PRB 99-22E

MENTAL DISORDER AND CANADIAN CRIMINAL LAW

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5 October 1999
Revised 22 January 2002

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BACKGROUND

Canadian courts have long had the power, in prescribed circumstances, to exempt an individual from criminal responsibility for actions performed while he or she was incapacitated by a mental disorder. That power rests on "the basic principle of Canadian criminal law that to be convicted of a crime, the state must prove not only a wrongful act, but also a guilty mind."(1) Consequently, Canada's *Criminal Code* has always provided that persons will not be held criminally liable for their actions if their mental state at the time rendered them "incapable of appreciating" the nature and quality of the act and knowing that it was wrong. In such a case, however, it may be necessary for the state to exercise some level of control over those mentally disordered individuals who are believed to pose a threat to others. Thus, Parliament is faced with the challenge of achieving a balance between individual rights and public safety. This paper will trace the development of what used to be known as the "insanity" defence in Canadian law and review a number of outstanding issues relating to the criminal justice system's treatment of mentally disordered persons.

HISTORY

Based on rules promulgated in 1843 by the British House of Lords in the *M'Naghten* case, the common law defence of "insanity" was first incorporated into Canadian legislation in the *Criminal Code*, *1892*.(2) Originally, the *Criminal Code* disallowed conviction of any accused 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 that it was wrong.(3)

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(1) Department of Justice, *Mental Disorder Amendments to the Criminal Code*, Information Paper, September 1991, p. 4.

(2) Edwin A. Tollefson and Bernard Starkman, *Mental Disorder in Criminal Proceedings*, Carswell, Canada, 1993, p. 15. See also: *Daniel M'Naghten's Case* (1843), 8 E.R. 718 (H.L.).

(3) *Criminal Code, 1892*, S.C. 1892, Chap. 29, s. 11.

The same section incorporated a legal presumption of sanity, however, and an acquittal on account of insanity resulted in detention "in strict custody" at the pleasure of the Lieutenant Governor of the province. No matter what the mental status of an accused at the time of the alleged offence, anyone found "unfit" to stand trial on account of insanity would also be held at the pleasure of the Lieutenant Governor.

In 1975, the Law Reform Commission of Canada discussed the need for reform of the treatment accorded by the criminal justice system to mentally disordered accused, citing the dangers of "unclear language, improper attitudes, and the need for practical solutions to social problems."(4) The Commission cautioned against "a blanket assumption that all mentally ill persons are prone to violence" and argued that "[r]estriction of the freedom of a mentally disordered accused or offender should only be imposed when justified."(5) Among several suggestions for the treatment of mentally disordered accused made in the Commission's subsequent Report, was one that dispositions in such cases "be made openly, according to known criteria, be reviewable and of determinate length." Specifically, instead of the Lieutenant Governor warrant scheme, the Commission favoured a hearing process to determine the appropriate disposition for persons found not guilty by reason of insanity.(6)

In 1982, the Department of Justice initiated the Mental Disorder Project as part of a national Criminal Law Review.(7) A discussion paper distributed by the Department the following year acknowledged numerous shortcomings of the mental disorder provisions of the *Criminal Code*, calling them "fraught with ambiguities, inconsistencies, omissions, arbitrariness, and often a general lack of clarity, guidance or direction."(8) The question of compliance with the *Canadian Charter of Rights and Freedoms* was also raised. For example, the paper questioned the fairness of a scheme that allowed persons found "unfit" to stand trial to be confined indefinitely without the Crown having to establish a *prima facie* case of guilt.

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(4) Law Reform Commission of Canada, *The Criminal Process and Mental Disorder*; Working Paper 14, 1975, p. 17.

(5) *Ibid.*, p. 19.

(6) Law Reform Commission of Canada, *Mental Disorder in the Criminal Process*, March 1976, p. 38.

(7) In October 1979, federal and provincial Ministers responsible for the criminal justice system in Canada agreed to cooperate in a comprehensive review of Canada's criminal law and procedure, in the context of underlying policy considerations. See: *The Criminal Law in Canadian Society*, Government of Canada, Ottawa, August 1982, p. 10.

(8) Department of Justice, *Mental Disorder Project, Discussion Paper*, September 1983, p. 3.

Likewise, concerns were raised about a scheme that mandated the automatic detention of mentally disordered accused, with no requirement for a hearing or proof that he or she posed a danger to others.

1986 DRAFT PROPOSALS FOR REFORM

The Department of Justice released the Final Report of the Mental Disorder Project in September 1985. Many of the recommendations it contained were incorporated into a draft bill that was tabled by then Minister of Justice John Crosbie on 25 June 1986.(9) The bill contained a number of amendments aimed at modernizing language, streamlining procedures, and protecting the Charter rights of accused persons. These proposals quickly became a focus for further consultation with the provinces and organizations in both the public and private sectors. Among a number of major reforms, the bill proposed changing the name of the defence to "mental disorder," giving the court broader jurisdiction to order psychiatric assessments, and limiting the evidentiary use of statements made in the course of such assessments. The bill also proposed criteria for determining "fitness" and would have replaced the Lieutenant Governor warrant scheme with boards of review in each province.

One of the more controversial proposals in the draft bill was aimed at limiting the length of time for which a mentally disordered accused could be held. So-called "caps" would be life, ten years and two years, depending upon the maximum penalty available for the offence charged.(10) The provincial Attorneys General, in particular, were concerned that capping periods of detention "would lead to the mandatory release of dangerous persons when they reached their outer limit of detention under the authority of the criminal law."(11) A proposal to allow the courts to order up to 60 days' psychiatric treatment as part of an offender's term of imprisonment also generated criticism. It was argued that implementation of these "hospital orders" provisions would impose a significant financial burden on some provinces.(12)

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(9) Tollefson and Starkman (1993), p. 4.

(10) For example, the cap for a charge of first degree murder would be life. The cap for charges involving danger to the public would be the lesser of ten years or the maximum sentence under the *Criminal Code*. In any other case, the cap would be the lesser of two years or the maximum sentence for the offence charged.

(11) Tollefson and Starkman (1993), p. 6.

(12) *Ibid.*

Consultations on these legislative proposals continued through the 1988 general election, but by this time the Ontario Court of Appeal decision in *R*. v. *Swain*[13] was under appeal to the Supreme Court of Canada.

COMPLIANCE WITH THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Although a two-thirds majority of the Ontario Court of Appeal had upheld the legislation and common law practices then affecting the defence of insanity, this decision did not stand. On 2 May 1991, the Supreme Court of Canada found that the common law rule allowing the Crown to raise evidence of insanity, over the objections of the accused, infringed Swain's section 7 Charter rights in a way not justified by section 1. Likewise, *Criminal Code* section 542(2), mandating automatic detention of persons found not guilty by reason of insanity, was found to infringe sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* in a manner not saved by section 1.[14] In support of that conclusion, the Supreme Court of Canada pointed out that the indeterminate nature of the detention rendered the effect of the legislation "disproportionate" to its objectives. Because declaring section 542(2) invalid would compel the release of "all insanity acquitees, including those who may well be a danger to the public," the Court imposed a six-month period of temporary validity. That transitional period was later extended by the Court to 5 February 1992, in order to give Parliament sufficient time to pass remedial legislation.

BILL C-30[15]

Unable to achieve unanimous consent to table a bill before the 1991 summer recess, then Minister of Justice Kim Campbell published the bill as "Proposals to amend the Criminal Law concerning mental disorder."[16] Those proposals, in the form of Bill C-30, were subsequently tabled on 16 September 1991 (with most provisions coming into force in 1992).

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(13) *R*. v. *Swain* (1986), 50 C.R. (3rd) 97 (Ont. C.A.).

(14) *R*. v. *Swain*, [1991] 1 S.C.R. 933.

(15) An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof, S. C. 1991, C. 43.

(16) Tollefson and Starkman (1993), p. 10.

Unlike the 1986 Draft Bill, Bill C-30 included consequential amendments to the *Young Offenders Act* and the *National Defence Act.*

A. Substantive and Procedural Changes

In addition to important new definitions, Bill C-30 created a whole new scheme for managing mentally disordered accused under Part XX.1 of the *Criminal Code*. First, the terminology of the former insanity defence was amended so as to exempt from criminal liability persons who commit the act complained of while suffering from "a mental disorder" (this term replaces the previous "natural imbecility" or "disease of the mind"). To reflect that amendment, the consequential verdict was also changed from not guilty on "account of insanity" to "not criminally responsible on account of mental disorder." The scope of the defence was also expanded to cover summary conviction as well as indictable offences.

In addition, Bill C-30 provided a new definition with criteria for determining whether an accused is "unfit to stand trial," something not previously spelled out in the *Criminal Code.* Subject to limitations, the courts also have the power to order involuntary treatment of a mentally disordered accused, for the purposes of rendering him or her fit to stand trial. Furthermore, the case of an unfit accused must be reviewed by a court every two years, in order to determine whether sufficient evidence exists to bring the individual to trial. If the evidence is not sufficient, the accused is entitled to an acquittal.(17)

Upon finding an accused not criminally responsible on account of mental disorder, a court is no longer obliged to order him or her held in strict custody. Instead, the court has the option of choosing an appropriate disposition or deferring that decision to a Review Board.(18) In either case, the permissible dispositions include detention in hospital, discharge subject to conditions, or absolute discharge. However, the legislation requires courts and Review Boards to impose the least restrictive or onerous disposition necessary, bearing in mind prescribed criteria such as public safety, the mental condition of the accused, and the goal of his or her reintegration into society. In this way, the role of the Lieutenant Governor in Council was abolished and the relevant decision-making powers transferred to Review Boards in each

(17) *Criminal Code*, s. 672.33.

(18) Even when the court makes a disposition, the Review Board must hold its own hearing to review any court disposition, other than an absolute discharge, no later than 90 days afterward.

jurisdiction.[19] Bill C-30 also mandated an annual review of any Board disposition other than an absolute discharge.

Bill C-30 specified the circumstances under which the courts can order a psychiatric assessment, either for the purposes of determining an accused's fitness to stand trial, or to provide evidence as to his or her mental state at the time of the offence. Bill C-30 amendments also limited the evidentiary use of statements made by an accused during the course of an assessment.

A number of amendments were suggested during committee review of Bill C-30. For example, counsel for the Ontario Board of Review argued that Review Boards should have the authority to order assessments as well as treatment for unfit accused.[20] The Canadian Bar Association wanted a narrower definition of "hospital" that would require that any place so designated by a provincial government be "equipped to provide treatment for mental disorders."[21] The Canadian Disability Rights Council was opposed to forced treatment of "unfit" accused,[22] while the Canadian Association for Community Living wanted the definition of "mental disorder" to specifically exclude persons with mental handicaps.[23] However, the only significant amendment approved at committee stage was that calling for a five-year "comprehensive review of the provisions and operation" of the Act by a committee of the House of Commons.[24]

B. Unproclaimed Amendments

1. "Capping" of Dispositions

Among the more controversial provisions of the bill were several that have not yet been proclaimed in force. For example, Bill C-30 contained the same "capping" provisions proposed in the 1986 draft legislation that would limit the length of time that an unfit or mentally

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(19) Prior to the passage of Bill C-30, Review Boards acted in an advisory capacity to the Lieutenant Governor in Council, who was not bound by a board's recommendations.

(20) Standing Committee on Justice and the Solicitor General, Minutes of Proceedings and Evidence, 22 October 1991 (8:53).

(21) Canadian Bar Association, *Submission on Bill C-30*, September 1991, p. 6.

(22) Standing Committee on Justice and the Solicitor General, Minutes of Proceedings and Evidence, 23 October 1991 (10:7).

(23) *Ibid.* (10:10).

(24) Tollefson and Starkman (1993), p. 12.

disordered accused could be detained. The intention was that any accused still perceived to be dangerous at the end of the statutory cap "could be involuntarily committed to a secure hospital under the authority of the provincial mental health legislation."(25) In order to allow time for any necessary changes to provincial laws and administrative practices, however, the federal government proposed delaying proclamation of the capping provisions. At the same time, the transitional provisions of Bill C-30 specified that any existing Lieutenant Governor warrants would continue in force until the capping provisions had been proclaimed in force.

2. Dangerous Mentally Disordered Accused (DMDA)

To address further concerns about the capping provisions and the limitations of provincial civil commitment laws, the federal government incorporated the "dangerous mentally disordered accused" (DMDA) provisions into Bill C-30. They were patterned on the "dangerous offender" scheme in the *Criminal Code* that allows persons convicted of a serious personal injury offence or certain sexual offences to be sentenced indeterminately. The DMDA provisions were intended to enable the courts, in special circumstances, to increase the applicable cap to a maximum of life. As with existing dangerous offender provisions, the prosecutor would have to establish that the accused had been convicted of a serious personal injury offence and that past conduct suggested that he or she posed a threat or would be likely to cause harm to others in the future. The transitional provisions also called for the appointment of a "Commissioner" to review the cases of individuals already subject to a Lieutenant Governor warrant, to determine whether they would have qualified as a "dangerous mentally disordered accused" under the proposed law.(26) In the event of such a finding, the Commissioner would then be empowered to order detention in custody "for a maximum period of life." Proclamation of the DMDA provisions were also delayed because they would not be required until the capping provisions came into force.

3. Hospital Orders

In its 1976 Report, the Law Reform Commission argued that a therapeutic disposition should be available for persons who are held criminally responsible for their actions

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(25) Department of Justice, *Mental Disorder Amendments to the Criminal Code*, Information Paper, September 1991, p. 6.

(26) During Second Reading debate on Bill C-30, then Minister of Justice Kim Campbell advised the House that about 1,100 Canadians were being held under Lieutenant Governor warrants at that time. See Commons *Debates*, Friday, 4 October 1991, p. 3295.

but who are, nevertheless, suffering from a mental disorder. Consequently, the Commission recommended that sentencing judges be given the power to order, where appropriate, "that a term of imprisonment be spent in whole or in part in a psychiatric facility."(27) When proclaimed, the relevant provisions of Bill C-30 would give judges the power to order detention in a treatment facility "as the initial part of a sentence of imprisonment." Up to 60 days' treatment could be ordered for an individual suffering from a mental disorder "in an acute phase," in order "to prevent further significant deterioration of the mental or physical health of the offender, or to prevent the offender from causing serious bodily harm to any person." In response to the concerns of some provincial governments about the onerous costs of these provisions, their proclamation was also postponed "to allow pilot projects to be conducted in two or three provinces so that empirical data could be gathered on utilization and costs."(28) The hospital orders provisions, however, remain unproclaimed to date.

OUTSTANDING ISSUES

In addition to those provisions that have yet to be proclaimed in force, some other issues or criticisms prompted by Bill C-30 have yet to be resolved.

A. Review Board Powers

For example, it has been argued that provincial Review Boards require more powers in order to operate more effectively; in particular, a Review Board should have the power to order that an offender be assessed, where necessary, prior to a review hearing to ensure that it has sufficient information to render a fair and meaningful disposition. In addition, some have asked whether failure to comply with release conditions should be made an offence, so that there could be swift intervention in appropriate cases. It has also been suggested that Review Boards should have the power to discharge an unfit accused, presumably to prevent an individual from being subject to supervision long after he or she would have been released from any prison term that could have been imposed in the event of a conviction.

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(27) Law Reform Commission of Canada (March 1976), p. 25.

(28) Tollefson and Starkman (1993), p. 144.

B. Proclamation of Inoperative Sections

It may be that provincial governments would still be reluctant to see the capping provisions proclaimed, along with the companion DMDA scheme. Some mental health advocates and the Canadian Bar Association were not entirely supportive of the DMDA provisions; however, it seems likely that they would continue to favour limiting periods of supervision through capping. It may be that the Supreme Court of Canada's decision in *R* v. *Winko* has removed much of Parliament's incentive to bring those sections of the *Criminal Code* into force. In the *Winko* case, a unanimous Supreme Court found that the potentially indefinite period of supervision mandated in Part XX.1 does not offend section 15 of the Charter. The court compared the fate of persons convicted of a crime with the fate of mentally disordered accused and found that "[b]ecause the NCR accused's liberty is not restricted for the purpose of punishment, there is no corresponding reason for finitude."(29)

Parliament may face continuing pressure from advocates and interest groups to proclaim the "hospital orders" provisions of Bill C-30, although the Supreme Court of Canada decision in *Knoblauch* makes clear that treatment orders are already available as part of a conditional sentence.(30) It remains unclear whether provincial governments will continue to oppose granting judges the authority to direct the placement of mentally disordered offenders upon conviction, even if only for a fixed treatment period.

C. Related Issues

In addition to the foregoing, a handful of outstanding issues were not dealt with in Bill C-30.

1. Non-Insane Automatism

At committee stage, Law Professor Gerald Ferguson called for a codification of the defence of automatism, or at least a redrafting of Bill C-30 to distinguish between

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(29) *Winko* v. *British Columbia (Forensic Psychiatric Institute*), [1999] 2 S.C.R. 625.

(30) In *R.* v. *Knoblauch*, [2000] 2 S.C.R. 780, the Supreme Court upheld a conditional sentence of two years less a day followed by three years of probation, both of which required the offender to reside "in a locked secure psychiatric treatment unit where he was currently receiving treatment, until a consensus of psychiatric professionals made a decision to transfer him from that locked unit."

automatism and insanity.(31) Automatism is a common law defence that refers to "a state in which the accused can be said to have lost control over his or her conduct because of a mental disorder, a physical illness or condition, a blow to the head, or a psychological shock."(32) Where the source of automatism lies in a mental disorder, the accused is dealt with under Part XX.1 of the *Criminal Code*. Where the source is not a mental illness, the accused is entitled to an acquittal, an outcome that may lead to public safety concerns. In the wake of some controversy arising out of a 1992 Supreme Court of Canada decision upholding an acquittal based on the defence of non-insane automatism, draft *Criminal Code* amendments were circulated in June 1993.(33) These draft amendments would have defined automatism, allowed for a verdict of "not criminally responsible on account of automatism," and provided the same range of dispositions now available for mentally disordered accused.(34) The government changed as a result of the 1993 federal election and these proposals were not introduced in the House of Commons.

2. The "Fitness" Standard

Section 2 of the *Criminal Code* defines "unfit to stand trial" as unable "on account of mental disorder" to conduct a defence because of an inability "to understand the nature or object of the proceedings, understand the possible consequences of the proceedings, or communicate with counsel." In *R*. v. *Taylor*, the Ontario Court of Appeal held that a person's fitness to stand trial requires only a "limited cognitive capacity" to understand the process and to communicate with counsel, as opposed to a higher test of "analytical capacity" or capacity to make rational decisions beneficial to that person.(35) The Supreme Court of Canada has since affirmed the limited cognitive ability test for fitness in *R*. v. *Whittle*.(36) It has been argued that this test sets the bar too low and can result in an accused's being tried, in spite of an inability to

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(31) Standing Committee on Justice and the Solicitor General, Minutes of Proceedings and Evidence, 24 October 1991 (11:11).

(32) Standing Committee on Justice and the Solicitor General, *First Principles: Recodifying the General Part of the Criminal Code of Canada*, First Report, 3rd Session, 34th Parliament, February 1993, p. 39.

(33) See: *R*. v. *Parks*, [1992] 2 S.C.R. 871. Parks was charged with murder after he had killed his mother-in-law while he was sleepwalking. Although all agreed on the verdict, at least three Supreme Court judges discussed the issue of future dangerousness and McLachlin, J. noted, at p. 914, that "the possibility of supervisory orders in this situation may be a matter which Parliament would wish to consider in the near future."

(34) *Proposals to Amend the Criminal Code (General Principles)*, Minister of Justice, 28 June 1993.

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

(36) [1994] 2 S.C.R. 914.

act in his or her own best interests. However, those of the opposite view argue that as the result of an "analytical capacity" test, too many accused would be found unfit and would therefore have to languish for years without benefit of having their situation determined at trial. In 1998, the Criminal Section of the Uniform Law Conference of Canada passed a resolution asking the Department of Justice to refer the question of the appropriateness of the *Criminal Code* definition of unfitness to the Federal-Provincial-Territorial Working Group on Mental Disorder. A year later, the Working Group expressed the view that the existing *Criminal Code* test and definition of unfitness "provide adequate protection for unfit accused persons and adequate guidance to the courts." Consequently, the Working Group recommended no further amendments.(37)

3. Definition of Mental Disorder

As recommended in the final report of the Mental Disorder Project of the Department of Justice, Bill C-30 "retained and modernized" the insanity test by removing the phrases "in a state of natural imbecility" and "disease of the mind" and substituting "mental disorder."(38) As was the case prior to Bill C-30, an accused still has to establish that he or she was, as a result of a mental disorder, "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong." In 1990, the Supreme Court of Canada reversed its previous position on the interpretation of "wrong" in that context. In *R*. v. *Chaulk*, six of nine judges held that this word meant "morally wrong," as opposed to "legally wrong."(39) That interpretation of section 16 was further refined by the Supreme Court in a 1994 decision establishing that "[t]he accused must possess the intellectual ability to know right from wrong in an abstract sense. But he or she must also possess the ability to apply that knowledge in a rational way to the alleged criminal act."(40) In the aftermath of Mr. Chaulk's subsequent arrest on new murder charges, some have questioned whether the broader interpretation of mental disorder has operated to excuse too many people from criminal liability.

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(37) Uniform Law Conference of Canada, Criminal Section, *Fitness to Stand Trial*, June 1999. This paper was tabled, but not discussed, at the August 1999 Uniform Law Conference.

(38) Department of Justice, *Mental Disorder Project, Criminal Law Review*, *Final Report*, September 1985, p. 20.

(39) *R*. v. *Chaulk*, [1990] 3 S.C.R. 1303.

(40) *R*. v. *Oommen*, [1994] 2 S.C.R. 507, at p. 516.

CONCLUSION

Perhaps because the 1991 amendments were the result of more than 15 years of study and consultation and because the more controversial aspects of the legislation remain unproclaimed, the implementation of Bill C-30 has resulted in only limited criticism from interested groups and individuals. As previously noted, however, some substantive and procedural issues remain unresolved. These are likely to be among the matters canvassed by the committee that is ultimately charged with reviewing the provisions and operation of Bill C-30.