

# The Role and Powers of Forensic Psychiatric Review Boards in Canada: Recent Developments

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## I. Introduction: Overview of the Law of Forensic Psychiatry

The law of forensic psychiatry deals with the criminal justice system's response to criminal conduct caused by mental disorder. In 1992, Canada wholly rewrote its forensic psychiatry law. Parliament enacted a new Part XX.1 of the *Criminal Code of Canada*, titled "Mental Disorder", which provides a detailed code governing the forensic psychiatric system.

The principal reform accomplished by Part XX.1 was the creation of a system of forensic Review Boards in each province. The Boards assumed the role previously played by provincial Cabinets in determining the custodial status of forensic patients. Part XX.1 established the Review Boards as quasi-judicial tribunals which would afford all parties, including the accused, a full panoply of procedural justice rights. The Review Boards overnight became significant players in the lives of forensic patients, and in the professional lives of treatment personnel charged with providing therapeutic services to patients. This represented a quiet revolution in this relatively discreet, yet important world where criminal justice and mental health services meet.

The new system began with trepidation on all sides. Would it adequately protect public safety with respect to those few individuals who present a serious risk owing to serious mental disorder? Would the Review Boards assert a genuine independence from executive government and from the therapeutic community and be willing to find in favour of patients with respect to issues of release into the community? Would the legalization of the decision-making process interfere with efficient psychiatric treatment, including by imposing an adversarial relationship between patients and therapists?<sup>1</sup> Would the new law succeed in balancing the twin goals of a forensic justice system, as later identified by the Chief Justice of Canada?:

Justice requires that [not criminally responsible by reason of mental disorder] accused be accorded as much liberty as is compatible with

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<sup>1</sup> For a review of the early performance of one Review Board, see Isabel Grant, "Canada's New Mental Disorder Provisions: A Case Study of the British Columbia Criminal Code Review Board" (1997) 20 *International Journal of Law and Psychiatry* 419-443.

public safety. The difficulty lies in devising a rule and a system that permits this to be accomplished in each individual's case.<sup>2</sup>

Given these questions, Parliament inserted into the 1992 legislation a clause requiring a parliamentary review of Part XX.1 ten years following its passage.

The required review took place between 2002 and May 19, 2005, when a package of amendments to Part XX.1 were passed and proclaimed into law.<sup>3</sup> Several months later, the Supreme Court of Canada rendered a decision in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*.<sup>4</sup> The combined effect of the legislative amendments and the *Mazzei* decision is to reinforce the predominant role of the Review Boards in the forensic system. This article provides an overview of these developments and their significance.

## A. The Defence of Mental Disorder

Substantive Canadian criminal law adopted the British approach to individuals found to lack the mental element necessary for conviction due to illness or disability rendering them unable to comprehend the nature of their actions. This was formulated in the *M'Naghten*<sup>5</sup> rules governing the defence of "not guilty by reason of insanity" [NGRI], incorporated into section 16 of the *Criminal Code*. Prior to 1992, the *Criminal Code* concerned itself with little other than the bare basis for the NGRI disposition. The *Code* provided that once acquitted on the basis of insanity, the accused person was automatically detained at the pleasure of the Lieutenant Governor, acting on the advice of the Cabinet of the province.<sup>6</sup> The *Code* said nothing further about how executive government was to carry out this responsibility, nor whether forensic patients could challenge their ongoing detention.

In the 1970s, several provinces enacted forensic psychiatry statutes to govern procedural and treatment issues in the system.<sup>7</sup> Most did not. Provincial statutes could not, however, override the ultimate discretionary authority over forensic patients granted by the *Code* to provincial Cabinets. In most cases, this effectively meant that decisions concerning custody and release were left in the hands of treating personnel and hospital directors. In a few high-profile cases, tending to

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<sup>2</sup> *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para 9, 175 D.L.R. (4<sup>th</sup>) 193, McLachlin J. (as she then was) [Winko].

<sup>3</sup> Bill C-10, *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, 1<sup>st</sup> Sess., 38<sup>th</sup> Parl., 2004 (assented to 19 May 2005) S.C. 2005, c. 22.

<sup>4</sup> 2006 SCC 7, [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7 (QL).

<sup>5</sup> *R. v. M'Naghten* (1843) 10 Cl. and F. 200, 8 Eng. Rep. 718. Section 16 of the *Criminal Code* captures the essence of the *Mc'Naghten* rule in this wording: "No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."

<sup>6</sup> *Supra*, note 1 at para. 18.

<sup>7</sup> See for example *Forensic Psychiatry Act*, R.S.B.C. 1979, c.139 (now R.S.B.C. 1996, c. 156).

involve sensational offences, provincial Cabinets were unwilling to release individuals into the community despite advice from treatment teams to the effect that an individual no longer posed a serious risk to society. The forensic system was the last part of Canada's justice system in which such politically driven detention was possible. In 1982, the *Canadian Charter of Rights and Freedoms* came into force. It was widely recognized that the forensic system was vulnerable to a *Charter* challenge. That challenge arose in *R. v. Swain*, which concluded with a decision by the Supreme Court in 1991.<sup>8</sup>

Swain had been charged with aggravated spousal assault, committed during a period of mental disorder. By the time of trial, he had received treatment for his illness and been restored to mental health. Over Swain's objections, Crown counsel in Ontario was permitted to adduce evidence of his insanity at the time of the offence. Swain was found not guilty by reason of insanity, and was ordered detained at the pleasure of the Lieutenant Governor. Swain challenged the constitutionality of both the rule allowing the Crown to seek a finding of insanity, and the Lieutenant Governor warrant system. The Supreme Court of Canada found in Swain's favour on both issues. Although the Court did not base its ruling on equality rights in *Charter* section 15, Chief Justice Lamer located his analysis in the context of the history of discrimination against persons with mental disabilities:

...The mentally ill have historically been the subjects of abuse, neglect and discrimination in our society. The stigma of mental illness can be very damaging. The intervener, [the Canadian Disability Rights Council], describes the historical treatment of the mentally ill as follows:

For centuries, persons with a mental disability have been systematically isolated, segregated from mainstream of society, devalued, ridiculed, and excluded from participation in ordinary social and political processes.

The above description is, in my view, unfortunately accurate and appears to stem from an irrational fear of the mentally ill in our society.<sup>9</sup>

The Court held that section 7 of the *Charter* affirms "respect for the autonomy and intrinsic value of all individuals,"<sup>10</sup> including the right of accused persons to control their own defence.<sup>11</sup> The Court re-fashioned the common law rule, so as to bar the Crown from raising the issue of mental disorder (if the accused has not

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<sup>8</sup> *R. v. Swain*, [1991] 1 S.C.R. 933, 47 O.A.C. 81.

<sup>9</sup> *Ibid.* at para 39.

<sup>10</sup> *Ibid.* at para 34.

<sup>11</sup> *Ibid.* at para 35.

already done so) until the trier of fact has concluded that the accused is otherwise guilty of the offence, but prior to a conviction being entered.<sup>12</sup>

More significantly for this paper, a majority of the Court ruled that Swain's automatic detention for an indeterminate period of time amounted to arbitrary imprisonment in breach of sections 7 and 9 of the *Charter*. Parliament enacted Part XX.1 into law several months later.

## B. Part XX.1 of the *Criminal Code*

The mental disorder provisions in Part XX.1 of the *Criminal Code* [*Code*] replaced the NGRI designation with the concept of an accused's being found "not criminally responsible by reason of mental disorder" [NCRMD]. The substantive basis for the NCRMD finding remained unchanged. In addition to setting out a code for dealing with persons found NCRMD, Part XX.1 also included provisions governing persons who are determined to be unfit to stand trial by reason of mental disorder in the first place. This paper is focussed on the NCRMD stream, rather than the on the issue of fitness.<sup>13</sup>

An NCRMD accused who is found not to pose a significant threat to public safety is entitled to an absolute discharge.<sup>14</sup> In all other cases, the Board must decide between hospital detention and a conditional discharge. Section 672.54 of the *Code* sets out the factors that Review Boards need to consider when making these decisions:

672.54 — Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

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<sup>12</sup> *Ibid.* at para 70.

<sup>13</sup> A brief summary of the "fitness to stand trial" scheme of Part XX.1 is as follows: Where fitness is put in issue, the trial court may order an assessment of the mental condition of the accused. The court can also order that the accused be treated without consent for up to 60 days for the purpose of returning him to mental fitness. So long as a person remains unfit, the criminal trial of the offence is stayed, and the individual falls within the jurisdiction of the Review Board. The unfit accused may either be held in hospital custody or released into the community on conditions. The Board must conduct an annual review of the fitness issue. Every two years, the Crown must satisfy the court that it can make out a prima facie case against the accused for the offence. If not, the court must acquit the accused. If at any point the Board finds that the accused has returned to fitness, it remits the criminal matter back to court for trial of the offence. The Supreme Court of Canada considered the fitness provisions in *R. v. Demers* 2004 SCC 46, [2004] 2 S.C.R. 489. There, the Court ruled unconstitutional, pursuant to section 7 of the *Charter*, the unavailability of an absolute discharge for an unfit accused with a mental handicap who was unlikely ever to be deemed fit to stand trial.

<sup>14</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.672.54(a).

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
- (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Part XX.1 states that Board hearings are to be conducted as informally as conditions warrant.<sup>15</sup> The Crown may choose to appear. The accused has a right to counsel and, subject to certain exceptions, a right to be present throughout the hearing.<sup>16</sup> The Board has discretion to exclude the general public from hearings, if it deems this to be in the best interests of the accused and not contrary to the public interest.<sup>17</sup> The Review Board has a duty to provide reasons for a disposition order.<sup>18</sup> Any party to the proceeding has the right to appeal a disposition made by a Review Board to the province's Court of Appeal on a question of law or fact or of mixed law and fact.<sup>19</sup>

The *Code* requires that Review Boards be comprised of at least five members, and sit in panels of three with at least one psychiatrist on each panel.<sup>20</sup> Should only one psychiatrist be appointed to the Board, then one other member of the Board must be a licensed psychologist or physician.<sup>21</sup> The Chairperson of the Review Board must be a lawyer.<sup>22</sup> Although exercising power under a federal statute, the Boards are appointed by the provincial executive. Judicial review of Review Board decisions takes place in the superior courts of each province.<sup>23</sup>

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<sup>15</sup> *Ibid.* at s.672.5 (2).

<sup>16</sup> *Ibid.* at s. 672.5 (5), (7), (9)-(10).

<sup>17</sup> *Ibid.* at s.672 (6). Any party may adduce evidence, make oral or written submissions, call witnesses, cross-examine any witnesses called by another party and, on application, cross-examine any person who has submitted a written assessment report to the court or Review Board, *ibid.* at s.672.5 (11).

<sup>18</sup> *Ibid.* at s.672.52 (3).

<sup>19</sup> *Ibid.* at s.672.72 (1).

<sup>20</sup> *Ibid.* at s.672.38 (1) and s. 672.39

<sup>21</sup> *Ibid.* at s.672.39

<sup>22</sup> *Ibid.* at s.672.4(1), 672.41(1).

<sup>23</sup> Section 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 defines "federal board, commission or other tribunal" (the basis of Federal Courts' supervisory jurisdiction) in terms that exclude bodies "constituted or established by or under a law of a province." Section 672.38(2) of the *Criminal Code* states that "A Review Board shall be treated as having been established under the law of the province."

### C. The Supreme Court Decision in *R. v. Winko*

Forensic patients and their advocates have long expressed concern that indefinite detention makes it possible for a mentally disordered person to be detained well beyond the period most offenders found guilty of the same act would spend in prison. This concern was foremost in their minds at the time when Part XX.1 was adopted, all the more so because it applies to individuals accused of both indictable and summary offences. Parliamentarians apparently agreed with this concern. The 1992 legislation contained a “capping” provision that placed a limit on the maximum period of detention an NCRMD accused could serve, depending on the offence which they had committed. However, the capping provision was never proclaimed. Ultimately, a Charter challenge with respect to this issue made its way to Court. The case was *R. v. Winko*, and it resulted in a sweeping Supreme Court decision upholding the general parameters and processes of Part XX.1.

*Winko* claimed that the indefinite nature of hospital detention for NCRMD accused constituted discriminatory treatment of persons with a mental disability, contrary to section 15(1) of the *Charter*. In 1999, the Supreme Court dismissed this challenge as it applied to NCR offenders.<sup>24</sup> The Court ruled that properly interpreted, section 672.54 of the *Code* does not infringe sections 7 or 15 of the *Charter*. Writing for the majority, Justice McLachlin (as she then was) stated that it was inappropriate to perform a mechanistic comparison of the confinement periods faced by a convicted accused and an NCRMD accused prosecuted for the same act. She held that Part XX.1 of the *Code* is not punitive in nature, but provides for a therapeutic response to mental disorder.<sup>25</sup> She argued that this different response promotes, rather than denies, the right of the mentally disordered individual to be equally respected under the law;<sup>26</sup> and further, that the possibility of indefinite detention does not reflect derogatory group stereotypes, but represents a means of responding to individual need. Such an approach, in her view, is consistent with achieving substantive equality.<sup>27</sup> In separate concurring reasons, Justices Gonthier and L’Heureux-Dubé agreed on this point, and remarked that:

Section 672.54 is not overbroad precisely because it is tailored to fit the particular situation of the NCR accused....If punishment clearly cannot be one of the objectives of Part XX.1, then the correlative principle of proportionality cannot apply either.<sup>28</sup>

The Court engaged in an interpretation of the factors set out in section 672.54 to ensure that they met with *Charter* requirements. It said that a Review Board must

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<sup>24</sup> The three companion appeals to *Winko* were *Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722, 175 D.L.R. (4<sup>th</sup>) 275; *Orlowski v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 733, 175 D.L.R. (4<sup>th</sup>) 283; and *R. v. LePage*, [1999] 2 S.C.R. 744, 175 D.L.R. (4<sup>th</sup>) 269.

<sup>25</sup> *Winko*, *supra* note 2 at para. 39-42.

<sup>26</sup> *Ibid.* at para. 88.

<sup>27</sup> *Ibid.* at para. 90.

<sup>28</sup> *Ibid.* at paras. 170,173.

turn its mind to all four of the mandated factors in s.672.54 outlined above. When determining whether or not the accused is a “significant threat to the safety of the public”, the decision-maker must base its finding on the evidence presented at the hearing. There is no presumption of dangerousness, and the NCRMD accused does not have the burden of proving he or she does not pose a significant threat. If the Board is unable to conclude that the NCRMD accused constitutes a significant threat to the public’s safety, the individual must be granted an absolute discharge.<sup>29</sup>

The Court found that a “significant threat to the safety of the public” means “a real risk of physical or psychological harm occurring to individuals in the community” that is serious, not merely trivial or annoying.<sup>30</sup> Neither a “minuscule risk of grave harm” nor a “high risk of trivial harm” will meet this threshold.<sup>31</sup> Further, the conduct giving rise to the harm must be criminal in nature — the Board must conclude that the “individual poses a significant risk of committing a serious criminal offence.”<sup>32</sup>

The Court noted that Part XX.1 creates an inquisitorial as opposed to an adversarial legal regime.<sup>33</sup> Thus, the Review Board has the duty to seek out enough evidence (both for *and* against restricting the liberty of the NCRMD accused) to make the best disposition.<sup>34</sup> Evidence of a past offence is not by itself sufficient to prove that the individual continues to pose a significant threat, but it may be used to demonstrate a propensity of the accused to commit harmful acts.<sup>35</sup>

The Court emphasized that if a Review Board concludes that the individual is a “significant threat” to the community, it must again turn to the factors that require balancing under s.672.54 in making its order concerning detention or conditional release. The Board must consider the individual’s circumstances,<sup>36</sup> and make the disposition that is least onerous and least restrictive to the accused given these considerations.<sup>37</sup>

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<sup>29</sup> *Ibid.* at para. 49.

<sup>30</sup> *Ibid.* at para. 57, 62.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at para. 54, 62.

<sup>34</sup> *Ibid.* at para 54. The Court said that appropriate evidence would include: \*the circumstances of the original offence, the past and expected course of the NCR accused’s treatment, if any, the present state of the NCR accused’s mental condition, the NCR accused’s own plans for the future, the support services existing for the NCR accused in the community, and perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. *Ibid.* at para 61.

<sup>35</sup> *Ibid.* at para 60.

<sup>36</sup> *Ibid.* at para 62.

<sup>37</sup> *Canadian Criminal Code, supra* note 14, s.672.54.

## II. The Legislative Review Process and Bill C-10

Parliament's *Standing Committee on Justice and Human Rights* carried out the ten year review of Part XX.1 mandated by the legislation between 2002 and 2004. The submissions received by the Committee broke down roughly between groups who promoted the public safety goal of the forensic system, such as the Canadian Chiefs of Police, and groups promoting the civil liberties goal, such as the Canadian Bar Association, and patient advocacy organizations such as the Psychiatric Patients' Advocate Office [PPAO], in Ontario.

In general, the more dramatic positions argued by these groups did not get taken up by the Standing Committee or, in the end, by Parliament. The PPAO, for instance, proposed that Part XX.1 of the *Criminal Code* be amended to include a purpose statement that would emphasize the need for rehabilitation and recovery services. Further, PPAO continued to push for the repeal of treatment without consent for those found unfit to stand trial under s.672.58. In contrast, the Canadian Association of Chiefs of Police proposed that NCRMD accused should also be denied the right to refuse treatment.<sup>38</sup> The proposals by both sides on this controversial matter went unheeded.

A more subtle difference in the position of these groups is reflected in their view of the appropriate role and powers of the forensic Review Boards. Patient rights' groups have tended to view enhanced powers of the Boards in the area of treatment decision-making as a good thing, on the basis that it reduces the authority of treatment professionals in the lives of patients. In the end, the legislation passed by Parliament in May, 2005 expanded the jurisdiction of the Review Boards primarily in regard to what might be termed "housekeeping measures." On the whole, Parliament rejected any increased role for the Boards in governing issues of forensic treatment. In the following brief overview, we classify the changes instituted by Bill C-10 in this way:

- A. Responses to *Winko*
- B. Miscellaneous Changes to Review Board Powers
- C. Review Board Powers Concerning Assessment and Treatment

It is the latter category which is of greatest interest, and which links to the Supreme Court of Canada's recent ruling in *Mazzei v. B.C.*

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<sup>38</sup> House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Bill C-10 — Meeting No. 5*. 38<sup>th</sup> Parl., 1<sup>st</sup> sess., (15 November 2004) at 1600 (Mr. Vince Bevan, Canadian Association of Chiefs of Police). Mr. Bevan made reference to the Supreme Court of Canada's decision in *Starson v. Swayze* [2003] 1 S.C.R. 722, where the court upheld the respondent's right to refuse treatment for his mental illness.

## A. Responses to *Winko*

Bill C-10 repealed the “capping” provision that was enacted in 1991 but never proclaimed.<sup>39</sup> Given the ruling in *Winko*, the provisions were no longer thought necessary.<sup>40</sup> There, the Supreme Court held that the detention of a NCR accused for a potentially indeterminate period of time under Part XX.1 of the Code, did not violate sections 7 or 15 of the *Charter*.<sup>41</sup> The Criminal Bar did not argue for retaining the capping provision. It submitted that it was sufficient from a justice point of view for a disposition order to be consistent with the principles concerning individual assessment and least onerous disposition set out in *Winko*. The Bar expressed the concern, however, that Review Boards apply the *Winko* principles inconsistently, and asked that a comprehensive national evaluation of Review Board performance be undertaken.<sup>42</sup>

The unproclaimed provisions relating to “dangerous mentally disordered accused” in section 672.65 were also repealed. These provisions were contemplated to address the concern that the capping provisions could result in the discharge of individuals who still posed a significant threat to public safety.<sup>43</sup> In the event the court found the accused to be a dangerous mentally disordered accused, under section 672.65 (4) it could increase the cap to detention for life.<sup>44</sup> With the repeal of the capping provisions, these provisions become unnecessary.<sup>45</sup>

## B. Timelines for Hearings

Review Boards had experienced difficulties meeting certain of the timelines set out in Part XX.1, particularly the mandatory review of all dispositions, other than absolute discharges, every 12 months. The PPAO and the Canadian Bar Association opposed extending the time period for mandatory reviews of disposition, arguing that such an extension would imply a presumption of dangerousness, contrary to the thrust of the Supreme Court’s ruling in *Winko*.<sup>46</sup> Nevertheless,

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<sup>39</sup> *Supra* note 3 at cl. 24.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Winko v. British Columbia* (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, 175 D.L.R. (4<sup>th</sup>) 193.

<sup>42</sup> Criminal Bar submission at 8. A provision in section 672.65 of the Criminal Code dealing with the “dangerous mentally disordered accused” had also remained unproclaimed since 1991, and was repealed in Bill C-10. It had addressed the concern that ‘capping’ might result in discharges of dangerous persons whose treatment had not progressed. With the repeal of the capping provision, this concept became unnecessary. National Criminal Justice Section, Canadian Bar Association, *Bill C-10: Criminal Code Amendments (Mental Disorder)* (November 2004) at 8. Online: <<http://www.cba.org/CBA/submissions/pdf/04-43-eng.pdf>>.

<sup>43</sup> Wade Raaflaub, Parliamentary Information and Research Service, *Legislative Summary: Bill C-10: An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts* (20 May 2005) at 28.

<sup>44</sup> Proposed Addition to C.C.C. at s.672.65 (3).

<sup>45</sup> *Supra* note 43 at 29.

<sup>46</sup> Ontario, Psychiatric Patient Advocate Office, *Position Paper: Submission on Bill C-10* (November 2004) at section 5, online: <<http://www.ppa.gov.on.ca/pos-c10.html>>. *Supra* note 42 at 9.

Parliament addressed the Boards' concerns by empowering them to extend the time for holding a review hearing to a maximum of 24 months in certain circumstances.<sup>47</sup>

### C. Victims' Rights

Bill C-10 significantly expands the authority of Review Boards with respect to the protection of the identity of victims and witnesses. A new section 672.501 mirrors the publication ban provisions of the *Criminal Code* for judicial proceedings.<sup>48</sup> Twelve subsections outline the circumstances when the Review Board can or must make an order prohibiting the publication by document, broadcast, or any other transmission, of any information that could identify the victim or witness. Failing to comply with such an order is a summary offence.<sup>49</sup> The Board must order a publication ban to protect the identity of the victim or any witness under the age of 18 when the accused is charged with a sexual or other offence referred to in s.486(3) of the *Code*.<sup>50</sup> The Board must also make an order in a case where the accused is charged with an offence relating to child pornography, where the publication of any information could be used to identify a person depicted in the pornography.<sup>51</sup>

In all other cases, the Review Board has the discretion to order a publication ban if satisfied that it is necessary for the proper administration of justice.<sup>52</sup> The Review Board may hold an *in camera* hearing in order to make this determination,<sup>53</sup> and may impose any conditions it deems fit.

The new legislation requires that victims be given notice of all disposition and review hearings. A Review Board must notify the victim of their right to file a statement if the Board believes it may consider an absolute or conditional discharge because of a change in the accused's mental condition.<sup>54</sup> Section 672 (15.1) allows

<sup>47</sup> Section 654.81 states that an extension may be granted if (a) counsel for the accused and the Attorney General consent to the extension, or (b) where the accused was found NCR for a "serious personal injury offence," is ordered detained in hospital, and the Review Board is satisfied that the condition of the accused is not likely to improve during the period of the extension. *Supra* note 14 at s. 654.81.

<sup>48</sup> *Supra* note 14 at s. 486.

<sup>49</sup> *Supra* note 3 at cl. 17 (adding s.672.501 (11)). S.672.501 (12) ensures that if there is a proceeding against a person charged with failing to comply with a publication ban order made by the Review Board, the publication ban continues to prohibit any other disclosure of the information.

<sup>50</sup> *Supra* note 3 at cl. 17 adding s.672.501 (1).

<sup>51</sup> *Supra* note 3 at cl. 17 adding s.672.501 (2). This includes any representations, written material or recordings that constitute child pornography under s.163.1.

<sup>52</sup> *Supra* note 3 at cl. 17 adding s.672.501 (3) However, this ban does not foreclose the use of the information when it is required for certain limited reasons in the administration of justice as long as the purpose of the disclosure was not to make the information known to the community at large (addition s.672.501 (4)).

<sup>53</sup> *Supra* note 3 at cl. 17 adding s.672.501 (7). The details of all the contents of the application and application hearing are to be confidential unless the Review Board decides against the publication ban (addition s.672.501 (10)).

<sup>54</sup> *Supra* note 3 at cl. 16 (3) adding s.672.5 (13.2). In the vast majority of cases, review hearings will be held before a Review Board, rather than the court.

for the oral presentation of the impact statement by a victim.<sup>55</sup> The Review Board can decline to hear an oral presentation where it believes this would interfere with the proper administration of justice.<sup>56</sup>

The Bar questioned whether these amendments struck a proper balance between the rights of victims and the rights of accused. It reminded the legislators that NCRMD accused and persons found unfit have *not* been found guilty of an offence. Moreover, in the instance of an accused found unfit to stand trial, the *actus reus* of the offence will not have been proven. The Bar argued that in these circumstances, an alleged victim should not have the same status as the victim of a criminally convicted offender. In addition,

Inviting participation of victims at Review Board hearings risks altering the primary focus of the proceedings to the victim and the facts of the case, rather than the psychiatric state of the accused, the medical prognosis and the risk to public safety.<sup>57</sup>

The PPAO agreed. It questioned the appropriateness of allowing oral statements to be presented on an annual basis.<sup>58</sup> It argued that this would distract Review Boards from their task of assessing evidence going to the *current* condition and level of risk of the individual accused, instead highlighting actions that may have occurred when the individual was at a “low point in their illness.”<sup>59</sup>

The Canadian Professional Police Association, however, fully supported the proposed amendments.<sup>60</sup> In its view, the opportunity for the accused to hear from the victim about the impact of his actions would “reinforce the importance of continuing with medication, even if the treatment presents undesirable side effects.”<sup>61</sup>

### C. Review Board Powers Concerning Assessment and Treatment

Part XX.1 granted only courts the power to order psychiatric assessments.<sup>62</sup> In carrying out their duties, Review Boards depended on those original assessments, and thereafter on assessments produced by treatment personnel. The Canadian Bar Association argued for a broad Review Board jurisdiction to order assessments,

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<sup>55</sup> *Supra* note 3 at cl. 16 (3) adding s.672 (15.1)

<sup>56</sup> *Supra* note 3 at cl. 16 (3) adding s.672.5 (15.1)

<sup>57</sup> *Ibid.*

<sup>58</sup> *Supra* note 42 at page 10.

<sup>59</sup> *Ibid.*

<sup>60</sup> Canadian Professional Police Association, *Brief to the Senate Standing Committee on Legal and Constitutional Affairs Regarding Bill C-10, (An Act to Amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts)* (4 May 2005) at 8, online: CPPA <[http://www.cppa-acpp.ca/justice\\_reform/index\\_e.asp](http://www.cppa-acpp.ca/justice_reform/index_e.asp)> [CPPA Submission].

<sup>61</sup> *Ibid.* at 9

<sup>62</sup> *Supra* note 14 at s. 672.11

particularly when an accused person is not satisfied with the assessment provided by a hospital.<sup>63</sup> Bernd Walter, Chair of the British Columbia Review Board, echoed this concern:

The board is a quasi-judicial body, and should be trusted to order the type of assessment it requires to discharge its inquisitorial burden and mandate, and to tailor its disposition to fit the accused's individual circumstances...<sup>64</sup>

Mr. Walter indicated that the definition of “assessment,” was inappropriately restricted to the judicial function of rendering a verdict on the NCRMD issue, and therefore did not enable Review Boards to obtain needed information.<sup>65</sup> He suggested that Review Boards be able to order assessments tailored to the forensic risk of the accused, and to the accused's level of intellectual functioning, cognitive impairment, dementia, or fetal alcohol syndrome.<sup>66</sup> The Ontario Review Board and Review Boards Canada joined in recommending that the restrictive criteria in s.672.121 be eliminated.<sup>67</sup>

Parliament responded in a limited fashion to these proposals. It granted Review Boards a new power to order psychiatric assessments in certain specific circumstances: where the accused has been recently transferred to Board jurisdiction, the last assessment is more than a year old, or no assessment report is available.<sup>68</sup>

The PPAO also advocated giving Review Boards the power to order that community therapeutic and support services be provided to NCRMD accused. In its view, this could help to reduce the number of occasions when individuals released into the community find themselves unable to locate or access appropriate resources, resulting in their return to a psychiatric hospital.<sup>69</sup> Chair of the British Columbia Review Board Bernd Walter agreed, saying:

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<sup>63</sup> Criminal Bar submission *supra* note 42 at 2.

“In spite of our general support, we believe the proposal in Bill C-10 is not broad enough. For example, it does not address situations where a party is dissatisfied with the assessment provided by a hospital, and argues that the Board should direct a new assessment by an independent assessor .... In our view, the Board should be able to hear arguments about the adequacy of the report and, if necessary, order a new one prepared by another assessor.”

<sup>64</sup> House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Bill C-10 — Meeting No. 5*, 38<sup>th</sup> Parl., 1<sup>st</sup> sess., (15 November 2004) at 1530 (Mr. Bernd Walter, Chair, British Columbia Review Board).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Bill C-10 — Meeting No. 5*, 38<sup>th</sup> Parl., 1<sup>st</sup> sess., (15 November 2004) at 1540 (Mr. Joe Wright, Secretary, Counsel, Ontario Review Board, Review Boards Canada).

<sup>68</sup> *Supra* note 3 at cl. 3 adding s.672.121.

<sup>69</sup> *Supra* note 46 at section 2.

[I]t seems to me manifestly unfair, and perhaps even unconstitutional, that parties before a tribunal are given different statuses in the context of a hearing that is fundamentally concerned with values and entitlements that are protected by sections 7 and 11 of the Charter of Rights and Freedoms. It would be very easy to amend section s.672.54 to make it clear that the board may impose on any party conditions it considers necessary to carry out the requirements and the criteria imposed in that pivotal defining section.<sup>70</sup>

Parliament declined to grant powers of this kind to Review Boards.

### III. The Supreme Court Decision in *Mazzei v. Director of F.P.I. (SCC, 2006)*

While Parliament declined to expand Review Board jurisdiction in the areas of assessment and treatment of NCRMD accused in the 2005 amendments to Part XX.1 of the *Criminal Code*, the question of Boards' powers to intervene in matters going to treatment has arisen repeatedly in the jurisprudence emerging from Review Board decisions. The argument has generally aligned forensic hospitals and governments on one side, arguing for restricted Board jurisdiction, against Boards and patients on the other.

Prior to the *Mazzei* decision in March 2006, the nature of this argument was best demonstrated in two cases decided by the Supreme Court in late 2003: *Penetanguishene Mental Health Centre*<sup>71</sup> v. *Ontario* and *Pinet v. St. Thomas Psychiatric Hospital*<sup>72</sup>. In both cases, the principal issue concerned whether the duty placed on Review Boards by s. 672.54 to ensure that its dispositions are "the least onerous and least restrictive to the accused" extends to the entirety of a Board's order, including any conditions placed on an accused's release into the community or hospital detention. In *Penetanguishene*, the Ontario Review Board ordered that the accused be detained in hospital, but added the conditions that he be held in a medium security rather than a maximum security facility, and that he have certain grounds privileges.

The government of Ontario appealed, arguing that the Review Board had erred in ordering the added conditions based on its understanding of what would be least restrictive of the accused's liberty, within the context of hospital detention. The government argued that section 672.54 does not "fetter" the Board's discretion in that regard. Rather, they argued, the liberty interest pertained only to the Board's choice of 'bare' disposition between an absolute discharge, a conditional discharge, and hospital detention. Once having made that decision, the Board was not obliged to take the accused's liberty interests into account.

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<sup>70</sup> *Ibid.*

<sup>71</sup> 2004 SCC 20, [2004] 1 S.C.R. 498.

<sup>72</sup> 2004 SCC 21, [2004] 1 S.C.R. 528.

An interesting feature of this case is that the Ontario and Nunavut Review Boards *opposed* the government's position, even though that position ostensibly argued for a broad, unfettered Board discretion. What was going on? In short, the Crown, on behalf of its forensic officials, was seeking to keep the Review Board out of "micro-managing" (its word) the in-hospital treatment program of an NCRMD accused in the interests of greater freedom of movement than the hospital might deem appropriate.

The Court unanimously rejected the government's interpretation of section 672.54. Justice Binnie stated:

The heart of the Crown's argument is that a "least onerous and least restrictive" requirement may undermine treatment needs. The Crown argues the "least onerous and least restrictive" requirement would impose undue rigidity, whereas the "appropriateness" test guarantees flexibility. With respect, these arguments do not do justice to the wording of s. 672.54. Just as the Crown is wrong, I think, to try to detach the word "appropriate" from the factors listed in s. 672.54 in order to give Review Boards greater "flexibility", so, too, the Crown is wrong, with respect, to try to detach the "least onerous and least restrictive" requirement from its statutory context. Section 672.54 directs the Review Board to have regard to "the other needs of the accused". At the forefront of these "other needs" is the need for treatment.<sup>73</sup>

This decision implies that Review Boards may include in their orders conditions that enter with some detail into the planning of the context within which forensic psychiatric treatment is provided to the NCRMD accused. That question arose again, but in a much more direct fashion, in *Mazzei*.

Vernon Mazzei is a long-time "client" of the forensic psychiatric system in B.C. In 1986, Mazzei was found "not guilty by reason of insanity" with respect to a number of criminal offences, including robbery and unlawful confinement. Justice Bastarache, writing for the unanimous Court, described the diagnosis that has remained in place since that time as follows:

Mazzei was diagnosed by a number of psychiatrists; the consensus seems to be that he suffers from chronic paranoid schizophrenia, a serious antisocial personality disorder, and organic brain damage, all of which appear to have been exacerbated by long-term and chronic substance abuse.<sup>74</sup>

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<sup>73</sup> *Supra* note 71 at para 67.

<sup>74</sup> *Supra* note 4 at para. 2.

Following its creation in 1992, the B.C. Review Board granted Mazzei several conditional releases from the Forensic Psychiatric Hospital in Port Coquitlam, B.C., the province's major forensic facility. On every occasion, Mazzei breached the terms of his release, and was returned to hospital custody. The order which gave rise to the proceedings before the SCC related to a breach in 2001. At the subsequent B.C.R.B. hearing in April 2002, Mazzei's counsel argued that his client, an aboriginal, wished to attend a First Nations residential rehabilitation program. The treatment team at F.P.I. sought merely the renewal of the hospital custody order, without suggesting any new therapeutic options or prospects for Mazzei. B.C.R.B. members expressed frustration with the treatment team's lack of preparation and imagination<sup>75</sup>:

The Board made a ten-point order concerning Mazzei's continued custodial status and treatment program. The last three points in the order read as follows:

8. THAT for the accused's next hearing the Director undertake a comprehensive global review of Mr. Mazzei's diagnostic formulations, medications and programs with a view to developing an integrated treatment approach which considers the current treatment impasse and the accused's reluctance to become an active participant in his rehabilitation;

9. THAT for his next hearing the Board be provided with an independent assessment of the accused's risk to the public in consideration of the above refocused treatment plan;

10. THAT the Director undertake assertive efforts to enroll the accused in a culturally appropriate treatment program ...

The Director of Forensic Services appealed from this order to the B.C. Court of Appeal, which concluded that the impugned conditions exceeded the Board's jurisdiction, and set them aside. On appeal to the SCC, the Court identified two issues going to the jurisdiction of the Review Board: (a) does s. 672.54 contemplate the Review Board's being able to make orders binding on any person other than the accused, including the Director?; (b) does the section authorize the Board to make decisions concerning aspects of a forensic patient's treatment program?

The Court had relatively little difficulty with the first issue. The decisions in *Penetanguishene* and *Pinet* implied that the Board had the power to bind the Director. Moreover, a straightforward textual interpretation of s. 672.54 suggested that the provision gives power to Review Boards to make orders that are binding

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<sup>75</sup> *Ibid.* at para. 3 (“The Board expressed concern over the “late” and inadequate information provided by Mazzei's case manager and treatment team; his supervising psychiatrist's absence at the hearing; and his case manager's inability to answer many of the Board's questions”).

on treatment personnel as well as on the accused.<sup>76</sup> Parliament was entitled to assume that as statutory delegates, forensic personnel would be bound by the orders of this administrative tribunal.

The second issue presented more difficulty. The B.C. Director of Forensic Services sought to have the Court draw a bright line between the Board's power to make orders concerning the accused's custodial status, including conditions going to an accused's remaining in the community, and the power of Forensic Services and its treatment teams to make decisions concerning treatment matters.

Counsel for Mazzei argued that this issue had been answered by the Court itself in *Winko*, when it described the twin goals of Part XX.1 of the *Criminal Code* in the following terms as "protecting the safety of the public and treating the offender family."<sup>77</sup>

Counsel argued that the reference to 'fair treatment' meant that the therapeutic programs provided to forensic patients must meet a certain standard of quality. The Supreme Court disagreed. It stressed that by using the phrase "fair treatment" in *Winko*, the Court had intended only to refer to fair *legal process*, and not to *medical treatment*:

Medical treatment was therefore part of the old [pre-1992] scheme, but it was "not prescribed by the impugned provisions; rather it constitutes the means to achieving their end, the protection of society" (*Swain*, at p. 1005). The problem with the former scheme was not its purpose or the way in which it incorporated a peripheral or ancillary concern for the medical treatment of mentally ill offenders; the problem lay in the lack of protections for procedural fairness and for ensuring the dignity and liberty interests of the NCR accused.<sup>78</sup>

The Court proceeded to state that section 672.54 does not grant Review Boards the power to order "a particular course of treatment." It said this would be inconsistent with the division of powers over health care between the federal and provincial governments set out in the *Constitution Act, 1867*. A federal statute such as the *Code* could not grant a power to make treatment decisions.<sup>79</sup> Further, the Court said, Review Boards need have only one registered psychiatrist as a member, which implies that they lack the expertise to make specific treatment decisions.

Nevertheless, the Court proceeded to distinguish between *making* treatment decisions, and *supervising* the overall treatment program of an accused. The Court

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<sup>76</sup> *Ibid.* at paras 19-22 (The Court explained the fact the provision refers only to the "accused" by saying that the accused is the only party who would not be assumed to be bound by a review Board order unless expressly so stated.)

<sup>77</sup> *Supra* note 2, at para 42.

<sup>78</sup> *Ibid.* at para. 26.

<sup>79</sup> *Ibid.* at para. 34.

described the latter as lying within the role of the Review Board. The Court elaborated on the subtle distinction between these two things in this way:

In essence, conditions “regarding” medical treatment or its supervision are those conditions that Review Boards may impose to ensure that the NCR accused is provided with opportunities for appropriate and effective medical treatment, in order to help reduce the risk to public safety and to facilitate rehabilitation and community reintegration. The scope of this power would arguably include anything short of actually prescribing that treatment be carried out by hospital authorities. It would therefore include the power to require hospital authorities and staff to question and reconsider past or current treatment plans or diagnoses, and explore alternatives which might be more effective and appropriate.<sup>80</sup>

Only by fulfilling such a supervisory role ‘regarding’ treatment can Review Boards properly serve the dual purposes of Part XX.1 — enhancing public safety, while protecting the liberty interests of the accused.

Justice Bastarache then discussed what is necessary to the performing of this supervisory role. First, a Board must “form its own independent opinion of an accused’s treatment plan and clinical progress, and ultimately of the accused’s risk to public safety and prospects for rehabilitation and reintegration.”<sup>81</sup> That is, the Board must be able to assess efficacy of past and proposed treatment plans independently of treating personnel. Its task is not merely to accept what it is told by them about treatment matters. To form an independent assessment, the Board requires adequate information:

These goals simply cannot be accomplished without accurate, independent, and up-to-date information on an accused’s mental condition, treatment plan, clinical progress, and prospects for rehabilitation. This justifies a Board’s power to supervise the medical treatment provided thus far, and to suggest or explore alternative approaches where necessary. Review Boards may therefore validly require hospital staff to re-examine a diagnosis or a treatment plan, and to consider alternatives which might be more effective or appropriate, - thus requiring hospital authorities to justify their position regarding any “treatment impasse”.<sup>82</sup>

Having determined that the B.C. Review Board had the jurisdiction to ‘supervise’ an NCRMD accused’s treatment plan, the Court proceeded to consider whether the three impugned orders were reasonable on the particular facts of

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<sup>80</sup> *Ibid.* at para. 39.

<sup>81</sup> *Ibid.* at para. 42

<sup>82</sup> *Ibid.* at para. 42

Mazzei's case. In so doing, the Court made it even more apparent that it believes Review Boards should play an active role in addressing problems arising the therapeutic relationship between the forensic system and the individual patient.

With respect to the order that the Director conduct a comprehensive review of Mazzei's diagnosis and current treatment, the Court found that this did not interfere "with the medical services approved and implemented by the Director and hospital staff; nor does this condition interfere with the Director's ultimate discretion and authority with respect to the specific treatment provided". In a crucial passage, the Court added:

It does, however, represent a clear and acceptable limit on the Director's ability to act as the sole judge of the efficacy of a treatment approach, and as a valid exercise of the Board's supervisory powers over the provision of opportunities for appropriate medical treatment.<sup>83</sup>

The second condition required that the Director obtain an "independent risk assessment" of Mazzei in light of treatment options. This too served the Board's legitimate interest in having information available to assist it in forming its own "independent" assessment, especially in the circumstances of a disagreement between hospital personnel and accused:

However, this condition must also be interpreted in light of the Board's statutory mandate and the need to gather relevant information in order to craft an appropriate disposition. Independent advice would be justified in light of the aforementioned treatment impasse. The Board must be entitled to demand new independent information to be provided where there is a significant difference of opinion between the accused and the treatment team with respect to the current approach, and an apparent breakdown in communication and trust. Thus, in ordering an independent assessment of Mazzei's threat to public safety, in light of the failure of past treatment approaches and the prospect of new alternative options, the Board was clearly exercising a valid power to supervise the progress of Mazzei's rehabilitation.<sup>84</sup>

The third and last disputed order called for the Director to "undertake aggressive efforts to enroll the accused in a culturally appropriate treatment program." The Court acknowledged that this condition came close to prescribing a specific treatment program. However, Justice Bastarache noted, the condition did no more than encourage the Director to explore options, and did not foreclose his ability to find any such options unsuitable for Mazzei.<sup>85</sup>

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<sup>83</sup> *Ibid.* at para. 57.

<sup>84</sup> *Ibid.* at para. 59

<sup>85</sup> *Ibid.* at para. 62.

The Supreme Court therefore concluded that not only were all three contested conditions within the Review Board's jurisdiction under section 672.54 of the *Code*, but that they were also reasonable in the circumstances of the case.

#### **IV. Conclusion**

Fifteen years ago, Canada's laws governing forensic psychiatry entered a new era. The hallmark of this new era was the introduction into the system of an administrative tribunal process to govern the custodial status of persons found not criminally responsible for the commission of criminal offences by reason of mental disorder. In the last three years, we have seen both legislative and judicial reviews of how well this system is performing, and in particular, whether the scope of the tribunal's authority should be narrowed or expanded. The legislators did not deliver a verdict on the latter question. Their unwillingness to do so may indicate an underlying satisfaction with the structure created in 1992. It likely also reflects a desire not to choose sides in this delicate arena where public safety meets personal liberty. The Supreme Court has provided firmer direction. It has confirmed that forensic Review Boards are important players in the forensic system, whose role is not confined merely to deciding on the detention and release of those subject to their jurisdiction.

