chair with the principles of who should be part of the participatory circle. These principles will include issues such as safety and whether a participant would cause harm to the process and therefore should be excluded.¹¹ Exclusion of a participant is balanced against fairness to the party who wishes to have them included in the inquiry circle.

¹¹ The respondent and complainant always have the right to attend in terms of procedural fairness.

STAGE TWO: RESTORATIVE BOARD OF INQUIRY

A. PRE-BOARD COMMUNICATIONS

After stage one, the parties, including the restorative facilitator, contact the board chair to arrange an organizational meeting. The facilitator and all the parties must be simultaneously a part of any communications with the board chair on issues of substance.¹² The board chair and the facilitator can consult on issues of process, as long as it is approved by the board chair.¹³

Legal Comments

The settlement document and the document noting the unresolved issues are presented to the board chair. Other issues are also raised at this time, such as who will attend the circle.¹⁴ If there are differing interpretations of the law regarding harms and remedies under the Act, legal comments could be provided before or after the day of the circle.¹⁵

Documents

Similarly, if there are documents the parties wish to share, then the board chair can receive them before or after the final round of the restorative board circle, but *before* the board chair makes any finding of harm under the Act.¹⁶ The restorative facilitator can assist the parties in narrowing which documents may be relevant and when to provide them.

B. RESTORATIVE BOARD CIRCLE

Board Set-Up

The restorative board of inquiry is public.¹⁷ The restorative facilitator is

¹² Section 34(2) of the Act restricts the parties' contact with the board chair in this way to preserve the board chair's independence and impartiality.

¹³ Supra note 7.

¹⁴ Generally, the facilitator should refrain from providing any specific opinion as to who should be invited into the circle since s/he has a facilitative role. S/he, however, may provide helpful information on the principles of who should be invited into the circle to provide insight into harms, solutions and reparation.

¹⁵ Providing these comments after the final circle gives prominence to the stories and harms of the circles without their being filtered through the legal "straightjacket" of case law.

¹⁶ Documents typically cannot prove the existence of harm; therefore, there are far fewer documents at a restorative board of inquiry. An exception as to when a document would be helpful is if there were a denial of an event in its entirety.

¹⁷The Act, s. 34(1).

responsible to arrange the physical setup of the room. S/he ensures the following:

- The participants' chairs are placed in a circle with no table;
- The court reporter sits in the circle and records the entire proceeding;¹⁸
- Each participant (parties, invited members from the community and support persons) has a name tag and is assigned a seat. The court reporter is provided with the seating plan;
- The public is seated around the periphery of the room;
- The board chair calls the circle together;
- All the participants swear or affirm an oath to tell the truth;¹⁹
- The restorative facilitator introduces to the board chair the agreement obtained and the issues the parties would like to discuss and resolve;
- The board chair confirms with the parties these are the agreements and areas of further discussion and resolution;
- The facilitator or the board chair introduces the talking piece;
- The general order of seating places the complainant(s) to the right of the board chair and restorative facilitator and then the respondents. This order allows the complainant(s) to speak first about their harms.²⁰

All questions are asked by the board chair.²¹ The first discussion around the circle answers these questions, below, posed by the board chair. The board chair may ask these questions on each issue and direct the questions to particular participants. It depends on the number and complexity of the outstanding issues:

- What happened, what are the issues?
- How were you affected, what was hard for you?
- What circumstances or factors contributed to what happened?
- Who else was affected or involved?

¹⁸ Section 34(4) of the Act requires boards of inquiry to be recorded.

¹⁹ Lawyers assisting the parties do not have to swear an oath if their role is supportive and they are offering no direct experience.

²⁰ *Thamotharem v. Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 385 paras 34-35 did not require as a matter of fairness that claimants be given the opportunity to be questioned first by their counsel.

²¹ The adjudicator starts the questioning and directs the entire hearing in this manner. This procedure is affirmed by the Federal Court of Appeal in *Thamotharem, ibid*, as not being contrary section seven Charter rights. The duty of fairness does not include an automatic right to cross examine witnesses. The procedural fairness guarantees to parties is the right to rebut opposing evidence and to correct or contradict prejudicial statements. If this can be achieved without recourse to cross-examination, then parties appearing before a tribunal are not entitled to it (MacAulay and Sprague, *Practice and Procedure before Administrative Tribunals*, Vol. 2, (Toronto: Carswell 2004) at 12-178.7).

After these questions are asked around the circle, the board chair confirms areas of agreement and any issues that remain outstanding. Sometimes the remedy question is addressed on a different day.²²

The board chair may offer suggestions on refining any of the four issues: harm, contributing circumstances, future solutions and reparations to assist achieving an agreement. The participants are given a final opportunity to comment.

C. BOARD AGREEMENT AND/OR BOARD DETERMINATION

If there are issues that still remain unresolved, they are decided by the board chair. This decision could happen after a rest break or the parties return on another day. Preferably, this determination is done in the circle with the parties present to allow the parties to process and comment on the outcomes. The board chair should then follow up with a written decision and an order that includes:

- all the harms and then, specifically, which of these are contraventions of the Act;
- the circumstances that contributed to these harms;
- solutions and, then specifically, which of those are to be ordered under the Act; (Therefore, when ordered, solutions must be connected to harm under the Act, although the board chair can make suggestions on the issues not covered by the Act.)
- who is responsible to fix the past harm and what those reparations are. Those responsible for the reparations and the reparations themselves that comprise the order must result from the harms that contravene the Act.
- the board chair may also offer the parties an opportunity to sign the decision crafted by the chair, if they agree with it or wish to acknowledge their agreement with parts of it. Although not legally required, it may assist the parties in feeling included and it supports a respectful process.

All harms, solutions and reparations should be identified in the board's decision, whether or not they fall within the authority of the Act. Those that do not fall within the Act's jurisdiction may be included in the "whereas" clauses at the

²² Whether there is more than one circle with the board chair will depend on the length of time the first circle takes and the need for the participants to have some time to absorb the new information.

beginning of the order and can form the factual background of the decision. Harms under the Act and the resulting remedies comprise the body of the order. The board chair also considers whether future circles are required to allow oversight or implementation of any remedies. If so, the board chair would maintain jurisdiction.²³

²³ *Craig and Robertson v. HRM (Metro Transit)*, NSBd Inq 2011.