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THE MENTAL DISORDER PROVISIONS OF THE *CRIMINAL CODE*

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THE MENTAL DISORDER PROVISIONS OF THE *CRIMINAL CODE*

INTRODUCTION

Many individuals found unfit to stand trial or not criminally responsible on account of mental disorder have histories of mental illness or psychiatric treatment for a mental disorder. Research suggests that individuals with mental disorders are more vulnerable to arrest and detection for nuisance offences, are more likely to be remanded into custody for these minor offences, and spend more time on remand and awaiting a sentencing disposition.(1) Mental illness accordingly poses significant challenges for the criminal law. The need to protect society from dangerous conduct must always be carefully balanced with the liberty, dignity and equality of mentally ill persons charged with an offence.(2)

In May 2005, Parliament adopted amendments to the *Criminal Code* with a view to improving the provisions that govern mentally disordered accused and the procedures used by courts and Review Boards, the legal bodies that make decisions about their detention, supervision and release. The changes were the result, in part, of a parliamentary review required by previous legislation proclaimed in 1992, which had completely overhauled the regime applicable to persons found unfit to stand trial or not criminally responsible for an offence on account of mental disorder. This paper reviews the law surrounding mental disorder and criminal responsibility, with particular emphasis on the more significant 2005 amendments.

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(1) See, e.g., John Howard Society, Submission to the Legislative Assembly of Ontario, Standing Committee on Public Accounts, Toronto, 22 February 2001, p. 4.

(2) See, e.g., Vicki Lalonde, "Chief Justice McLachlin speaks on legal challenges of mental illness," *Lawyers Weekly* [Markham, Ontario], 4 March 2005.

CHRONOLOGY OF THE LAW

The following timeline sets out important events in the development of Canadian statutory law and jurisprudence governing the criminal responsibility of persons with a mental disorder:

1843 – The common law defence of insanity is formulated by the British House of Lords in *M'Naghten's Case*.(3) The defence rests on the principle that, in order to convict, the state must prove not only a wrongful act but also a guilty mind.

1892 – Canada's first *Criminal Code*(4) makes the insanity defence available to an accused person who, because of a "natural imbecility" or "disease of the mind," was incapable of appreciating the nature and quality of the act or omission, and of knowing it was wrong.

1991 – The Supreme Court of Canada renders its decision in *R.* v. *Swain*,(5) concluding that the automatic indeterminate detention of persons found not guilty by reason of insanity, as set out in the *Criminal Code*,(6) infringes their right to liberty under the *Canadian Charter of Rights and Freedoms*.(7)

1992 – A new Part XX.1 of the *Criminal Code* comes into force to govern mentally disordered accused persons, following Parliament's adoption of Bill C-30.(8) Among other things, it allows for the possibility of an immediate absolute discharge; and it requires, in all other cases, annual Review Board hearings so that the least restrictive disposition is always imposed on a mentally disordered accused. Bill C-30 also replaces references to "insanity" with the term "mental disorder" and extends the defence to summary conviction in addition to indictable offences.

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(3) *Daniel M'Naghten's Case* (1843), 8 E.R. 718 (H.L.).

(4) *Criminal Code*, S.C. 1892, c. 29, s.11.

(5) *R.* v. *Swain*, [1991] 1 S.C.R. 933; available at: http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol1/html/1991scr1_0933.html.

(6) *Criminal Code*, R.S.C. 1970, c. C-34, s. 542(2), later *Criminal Code*, R.S.C. 1985, c. C-46, s. 614(2).

(7) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7. The Supreme Court suspended the declaration of invalidity of the relevant section of the *Criminal Code* to give Parliament an opportunity to adopt remedial legislation, which was introduced as Bill C-30.

(8) *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and Young Offenders Act in consequence thereof*, S.C. 1991, c. 43. Most of Bill C-30 was proclaimed in force in February 1992.

1999 – The Supreme Court of Canada renders its decision in *Winko* v. *British Columbia (Forensic Psychiatric Institute)*,(9) upholding the regime in Part XX.1 of the *Criminal Code* as constitutional, and concluding that it properly balances public safety and the rights of mentally disordered accused.

2002 – Further to a parliamentary review required by Bill C-30, the House of Commons Standing Committee on Justice and Human Rights tables 19 recommendations intended to improve Part XX.1 of the *Criminal Code*.(10) The Government of Canada responds, indicating that it will introduce legislation to implement most of the recommendations as well as other improvements.(11)

2004 – The Supreme Court of Canada renders its decision in *R.* v. *Demers*,(12) concluding that the ongoing subjection of a permanently unfit accused to Part XX.1 of the *Criminal Code* constitutes a violation of liberty under the *Canadian Charter of Rights and Freedoms* where the accused poses no significant threat to public safety.

2005 – Parliament adopts Bill C-10,(13) amending Part XX.1 of the *Criminal Code*. Most notably, it expands the powers of Review Boards by allowing them to order psychological assessments, order publication bans, and extend the time for the next hearing; provides for the possibility of psychological assessments by persons other than medical practitioners; allows victim impact statements to be presented at hearings; permits a stay of proceedings in the case of a mentally disordered accused who is permanently unfit to stand trial; and repeals unproclaimed provisions that would have limited the length of detention of a mentally disordered accused, or allowed this period to be extended for particularly dangerous persons.(14)

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(9) *Winko* v. *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; available at: http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol2/html/1999scr2_0625.html.

(10) Standing Committee on Justice and Human Rights, 14th Report, *Review of the Mental Disorder Provisions of the Criminal Code*, Ottawa, June 2002; available at: http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Studies/Reports/JUSTRP14-e.htm.

(11) Government of Canada, *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code*, Ottawa, November 2002; available at: http://www.justice.gc.ca/en/dept/pub/tm_md/mdr.pdf ("*Response*").

(12) *R.* v. *Demers*, 2004 SCC 46; available at: http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2_0489.html. The Supreme Court suspended its declaration that the relevant provisions of the *Criminal Code* were invalid to allow Parliament the opportunity to pass amendments, which were introduced in Bill C-10.

(13) *An Act to Amend the Criminal Code (mental disorder) and to make Consequential Amendments to Other Acts*, S.C. 2005, c. 22. See Wade Raaflaub, *Bill C-10: An Act to Amend the Criminal Code (mental disorder) and to make Consequential Amendments to Other Acts*, LS-481, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 20 May 2005; available at: http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/ls3811000/381c10-e.asp.

(14) These unproclaimed provisions on "capping" and "dangerous mentally disordered accused" were considered to be unnecessary, as the detention of a mentally disordered accused is not intended to punish but to treat and rehabilitate, and an accused is entitled to release if he or she poses no significant threat to public safety.

PART XX.1 OF THE *CRIMINAL CODE*

Part XX.1 of the *Criminal Code* sets out a comprehensive and independent regime governing accused persons who are found either unfit to stand trial or not criminally responsible for an offence on account of mental disorder.(15)

A. Fitness to Stand Trial and Verdicts of Not Criminally Responsible

Every person is presumed not to suffer from a mental disorder and to be fit to stand trial. The burden of proof that an accused was suffering from a mental disorder at the time of the offence, so as to be exempt from criminal liability, rests with the party who raises the issue. The issue of fitness to stand trial may be tried of the court's own motion or on application of the accused or prosecutor, in which case that party has the burden of proof.

To determine fitness to stand trial, the courts use the "limited cognitive capacity test," by which an accused is considered to be fit to stand trial where he or she has the capacity to understand the process and instruct counsel. The accused is not required to be capable of exercising analytical reasoning in making a choice to accept the advice of counsel, or in coming to a decision that best serves his or her interests.(16)

Rather than being found "not guilty by reason of insanity," an accused may now be found "not criminally responsible on account of mental disorder." Such a verdict no longer automatically results in "strict custody," as was the case prior to 1992 when provincial lieutenant governors in council had jurisdiction over persons found insane or unfit to stand trial and could detain them at pleasure.

"Mental disorder" is defined in the *Criminal Code* as "disease of the mind." Its legal meaning has been interpreted to be any illness, disorder or abnormal condition which impairs the human mind from its functioning, excluding self-induced states caused by alcohol or

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(15) *Criminal Code*, R.S.C. 1985, c. C-46, ss. 672.1 to 672.95. The defence of mental disorder itself is set out in s. 16. For additional history and an overview of Canada's mental disorder provisions, see Marilyn Pilon, *Mental Disorder and Canadian Criminal Law*, PRB 99-22, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 22 January 2002; available at: http://lpintrabp.parl.gc.ca/lopimages2/PRBpubs/bp1000/prb9922-e.asp.

(16) *R.* v. *Whittle*, [1994] 2 S.C.R. 914, p. 934.

drugs, as well as transitory states such as hysteria and concussion.(17) To be found not criminally responsible on account of mental disorder, the accused must have been, at the time of the alleged offence, incapable of appreciating the nature and quality of the act or omission, or of knowing that it was wrong.(18)

B. Possible Dispositions for a Mentally Disordered Accused

If a court finds that an accused is not criminally responsible on account of mental disorder, it may choose one of three dispositions: an absolute discharge, a conditional discharge (living in the community with conditions), or detention in hospital (with or without conditions). Alternatively, and very frequently, the court refers the decision to the Review Board of the appropriate province or territory. Any disposition other than an absolute discharge must be reviewed annually by the Review Board until it determines that the accused is not a significant threat to the safety of the public and discharges him or her absolutely.

Following the adoption of Bill C-10 in 2005, there are two exceptions to an annual hearing, the first being where all parties consent to hold the next hearing in 24 months. Secondly, a review in 24 months is possible if the accused has committed a "serious personal injury offence," is subject to hospital detention, and the Review Board believes that the condition of the accused is not likely to improve and hospital detention remains necessary.

When an accused person has been found by a court to be unfit to stand trial, the disposition may initially only be a conditional discharge or hospital detention, not an absolute discharge. At each hearing to review the disposition, the Review Board is to determine whether the accused has become fit to stand trial and if so, send him or her back to court. If the court concludes that the accused is indeed fit, a trial may proceed. If the accused is found to remain unfit, he or she will remain subject to further Review Board hearings. In addition, a court must review the case of an unfit accused every two years to determine whether sufficient evidence remains to bring him or her to trial. If there is no longer a *prima facie* case, the accused is entitled to an acquittal.

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(17) *R.* v. *Cooper*, [1980] 1 S.C.R. 1149, p. 1159.

(18) Interestingly, s. 11 of the 1892 *Criminal Code* required a person to be incapable of appreciating the nature and quality of the act or omission <u>and</u> of knowing it was wrong, whereas s. 16 of the current *Criminal Code* uses the conjunction "or."

Following the adoption of Bill C-10 in 2005, there is another possible outcome for a mentally disordered accused person. Specifically, a Review Board may recommend that a court hold an inquiry, or a court may hold one of its own motion, with a view to granting a stay of proceedings in the case of a person who is unlikely ever to become fit to stand trial and poses no significant threat to the public. A stay of proceedings effectively terminates all further court inquiries into a *prima facie* case and the ongoing Review Board hearings for the permanently unfit accused.

In all cases, courts and Review Boards are required to impose the least restrictive disposition necessary, having regard to public safety, the mental condition of the accused, and the goal of his or her reintegration into society. When making or reviewing a disposition, courts and Review Boards routinely rely on an assessment of the mental condition of the accused. Following the adoption of Bill C-10 in 2005, an assessment may now be ordered by a Review Board, and may be conducted by other professionals, in addition to medical practitioners, who have been designated as qualified by the relevant province or territory. For example, forensic psychologists may be able to conduct an assessment in addition to psychiatrists.

C. Treatment of a Mentally Disordered Accused

A disposition in relation to a mentally disordered accused may not direct psychiatric or other treatment unless the accused has consented and it is in his or her interests. There is one exception, by which a court that has rendered a verdict of unfit to stand trial may, on application by the prosecutor, order treatment of the accused for a period of not more than 60 days for the purpose of making him or her fit to stand trial. Such a treatment order requires particular medical evidence, must have the consent of the hospital, though not the accused, and may never involve prohibited treatment such as psychosurgery or electro-convulsive therapy.

Where a court or Review Board orders detention in hospital as the appropriate disposition for a mentally disordered accused, he or she is not required to submit to treatment. The disposition is meant to detain the accused in an environment where appropriate medical and psychiatric care is available. In cases where the accused refuses treatment that may be necessary to maintain or improve his or her mental health, or where his or her condition may deteriorate, treatment may be administered in accordance with provincial or territorial mental health legislation and policy.

D. Victim Rights and Interests

On its adoption in 2005, Bill C-10 went some distance in advancing the interests of the victims of mentally disordered accused persons. Although victims have been able to file victim impact statements for the court's or Review Board's consideration since 1999,[19] the statements may now, under certain circumstances, be read or otherwise presented at the mentally disordered accused's hearing. The Review Board is also required to ask whether the victim has been advised of the opportunity to file a victim impact statement, and it has the discretion to adjourn the hearing so that one may be prepared. However, the Review Board may deny an adjournment, or the presentation of the victim impact statement at the hearing, if it considers that it would interfere with the proper administration of justice.

Bill C-10 also made it possible for victims to receive notice of a court or Review Board hearing. It is available on their request, but in accordance with rules set by the court or Review Board regarding time and manner of notice. In addition to knowing the dates of hearings, victims are entitled to be advised of the provisions of the *Criminal Code* that are relevant to them, such as those allowing victim impact statements and publication bans. With regard to publication bans, Bill C-10 also gave Review Boards, in addition to courts, the power to order such bans with a view to protecting the identity of victims or witnesses.

Another change to Part XX.1 of the *Criminal Code* following the adoption of Bill C-10 is that when a court or Review Board receives an assessment report for the purpose of reviewing a disposition, it must determine whether there has been a change in the mental condition of the accused that might warrant his or her discharge. If there are grounds for a discharge, victims of the offence must be notified of their entitlement to file a victim impact statement for consideration in determining the appropriate disposition.

CONCLUSION

Unavailable or inadequate mental health services for the general public, combined with the interplay between the health and justice systems, has resulted in concern over the criminalization of mentally disordered persons as a means to provide them with treatment.[20] It

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(19) *An Act to amend the Criminal Code (victims of crime)*, S.C. 1999, c. 25, s. 11.

(20) Canadian Centre for Justice Statistics, *Special Study on Mentally Disordered Accused and the Criminal Justice System* (Catalogue No. 85-559-XIE), Minister of Industry (Minister responsible for Statistics Canada), Ottawa, January 2003, p. 10; available at: http://www.statcan.ca/english/freepub/85-559-XIE/85-559-XIE00201.pdf.

has also been recognized that there is an overrepresentation of mentally ill persons in prison populations.[21] Whether an individual is convicted of an offence, or is found not criminally responsible for it or unfit to stand trial, the criminal justice or Review Board system is certainly not the ideal context in which to provide the individual with treatment or other assistance for the underlying mental illness.

Even where the criminal law strikes an appropriate balance between public safety and the rights and interests of mentally disordered accused, proactive policies and measures to ensure the overall mental health of Canadians will assist in preventing some individuals from ever coming into contact with police and courts in the first place. Because health, criminal law policy and the administration of justice are overlapping federal and provincial/territorial matters, national strategies are crucial if the number of mentally disordered accused and mentally ill convicted offenders is to be reduced.

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(21) See Julian V. Roberts and Simon Verdun-Jones, "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing after the Judgment in *Knoblauch*," *Alberta Law Review*, Vol. 39, No. 4, April 2002, pp. 789-790. See also Tim Riordan, *Exploring the Circle: Mental Illness, Homelessness and the Criminal Justice System in Canad*a, PRB 04-02E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 23 April 2004; available at: http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0402-e.asp#amentaltxt.