

ARTICLE

# BILL C-14: A STEP BACKWARDS FOR THE RIGHTS OF MENTALLY DISORDERED OFFENDERS IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

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CITED: (2014) 19 Appeal 63–81

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## INTRODUCTION

The Canadian criminal justice system has long grappled with those who commit criminal acts while suffering from a mental disorder. As stated by Justice McLachlin (as she then was) in *Winko v British Columbia (Forensic Psychiatric Institute)* (“*Winko*”), “[i]n every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.”<sup>1</sup> The task has certainly not been an easy one to date with lawmakers struggling to strike the appropriate balance between protecting the public and respecting the liberty of mentally disordered offenders. In 1992, this balance was achieved with the disposition scheme for offenders found not criminally responsible on account of mental disorder (NCRMD). Unfortunately, Bill C-14 will change the existing regime and could negatively impact both the criminal justice and the mental health system.<sup>2</sup> This paper will outline the origins of the mental disorder defence in Canada, examine how the NCRMD scheme currently operates, discuss a recent case involving a NCRMD accused, and finally analyze the proposed amendments. Sensationalistic cases involving mentally disordered offenders combined with a lack of understanding by the public as to how the mental disorder defence operates have caused the current government to push for unnecessary and unconstitutional amendments to the NCRMD regime.

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1 *Winko v British Columbia (Forensic Psychiatric Institute)*, [1998] 2 SCR 625 at 637–638, [1999] SCJ No 31 [*Winko*].

2 Bill C-14, *An Act to Amend the Criminal Code and the National Defence Act (Mental Disorder)*, 2nd Sess, 41st Parl, 2013 (first reading in the Senate November 26, 2013) [Bill C-14]. Previously introduced as Bill C-54 in the 1st Session of the 41st Parliament. The bill was awaiting second reading debate in the Senate when it died on the Order Paper because Parliament was prorogued in Fall 2013. By an Order made by the House of Commons on October 21, 2013, Bill C-14 was deemed approved at all stages completed in the previous session.

## I. HISTORY

The law has long provided an exemption from criminal responsibility for those who were mentally disordered at the time of the offence.<sup>3</sup> In Britain, the *Criminal Lunatics Act* was passed in the early 19th century and established a special verdict where, if the jury found that an accused was insane at the time of the offence, the court would direct that the accused be kept in strict custody “[...] until his Majesty’s pleasure shall be known.”<sup>4</sup> *M’Naghten’s Case* clarified the elements of the defence. In 1843, Daniel M’Naghten murdered the civil servant Edward Drummond and was found not guilty on the grounds of insanity. There was negative public reaction to this decision and the English common law judges were asked to state their opinion regarding the defence. The court held that:

The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.<sup>5</sup>

In Canada, the substantive defence and the post-verdict lieutenant governor’s warrant (LGW) system were both based on the British approach to insanity.<sup>6</sup> Offenders found not guilty by reason of insanity (NGRI) were automatically detained pursuant to the LGW system.<sup>7</sup> This regime was focused on the protection of society at the expense of the mentally ill offender’s liberty interests. The lieutenant governor had the power to indeterminately detain individuals found NGRI or to discharge them if it was in the offender’s best interests and not contrary to the public interest.<sup>8</sup> The offender had no ability to either appeal a decision or force the lieutenant governor to make a ruling within a certain time period.<sup>9</sup> In 1969, an amendment was implemented allowing the lieutenant governor to appoint an advisory board that could make recommendations regarding the dispositions of NGRI accused; however, this decision was entirely discretionary.<sup>10</sup> The LGW system afforded no procedural protections for mentally disordered offenders and although the need for reform was recognized, change would not be realized until the 1990s.

3 For a discussion of the historical origins of the mental disorder defence, see Edwin A Tollefson & Bernard Starkman, *Mental Disorder in Criminal Proceedings* (Toronto: Thomson Carswell, 1993) at 13-16 [Tollefson]. See also, Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law*, loose-leaf (consulted on January 6, 2014) (Toronto: Thomson Carswell, 2006) ch 4 at 1-3 [Barrett].

4 Tollefson, *supra* note 3 at 14.

5 *M’Naghten’s Case* (1843), 10 CL & Fin 200 at 209 [*M’Naghten’s Case*], cited in Canada, Royal Commission on the Law of Insanity as a Defence in Criminal Cases, *Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (Hull: Queen’s Printer, 1956) at 11 [*Report of the Royal Commission*].

6 Section 19 of *The Criminal Code, 1892*, SC 1892, c 29, the original provision that dealt with the substantive defence, was replaced by section 16 which came into force in the *Criminal Code, SC 1953-54*, c 51. The wording of the provision was heavily borrowed from *M’Naghten’s Case*.

7 Subsection 542(2) of the *Criminal Code*, RSC 1970, c C-34 read “where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known.” This provision’s number was changed to s. 614(2) by RSC 1985, c C-46.

8 Barrett, *supra* note 3, ch 1 at 3. See also Simon N Verdun-Jones, “The Insanity Defence in Canada: Setting a New Course” (1994) 17:2 *Int’l J L & Psychiatry* 175 at 176 (ScienceDirect) [Verdun-Jones].

9 Barrett, *ibid* ch 1 at 3-4.

10 Tollefson, *supra* note 3 at 1.

Various groups called for changes to the LGW scheme. Firstly, as early as 1956, the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (Royal Commission) recommended that the provinces regularly assess the dispositions of NGRI accused.<sup>11</sup> Secondly, in 1976, the Law Reform Commission of Canada reviewed the *Criminal Code* mental disorder provisions and suggested that a verdict of NGRI should result in a full acquittal and the provincial mental health authorities should then assume responsibility for the offender.<sup>12</sup> The Law Reform Commission further recommended that the post-verdict system be eliminated and stated, “[t]he use of lieutenant governor warrants as a means of disposition of an accused or prisoner suffering from a mental illness is incompatible with our overall sentencing policy.”<sup>13</sup> Finally, the Mental Disorder Project, created by the Department of Justice in 1982 to research the existing mental disorder regime, similarly urged in its 1984 Draft Report (Draft Report) the dismantling of the lieutenant governor’s role. The Draft Report recommended that courts should make the primary disposition decision and mandatory review boards should be established that would deal with the accused on an ongoing basis.<sup>14</sup> There were undoubtedly strong concerns about the fairness of NGRI system but it would take a push from the Supreme Court of Canada (SCC) to provoke substantial reform.

In 1991, the SCC in *R v Swain* (“*Swain*”) struck down the LGW regime and forced the Parliament of Canada to develop a new scheme for dealing with mentally disordered offenders.<sup>15</sup> Chief Justice Lamer held for the majority of the SCC that section 614(2), the provision that placed the NGRI offender in automatic detention at the discretion of the lieutenant governor, violated both sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).<sup>16</sup> He found that holding those found NGRI in detention might be necessary to protect the public even though these individuals were not morally blameworthy.<sup>17</sup> However, the liberty interest of NGRI offenders under section 7 of the *Charter* was violated because they were automatically detained without any procedural protections.<sup>18</sup> Likewise, section 9 was offended due to the fact that the detention of those found NGRI was entirely arbitrary with no criteria in place to determine whether detention was warranted in the circumstances.<sup>19</sup> The SCC struck down section 614(2), but allowed a period of temporary validity of six months so that the Parliament of Canada could enact new legislation.<sup>20</sup> In the following year, a comprehensive new regime was introduced.

## II. THE SUBSTANTIVE NCRMD DEFENCE

In 1992, the Parliament of Canada amended the substantive defence cosmetically and the post-verdict regime for dealing with mentally disordered offenders substantially.<sup>21</sup>

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11 *Report of the Royal Commission, supra* note 5 at 42.

12 Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: 1976) at 22.

13 *Ibid* at 38.

14 Department of Justice, *Mental Disorder Project*, Draft Report (Ottawa: May 1984) at 41, 45 [*Mental Disorder Project*].

15 *R v Swain*, [1991] 1 SCR 933, [1991] SCJ No 32 [*Swain*]. For a discussion of this decision, see Verdun-Jones, *supra* note 8 at 175-177.

16 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. In the judgment, the SCC referred to the provision as subsection 542(2) as it then was in the RSC 1970, c C-34 version of the *Criminal Code*.

17 *Swain, supra* note 15 at para 116.

18 *Ibid* at para 122.

19 *Ibid* at para 130.

20 *Ibid* at para 156.

21 Bill C-30, *An Act to Amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, SC 1991, c 43.

Section 672.34 of the *Criminal Code* changed the verdict from NGRI to NCRMD.<sup>22</sup> As held by the majority of the SCC in *R v Chaulk* (“*Chaulk*”), the defence operates “[...] as an exemption to criminal liability which is based on an incapacity for criminal intent.”<sup>23</sup> Section 16 of the *Criminal Code* provides that:

16. (1) 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.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.<sup>24</sup>

There are two procedural and evidentiary issues to note. Firstly, there are limitations on which party may raise the issue of whether an accused was suffering from a mental disorder at the time of the criminal act.<sup>25</sup> An accused may not wish to raise an NCRMD defence during his or her trial for a number of reasons including avoidance of the hefty consequences that can result from the specialized verdict and the negative perception of mental illness.<sup>26</sup> As well, the accused may wish to plead a different defence that could result in a full acquittal regardless of whether they were mentally disordered at the time of the criminal act. If the Crown could raise evidence of mental disorder at any point, this ability could endanger the offender’s liberty interests, especially if the offender ended up being subject to a longer sentence than would be applicable under the traditional sentencing scheme.

Secondly, under subsection 16(2) of the *Criminal Code*, there is a presumption of sanity until either the Crown or the accused proves the contrary on a balance of probabilities.<sup>27</sup> In *Chaulk*, Chief Justice Lamer writing for the majority of the SCC held that this reverse onus was constitutional.<sup>28</sup> He held that subsection 16(2) infringed the presumption of innocence embodied in section 11(d) of the *Charter* because it allowed a conviction even though the trier of fact might have a reasonable doubt as to guilt.<sup>29</sup> However, this violation was justified under section 1 of the *Charter* due to the fact that to hold otherwise would place an onerous burden on the Crown to disprove sanity beyond a reasonable doubt in every case.<sup>30</sup>

Subsection 16(1) of the *Criminal Code* sets out the elements that must be proven to establish the NCRMD defence. The party that seeks to argue it faces a rigorous test. Firstly, it must be ascertained whether the accused was suffering from a ‘mental disorder’

22 *Criminal Code*, RSC 1985, c C-46, s 672.34 [*Criminal Code*].

23 *R v Chaulk*, [1990] 3 SCR 1303 at 1321, [1990] SCJ No 139 [*Chaulk*].

24 *Criminal Code*, *supra* note 22, s 16.

25 In *Swain*, *supra* note 15, the majority of the SCC held that the accused can raise the defence at any stage of the trial; the Crown can only raise the issue after the trier of fact has decided the accused is guilty of the offence charged or unless the accused has put their mental state at issue.

26 Barrett, *supra* note 3, ch 4 at 37. See also Verdun-Jones, *supra* note 8 at 182-184.

27 *Criminal Code*, *supra* note 22, s 16(2).

28 See Verdun-Jones, *supra* note 8 at 187-189.

29 *Chaulk*, *supra* note 23 at 1330.

30 *Ibid* at 1337-1339.

under subsection 16(1).<sup>31</sup> ‘Mental disorder’ is defined as a ‘disease of the mind’ under section 2.<sup>32</sup> The majority of the SCC held in *R v Cooper* (“*Cooper*”) that a disease of the mind encompasses “[...] any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.”<sup>33</sup> Whether the accused was suffering from a ‘mental disorder’ within the meaning of subsection 16(1) is a question of law for the judge to decide. If the judge finds that the condition alleged would be a ‘disease of the mind,’ the trier of fact must determine if the accused in fact had this condition at the time of the criminal act.<sup>34</sup> There is also a medical element. Expert witnesses testify as to whether they believe the illness meets the definition of ‘disease of the mind.’<sup>35</sup> The party raising the defence faces the hurdle of convincing a judge on the balance of probabilities that they were suffering from a condition that legally should be accepted as a ‘disease of the mind.’

The NCRMD accused must satisfy one of two branches under subsection 16(1) of the *Criminal Code* to make out the defence. The first branch is whether the accused at the time of the act was incapable of appreciating the nature and quality of the act or omission.<sup>36</sup> As noted by the Royal Commission, the English legislation uses the word ‘knowing’ as opposed to ‘appreciating.’ In the Royal Commission’s view, the concept of appreciating is broader than that of bare knowledge: “[t]he true test necessarily is, was the accused person at the very time of the offence [...] by reason of a disease of the mind, unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it.”<sup>37</sup> The majority of the SCC in *Cooper* accepted the wider definition of ‘appreciate’; however, in later cases the meaning was narrowed.<sup>38</sup>

The second branch of the NCRMD defence is whether the accused was incapable of knowing that the conduct was wrong.<sup>39</sup> The SCC initially held that ‘wrong’ in subsection 16(1) referred to knowing that one’s conduct was ‘legally wrong.’<sup>40</sup> This holding was overturned in *Chaulk*, where the majority of the SCC held that the term also meant knowing that one’s behaviour was ‘morally wrong.’<sup>41</sup> Critics of this decision point out that there can be many views of what constitutes morally wrong behaviour in Canadian society.<sup>42</sup> The SCC in *R v Oommen* held that the true concern under the second branch of subsection 16(1) is the accused’s rational perception of his or her conduct.<sup>43</sup> If the party seeking to prove the onerous NCRMD defence under subsection 16(1) is successful, they will be subject to Part XX.1 of the *Criminal Code*.

31 *Criminal Code*, *supra* note 22, s 16(1).

32 *Ibid*, s 2.

33 *R v Cooper*, [1980] 1 SCR 1149 at 1159, 51 CCC (2d) 129 [*Cooper*].

34 Barrett, *supra* note 3, ch 4 at 9.

35 *Ibid*, ch 4 at 24.

36 *Criminal Code*, *supra* note 22, s 16(1).

37 *Report of the Royal Commission*, *supra* note 5 at 13.

38 See *R v Kjeldsen*, [1981] 2 SCR 617, 64 CCC (2d) 161 where the SCC held that ‘appreciate’ meant having the capacity to know what one is doing and if the accused had the capacity “to know that he was hitting the woman on the head with the rock...he must have the capacity to... understand the physical consequences which would flow from his act.” See also *R v Abbey*, [1982] 2 SCR 24, 68 CCC (2d) 394 where it was found that the accused’s appreciation of the penal consequences of their behaviour was irrelevant.

39 *Criminal Code*, *supra* note 22, s 16(1).

40 *R v Schwartz*, [1977] 1 SCR 673, 29 CCC (2d) 1 at 701.

41 *Chaulk*, *supra* note 23 at 1352-1358. See also Verdun-Jones, *supra* note 8 at 184-187.

42 Tollefson, *supra* note 3 at 31.

43 *R v Oommen*, [1994] 2 SCR 507, 91 CCC (3d) 8 at 520.

### III. THE CURRENT PROCEDURAL SCHEME UNDER PART XX.1 OF THE CRIMINAL CODE

Part XX.1 of the *Criminal Code* comprehensively deals with those found NCRMD. The accused is no longer subject to automatic and indeterminate detention at the discretion of the lieutenant governor.<sup>44</sup> Courts and specialized Review Boards work to craft the appropriate disposition for the mentally disordered offender while taking into consideration both the safety of the public and the accused's liberty interests.<sup>45</sup> This scheme was "[...] a deliberate move by Parliament to eliminate the former stereotypical assumptions about mentally disordered accused and provide a rational and more humane method of dealing with such persons."<sup>46</sup>

Once a court renders a verdict of NCRMD under section 672.34, the accused comes under the jurisdiction of Part XX.1. Section 672.38 mandates that Review Boards be established in every province.<sup>47</sup> The boards have expertise in both criminal law and mental health issues: a judge must chair them; one member must be a psychiatrist; and, where only one member is a psychiatrist, at least one other member must have training in mental health and be entitled to practice medicine or psychology.<sup>48</sup> The trial judge has the ability to hold a disposition hearing and, if a disposition is made other than an absolute discharge, the Review Board must review the order within 90 days.<sup>49</sup> Otherwise, a Review Board must hold a disposition hearing within 45 days, or at the maximum 90 days if a court orders an extension.<sup>50</sup>

The disposition hearing is conducted in accordance with section 672.5 of the *Criminal Code*. It is conducted in an informal manner with any party being able to adduce evidence, make submissions, or call witnesses.<sup>51</sup> The Crown may appear while the accused has the right to appear and the right to counsel.<sup>52</sup> Victims have the right under subsection 672.5(14) to file a victim impact statement describing the harm that was done to them as a result of the criminal offence.<sup>53</sup> As well, section 672.541 requires the court or Review Board to take into consideration the victim impact statement when determining the appropriate disposition.<sup>54</sup> At the disposition hearing, the accused, the Crown acting in the public interest, and the victim all have equal opportunity to have their interests represented.

Two essential aspects of Part XX.1 are how dispositions are made and how NCRMD accused are dealt with on an ongoing basis. A court or a Review Board must order an absolute discharge if the NCRMD accused is not a significant threat to the safety of the public.<sup>55</sup> If it is determined that the individual is a significant threat to the safety of the public, the court or Review Board must order a conditional discharge or a hospital detention order.<sup>56</sup> The court or Review Board must make the least onerous and restrictive disposition taking into consideration four enumerated factors: the need to protect the

44 Barrett, *supra* note 3, ch 1 at 9.

45 See *Criminal Code*, *supra* note 22, s 672.54.

46 Barrett, *supra* note 3, ch 1 at 9.

47 *Criminal Code*, *supra* note 22, s 672.38.

48 *Ibid*, ss 672.39, 672.4(1), 672.41.

49 *Ibid*, ss 672.45, 672.47(3).

50 *Ibid*, s 672.47.

51 *Ibid*, ss 672.5(2), 672.5(11).

52 *Ibid*, ss 672.5(3), 672.5(7), 672.57(9).

53 *Ibid*, s 672.5(14).

54 *Ibid*, s 672.541.

55 *Ibid*, s 672.54. See also *Winko*, *supra* note 1 at 669.

56 *Ibid*, s 672.54.

public; the mental condition of the accused; the reintegration of the accused into society; and any other needs of the accused.<sup>57</sup> The Review Board has the ability to delegate authority to the person in charge of the hospital to vary restrictions on the liberty of the accused.<sup>58</sup> Section 672.81 deals with the mandatory review of dispositions. Other than for an absolute discharge, Review Boards are obligated to assess an NCRMD accused's disposition every 12 months.<sup>59</sup> Timely review of dispositions ensures that NCRMD accused are not allowed to languish indefinitely in detention.

Bill C-30, the remedial legislation that brought in Part XX.1, provided for capping provisions. However, these sections were not proclaimed.<sup>60</sup> A concern with Part XX.1 was that an accused could be held in detention longer than he or she would have been detained under the traditional sentencing regime if he or she continued to pose a significant threat to the safety of the public.<sup>61</sup> The capping provisions provided that detention under the NCRMD disposition be capped at certain time limits depending upon the maximum penalty available upon conviction and the nature of the index offence.<sup>62</sup> If an accused reached their cap and still posed a threat to society, the provincial civil commitment process would intervene to ensure that the individual would continue to be detained.<sup>63</sup> Critics of the proposed capping measures argued that the provincial mental health systems would not adequately deal with the release of possible dangerous offenders who still threatened the safety of the public.<sup>64</sup> The capping sections highlighted the ongoing debate about how to properly balance the safety of the public and the liberty interests of the NCRMD accused.

The majority of the SCC in *Winko* held that Part XX.1 was a constitutional scheme.<sup>65</sup> The accused submitted that section 672.54 violated both his section 7 and 15 rights under the *Charter* because it placed the burden of disproving a presumption of dangerousness on NCRMD accused and created the possibility of indefinite confinement.<sup>66</sup> The majority found that section 672.54 did not create a presumption of dangerousness; rather, the court or Review Board was mandated to order an absolute discharge unless there was a positive finding that the NCRMD accused posed a significant threat to the safety of the public.<sup>67</sup> In order to meet this definition, “[t]he threat posed must be more than speculative in nature [and it] must also be significant, both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community

57 See *Penetanguishene Mental Health Centre v Ontario*, [2004] 1 SCR 498, 182 CCC (3d) 193 where the SCC held that the ‘least onerous and restrictive requirement’ also applied to crafting conditions after the enumerated factors were taken into account under section 672.54. See also the companion case *Pinet v St. Thomas Psychiatric Hospital*, [2004] 1 SCR 528, 182 CCC (3d) 214 [*Pinet*] where the SCC reiterated that NCRMD offender’s liberty rights were to be considered at every stage of the Part XX.1 regime.

58 *Criminal Code*, *supra* note 22, s 672.56(1).

59 *Ibid*, s 672.81.

60 *Ibid*, s 672.64, as repealed by *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, SC 2005, c 22 [*An Act to amend the Criminal Code*].

61 See *Mental Disorder Project*, *supra* note 14 at 39 where the Department of Justice, prior to the 1992 reforms, recommended that the probable sentence had the person been convicted should be one of the primary considerations in establishing the time limit for a disposition for a verdict of NGRI.

62 Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code* (Ottawa: June 2002) at 2 [*Standing Committee*].

63 *Mental Disorder Project*, *supra* note 14 at 39.

64 Barrett, *supra* note 3, ch 1 at 13.

65 See also the companion cases of *Orlowski v Forensic Psychiatric Institute*, [1999] 2 SCR 722, [1999] SCJ No 33; *R v Lepage*, [1999] 2 SCR 744, [1999] SCJ No 34; *Bese v Forensic Psychiatric Institute*, [1999] 2 SCR 722, [1999] SCJ No 32.

66 *Winko*, *supra* note 1 at 644-645.

67 *Ibid* at 660-661.

and in the sense that this potential harm must be serious.<sup>68</sup> This definition of ‘significant threat’ provided useful future guidance to Review Boards.

The majority of the SCC rejected both of the *Charter* arguments. Section 7 of the *Charter* was not infringed because the NCRMD accused’s liberty was restricted no more than necessary to protect the public; in addition, section 15 of the *Charter* was not violated as Part XX.1 worked to combat negative stereotypes of the mentally ill.<sup>69</sup> The regime treated the NCRMD accused on the basis of their unique situation by providing for individual assessments, tailored dispositions, and annual reviews.<sup>70</sup> It was also noted that NCRMD accused could be detained without a fixed sentence because the purpose of a detention order was not to punish, but to protect society and treat the individual.<sup>71</sup> The SCC found that Part XX.1 was a laudable attempt by the Parliament of Canada to create a flexible scheme that dealt with the individual circumstances of mentally disordered offenders while still upholding the protection of Canadian society.<sup>72</sup>

Introduced in 2005, Bill C-10 made a number of changes to Part XX.1 of the *Criminal Code* that strengthened victim’s rights, but also reflected a move away from respecting the NCRMD accused’s liberty.<sup>73</sup> This bill was brought in largely in response to a review of Part XX.1 that was conducted by the Standing Committee on Justice and Human Rights in 2002.<sup>74</sup> Firstly, the capping provisions were repealed.<sup>75</sup> Secondly, sections were added to strengthen the rights of victims. Under subsection 672.5(15.1), the victim can present his or her statement at a disposition hearing if it would not interfere with the administration of justice.<sup>76</sup> The court or Review Board must inquire if the victim was informed of his or her right to prepare a victim impact statement and, if not, the hearing may be adjourned.<sup>77</sup> Additionally, under subsection 672.5(5.1), notice of the disposition hearing will be provided to the victim if requested.<sup>78</sup> Thirdly, the Review Board may extend the time for a review of a disposition up to two years if three criteria are met: the accused was found NCRMD for a serious personal injury offence; the accused is subject to a hospital detention order; and the Review Board is satisfied that his or her condition is not likely to improve and detention remains necessary for the extended period.<sup>79</sup> Currently, Part XX.1 is valid legislation that comprehensively deals with mentally disordered offenders.

After the enactment of Part XX.1, the number of accused who were found NCRMD increased. In 1987, 0.2% of those charged with an offence were found NCRMD compared

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68 *Ibid* at 665.

69 *Ibid* at 670-686.

70 *Ibid* at 681.

71 *Ibid* at 683-684.

72 *Winko*, *supra* note 1 at 686.

73 *An Act to amend the Criminal Code*, *supra* note 60.

74 Standing Committee, *supra* note 62. The Standing Committee recommended that sections be included that gave adequate notice of court or Review Board hearings to victims and that would permit victims to present their victim impact statements at disposition hearings. It was also recommended that the capping provisions be repealed.

75 *Criminal Code*, *supra* note 22, s 672.64, as repealed by *An Act to amend the Criminal Code*, *supra* note 60.

76 *Criminal Code*, *supra* note 22, 672.5(15.1).

77 *Ibid*, ss 672.5(15.2), 672.5(15.3).

78 *Ibid*, s 672.5(5.1).

79 *Ibid*, s 672.81(1.2). S 672.81(1.3) defines a ‘serious personal injury offence’ as an indictable offence involving the use of violence against another person, or conduct endangering the life or safety of another person or inflicting severe psychological damage upon another person, or a number of listed indictable offences.

with 0.54% in 2001.<sup>80</sup> From 1992 to 2004, 6,802 accused were found NCRMD with a 102% increase in the total number of cases admitted to Review Boards during this time period (including those found unfit to stand trial).<sup>81</sup> In British Columbia, James Livingston and his associates found that 276 offenders were found NCRMD during the six years after Bill C-30 was implemented.<sup>82</sup> In contrast, only 188 persons were found NGRI between November 1975 and January 1984.<sup>83</sup> A further study by Isabel Grant found that 38 new NCRMD cases entered the Review Board system in 1993 followed by 60 in 1994.<sup>84</sup> A possible reason for this increase is that the defence has become more attractive to defendants. As Hy Bloom and Brian Butler note, “[p]ost-*Swain*, it is almost always advantageous to pursue the defence, particularly if the client has completely recovered from the mental disorder and he or she no longer represents a significant threat to the safety of the public.”<sup>85</sup> As a result of the implementation of Part XX.1, the NCRMD defence was more frequently utilized.

Several studies have analyzed the characteristics of NCRMD accused and have revealed that a large number of these individuals have had previous contact with the criminal and mental health systems. Anne Crocker and her associates found that the primary diagnosis for NCRMD accused is schizophrenia.<sup>86</sup> In regard to past interaction with either the criminal justice or the mental health system, Jeff Latimer and Austin Lawrence found that 57.6% of NCRMD accused had a previous criminal conviction with 33.6% having at least one prior violent or sexual conviction.<sup>87</sup> In British Columbia, 76.5% of the NCRMD offenders that were examined had been in a psychiatric inpatient facility prior to their current involvement with the criminal justice system.<sup>88</sup> Similarly, in a study that took place in Quebec, 87.5% of NCRMD individuals had previously been hospitalized.<sup>89</sup> These studies suggest that many NCRMD accused may not be getting adequate mental health support and as a result find themselves coming into repeated contact with the criminal justice system.

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80 John E Gray, Margaret E Shone & Peter F Liddle, *Canadian Mental Health Law & Policy*, 2d ed (Markham: LexisNexis, 2008) at 415.

81 Jeff Latimer & Austin Lawrence, *The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Ottawa: Department of Justice, January, 2006) at 11 [Latimer].

82 James D Livingston et al, “A Follow-Up Study of Persons Found Not Criminally Responsible on Account of Mental Disorder in British Columbia” (2003) 48:6 *Can J Psychiatry* 408 at 413 (ProQuest) [Livingston].

83 *Ibid.*

84 Isabel Grant, “Canada’s New Mental Disorder Disposition Provisions: A Case Study of the British Columbia Criminal Code Review Board” (1997) 20:4 *Int’l J L & Psychiatry* 419 at 426 (ScienceDirect) [Grant]. See also Krishna Balachandra, Sam Swaminath & Larry C Litman, “Impact of *Winko* on Absolute Discharges”, online: (2004) 32:2 *J Am Acad Psychiatry Law* 172 < <http://www.jaapl.org>> that found an increase in the use of the NCRMD defence in Ontario after the decision in *Winko*.

85 Hy Bloom & Brian T Butler, *Defending Mentally Disordered Persons* (Toronto: Thomson Carswell, 1995) at 58.

86 Anne G Crocker et al, “Description and processing of individuals found Not Criminally Responsible on Account of Mental Disorder accused of “serious violent offences” (Ottawa: Department of Justice, March 2013) at 15 [Crocker, “Description”]. See also Sarah L Desmarais et al, “A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the *Winko* Decision”, online: (2008) 7:1 *Int’l J Forensic Ment Health* 1 at 5 <<http://www.tandfonline.com>> [Desmarais].

87 Latimer, *supra* note 81 at 16.

88 Livingston, *supra* note 82 at 410.

89 Anne G Crocker et al, “To Detain or To Release? Correlates of Dispositions for Individuals Declared Not Criminally Responsible on Account of Mental Disorder” (2011) 56:5 *Can J Psychiatry* 293 at 295 (ProQuest). See also Crocker, “Description”, *supra* note 86 at 17, where it was found that of accused found NCRMD for a serious violent offence, 38.8% had been previously convicted or found NCRMD.

A number of issues have been raised regarding Part XX.1.<sup>90</sup> Firstly, inadequate resources at the provincial level for mental health limit the effectiveness of the NCRMD regime. The criminal justice and the mental health system intersect and both must run efficiently if mentally disordered offenders are to be treated appropriately.<sup>91</sup> Unfortunately, these insufficient resources have had a negative effect on mentally disordered offenders in Ontario. From 1998 to 2008, *habeas corpus* applications were filed on behalf of several NCRMD accused who were being unlawfully held in detention centres because of insufficient space in psychiatric hospitals.<sup>92</sup> This unlawful detainment was occurring at all stages of the Part XX.1 process including assessments during trial, initial dispositions, and after annual reviews.<sup>93</sup> Inadequate mental health resources impact the constitutional rights of NCRMD offenders and could lead back to the arbitrary detention concerns that resulted in the dismantling of the LGW system.

Secondly, while victims' voices within the criminal justice system should be heard, the disposition hearing for a NCRMD verdict has a distinct purpose as opposed to a traditional sentencing hearing. Using section 672.541 and subsection 672.5(15.1) of the *Criminal Code*, the victim can have their victim impact statement considered by the court or Review Board and may present it at the disposition hearing.<sup>94</sup> At this time, the accused has been found to be not criminally responsible for the criminal act, and the sole issue before the court or Review Board is whether the NCRMD offender poses a significant risk to the public.<sup>95</sup> The admission of these statements could be "[...] counter therapeutic as it shifts the focus of the hearing away from determining the level of risk posed by the offender at the time of hearing back to the gravity of the index offence."<sup>96</sup> The case of Vince Li provides an example of an overbroad victim impact statement. In 2009, Li was found NCRMD with respect to a charge of second-degree murder for the killing of Timothy McLean on a Greyhound bus.<sup>97</sup> At his initial disposition hearing, portions of victim impact statements were struck out because they went beyond the impact that the offence actually had on the victims.<sup>98</sup> Clear guidelines should be developed around the acceptable content of a victim impact statement so that its presentation at a disposition hearing does not overshadow the crafting of an appropriate disposition order.

Thirdly, the extension of reviews under subsection 672.81(1.2) threatens the constitutionality of Part XX.1.<sup>99</sup> The majority of the SCC in *Winko* emphasized how the annual reviews allowed Review Boards to manage a NCRMD accused on a

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90 See, for example, Standing Committee, *supra* note 62.

91 *Ibid* at 22-24. The Standing Committee called upon the provincial and federal governments to review and determine what level of resources was needed to deal with NCRMD accused. It was recognized that the increased number of NCRMD pleas had placed substantial strain upon the mental health system and this issue had to be rectified as soon as possible.

92 Janet Leiper, "Cracks in the Façade of Liberty: The Resort to Habeas Corpus to Enforce Part XX.1 of the Criminal Code" (2009) 55 CLQ 134 at 152 (Criminal Spectrum).

93 *Ibid* at 135-136. See also Barrett, *supra* note 3, ch 9 at 8 for a discussion of NCRMD offenders subject to hospital detention orders being held in correctional facilities in the Yukon.

94 *Criminal Code*, *supra* note 22, ss 672.541, 672.5(15.1).

95 See Standing Committee, *supra* note 62 at 14.

96 Barrett, *supra* note 3, ch 1 at 24.

97 *Re, Li* (June 1, 2009), [2009] CarswellMan 439 (Man. Review Board) (WL Can) at paras 3, 9.

98 *Ibid* at para 29.

99 *Criminal Code*, *supra* note 22, s 672.81(1.2). This provision provides that the Review Board may, after making an initial disposition, extend the time for holding a subsequent hearing up to a maximum of two years if the accused has been found NCRMD for a serious personal injury offence, is subject to a hospital detention order, and the Review Board is satisfied that the condition of the accused is not likely to improve and detention remains necessary.

consistent and individualized basis.<sup>100</sup> Arbitrary detention is a concern if an offender who was found NCRMD is detained without their mental condition being assessed regularly. Also, allowing the extension solely for ‘personal injury offences’ focuses on the nature of the index offence not on the risk posed by the NCRMD offender at the time of the disposition hearing.<sup>101</sup> As will be discussed below, the current amendments propose to create the possibility of pushing back disposition review hearings for the new classification of ‘high-risk’ NCRMD accused to a maximum of 36 months.

#### IV. A CASE STUDY: *R V SCHOENBORN*

Recent NCRMD verdicts involving horrific index offences have led to calls for the toughening of Part XX.1.<sup>102</sup> An example of this is the British Columbia case of Allan Schoenborn.<sup>103</sup> In 2009, Schoenborn was found NCRMD with respect to three charges of first-degree murder of his children. Firstly, the accused was successful in establishing on a balance of probabilities that, at the time of the offence, he was suffering from schizophrenia, a ‘disease of the mind.’<sup>104</sup> Secondly, under the second branch of section 16(1) of the *Criminal Code*, he made out that he was incapable at the time of the criminal act, to appreciate that what he was doing was wrong according to the moral standards of reasonable members of Canadian society.<sup>105</sup> After the NCRMD verdict was rendered, it fell to the Review Board to craft the appropriate disposition.

In 2010, pursuant to section 672.47, the Review Board held the initial disposition hearing and noted at the outset that “[t]he circumstances of this case [had] garnered considerable public scrutiny and notoriety, [and] the index offences were horrific and extremely violent.”<sup>106</sup> Firstly, the Review Board found that Schoenborn did pose a significant threat of serious harm to the safety of the public under section 672.54. In coming to this conclusion, the Review Board relied upon a risk assessment provided by the accused’s treating psychiatrist. This report recommended ongoing detention, and outlined how Schoenborn had an unwarranted sense of entitlement and lacked any insight into his illness.<sup>107</sup> Another piece of evidence the Review Board took into account was the victim impact statement filed by Schoenborn’s ex-wife under section 672.541, which outlined her continuing fear of the accused.<sup>108</sup> Secondly, the Review Board determined the ‘least onerous and restrictive’ disposition under section 672.54 was detention with narrow conditions including a no-contact order with his ex-wife.<sup>109</sup> The Review Board had little difficulty crafting a restrictive disposition given Schoenborn’s ongoing mental condition.

Controversy surrounding the Schoenborn case continues to attract media attention. In 2011, the Review Board held Schoenborn’s first mandatory review pursuant to

100 *Winko*, *supra* note 1 at 681. See also *R v Vaughan*, [1997] OJ No. 4252 (QL) (ONCA) where the Ontario Court of Appeal emphasized the mandatory nature of the annual review of the NCRMD offender by the Review Board.

101 See Barrett, *supra* note 3, ch 10 at 7 where it is argued that “drawing distinctions in the NCR population based on the nature of the offence arguably imports an element of personal responsibility for the criminal act that is otherwise lacking from Part XX.1.”

102 See, for example, Ian Bailey, “Prime Minister chokes up over Schoenborn’s young victims”, *The Globe and Mail* (8 February 2013), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

103 *R v Schoenborn*, 2010 BCSC 220, 2010 CarswellBC 362.

104 *Ibid* at para 234.

105 *Ibid* at para 243.

106 *Reasons for Disposition in the Matter of Allan Dwayne Schoenborn* (6 April 2010), online: BC Review Board <<http://www.bcrb.bc.ca>> at para 2 [*Reasons for Disposition*].

107 *Ibid* at paras 21-22.

108 *Ibid* at para 36.

109 *Ibid* at para 37.

subsection 672.81(1) of the *Criminal Code*. The hospital detention order was continued and it was ordered that Schoenborn be eligible for escorted day trips to the community.<sup>110</sup> There was harsh backlash to this disposition by the public and the media. The *Globe & Mail* quoted New Democrat MLA Harry Lali who stated, “[h]ere you have this brutal murderer and [...] he’s being allowed leave into the community and people are right [to be] upset about it.”<sup>111</sup> The right to the escorted day passes was revoked shortly thereafter because Schoenborn withdrew his request for them.<sup>112</sup> The media portrayed Schoenborn as a convicted murderer instead of someone found to be suffering from a serious mental disorder and not criminally responsible for his act.

In February 2013, Schoenborn had his latest review where his detention order was renewed and the Review Board recommended that he be transferred to a mental health facility in Manitoba.<sup>113</sup> His ex-wife opposed the request as she had family that resided in the area; nevertheless, it was found that the move would assist Schoenborn in re-integrating into society and in managing the risk he posed to the public.<sup>114</sup> However, the British Columbia criminal justice branch denied this move in July 2013 because it was found that the transfer would not be in the best interests of public safety.<sup>115</sup> The circumstances of the index offences committed by Schoenborn were atrocious. However, there appears to be a lack of understanding on the part of the media and the public that Schoenborn was found NCRMD for the offences and that dispositions are not meant to be punitive in nature. As well, there is no recognition of the fact that Schoenborn has been held in strict custody since his verdict of NCRMD was rendered, and as long as he continues to pose a significant threat he will not be released into the community. Given the sustained negative media treatment of cases involving NCRMD accused such as Schoenborn, it is not surprising that Bill C-14 was proposed to amend Part XX.1 and prioritize public safety.

## V. BILL C-14

Bill C-14 will make a number of significant changes to Part XX.1, including altering section 672.54, creating a designation of ‘high-risk’ NCRMD accused, and strengthening victims’ rights.<sup>116</sup> The opening paragraph of section 672.54 will be amended to the following:

672.54. When a court or a Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or section 672.82, it shall, taking into account the safety of the public, which is the paramount consideration, 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 necessary and appropriate in the circumstances.<sup>117</sup>

110 “Killer with mental disorder granted escorted hospital leave”, *The Globe and Mail* (6 April 2011), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

111 *Ibid.*

112 “BC child killer’s escorted passes revoked”, *National Post* (21 April 2011), online: National Post <<http://www.nationalpost.com>>.

113 “BC board backs moving child killer Schoenborn to Manitoba”, *CBC News* (13 February 2013), online: CBC News <<http://www.cbc.ca>>.

114 *Ibid.*

115 “BC justice branch says no to transferring Allan Schoenborn to Manitoba”, *The Vancouver Sun* (29 July 2013), online: The Vancouver Sun <<http://www.vancouversun.com>>.

116 Bill C-14, *supra* note 2. Bill C-14 also amends the *National Defence Act* with respect to the mental disorder defence regime; however, the following discussion overviews the amendments to the *Criminal Code*.

117 *Ibid.*, cl 672.54.

Bill C-14 codifies aspects of the common law. Clause 672.5401 will codify the definition of significant harm that was put forth in *Winko*.<sup>118</sup> Also, as stated above, the amended section 672.54 will explicitly state that the safety of the public is the paramount consideration to be taken into account by a court or Review Board while making a disposition. The SCC has previously emphasized that the safety of the public is the most important factor under section 672.54.<sup>119</sup> Hopefully, codification of this paramourcy will assist courts and Review Boards in crafting appropriate dispositions under Part XX.1.

Under clause 672.64(1), a prosecutor will be able to apply to have the court designate a NCRMD offender as ‘high-risk’ if the accused was found NCRMD for a serious personal injury offence as defined in subsection 672.81(1.3) and was 18 years of age or more when the index offence was committed.<sup>120</sup> One of two additional criteria must be met: the court must be satisfied that there is a substantial likelihood that the accused will use violence that could endanger the safety of another person or that the acts that constituted the index offence were so brutal as to indicate a risk of grave harm to another person.<sup>121</sup> If the designation is granted, the court must, under clause 672.64(3), make a hospital detention order and the accused is barred from leaving the hospital unless it is necessary for their treatment and a plan to address the risk they pose is created.<sup>122</sup> When the Review Board reviews the court’s disposition order for a ‘high-risk’ NCRMD accused, it has no option other than to make a hospital detention order subject to the restrictions in clause 672.64(3).<sup>123</sup>

Bill C-14 also contains provisions that would extend the time period between disposition review hearings for ‘high-risk’ NCRMD accused and would make a superior court the only body that can lift this classification. Under clause 672.81(1.32), the Review Board may extend the time for holding a disposition review hearing to a maximum of 36 months if it is satisfied that the ‘high-risk’ accused’s condition is not likely to improve and detention remains necessary for the extended period of time.<sup>124</sup> Clause 672.84(1) permits the Review Board to refer the ‘high-risk’ designation to a superior court if it believes that the designation should be overturned.<sup>125</sup> Pursuant to clause 672.84(3), the superior court may only revoke the finding if they are satisfied that the accused will not use violence that could endanger the life or safety of another person.<sup>126</sup>

Victims’ rights are emphasized in Bill C-14. Clause 672.5(5.2) provides that notice of a NCRMD accused’s absolute or conditional discharge will be given to victims upon their request as well as the accused’s intended place of residence.<sup>127</sup> If a NCRMD accused’s ‘high-risk’ designation is reviewed by a superior court, under clause 672.5(13.3), victims

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118 *Ibid*, cl 672.5401.

119 See *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] SCJ No 7 at para 27 where the SCC held that the main objective of Part XX.1 was the protection of the public and the management of an accused’s safety risk. See also *Pinet*, *supra* note 57.

120 Bill C-14, *supra* note 2, cl 672.64(1).

121 *Ibid*, cl 672.64(2) lists the relevant evidence the court is to take into account in deciding whether a ‘high-risk’ designation is appropriate including: (a) the nature and circumstances of the offence; (b) any pattern of repetitive behaviour of which the offence forms a part; (c) the accused’s mental condition; (d) the past and expected course of the accused’s treatment, including the accused’s willingness to follow treatment; and (e) the opinions of experts who have examined the accused.

122 *Ibid*, cl 672.64(3).

123 *Ibid*, cl 672.47(4).

124 *Ibid*, cl 672.81(1.32).

125 *Ibid*, cl 672.84(1).

126 *Ibid*, cl 672.84(3).

127 *Ibid*, cl 672.5(5.2).

will be notified that they are able to file a victim impact statement.<sup>128</sup> Clause 672.541 mandates that the court or Review Board take into account any victim impact statement when making the appropriate disposition and in making or revoking a ‘high-risk’ designation.<sup>129</sup> Finally, clause 672.542 requires the court or Review Board to consider whether a no contact order between the NCRMD accused and the victim, witness to the offence, or justice system participant is an appropriate condition to attach to a disposition.<sup>130</sup>

There are a number of troubling aspects to the amendments contained in Bill C-14. The courts—rather than the specialized Review Boards—will have control over the ‘high-risk’ designation. Despite rhetoric to the contrary, victims’ rights are not significantly improved. The bill likely violates both sections 7 and 9 of the *Charter*. As well, the legislation is likely unconstitutional because it has a punitive purpose. Hospitals will be hindered in their ability to alter the disposition conditions of NCRMD accused designated as ‘high-risk.’ Empirical evidence suggests that a ‘high-risk’ designation is not needed to protect the public from NCRMD offenders. Finally, Bill C-14 will likely negatively impact both the criminal justice and the mental health system.

Firstly, courts should not be the entities responsible for determining whether an NCRMD offender should be designated as a ‘high-risk’ accused. Under the proposed amendments, if a court classified a NCRMD accused as ‘high-risk,’ the Review Board would be mandated to make a hospital detention order. The Review Board would have no discretion to overturn the designation; only a court could reverse it. Review Boards have the expertise necessary to deal with the complex issues of mental health that arise with NCRMD accused. The superior courts will have jurisdiction over the ‘high-risk’ designation, “[...] despite the fact that general criminal courts lack the requisite expertise to make determinations about risks posed by a person with mental illness.”<sup>131</sup> Also, the courts themselves have recognized the skill of Review Boards.<sup>132</sup> As will be discussed in detail below, control over the ‘high-risk’ designation will be placed with the courts despite the fact that Review Boards have been the driving force behind Part XX.1.

Review Boards play an essential role in the workings of Part XX.1. They bear the responsibility for overseeing NCRMD accused while they are under the jurisdiction of the criminal justice system. Courts have the ability by virtue of section 672.45 to hold the initial disposition hearing; however, in practice it is the Review Boards that do so and have the sole power under section 672.81 to conduct ongoing assessments of NCRMD accused.<sup>133</sup> Studies have shown that after a finding of NCRMD was made, courts defer the making of the disposition to Review Boards in the majority of cases.<sup>134</sup> As Joan Barrett and Riun Shandler note, “[c]ourts are at a distinct disadvantage in writing dispositions, as they simply do not have the institutional knowledge, expertise and experience Review Boards have.”<sup>135</sup> As discussed in Part III, the composition of the

128 *Ibid*, cl 672.5(13.3).

129 *Ibid*, cl 672.541.

130 *Ibid*, cl 672.542.

131 *House of Commons Debates*, 41st Parl, 1st Sess, No 217 (1 March 2013) at 14505 (Hon Irwin Cotler) [*House of Commons Debates*].

132 See *DH v British Columbia (Attorney General)*, 24 WCB (2d) 632, [1994] BCJ No. 2011 at para 24 where it was held that it “will be rare that this court [will] interfere with the Review Board’s decisions. Difficult and delicate questions of judgment have been assigned to the Board and it has been constituted with the expertise to discharge its duty in the public interest.” See also Barrett, *supra* note 3, ch 1 at 31.

133 *Criminal Code*, *supra* note 22, ss 672.45, 672.81.

134 See Livingston, *supra* note 82 at 411, where it was found that after a finding of NCRMD was made, courts in British Columbia deferred the making of the disposition to Review Boards in 82.2% of the cases. See also Crocker, “Description”, *supra* note 86 at 20-21.

135 Barrett, *supra* note 3, ch 10 at 3.

Review Boards ensures that the members have sufficient expertise in both the law and in mental health to be able to deal adequately with NCRMD offenders. These specialized bodies should be the ones in control of the ‘high-risk’ classification.

Secondly, it is unclear that Bill C-14 will substantially enhance the rights of victims even though the Conservative government has emphasized this point.<sup>136</sup> The Honourable Rob Nicholson stated that one of the reasons behind the introduction of Bill C-14 is “[ensuring] that the needs of victims receive the appropriate emphasis in the *Criminal Code* mental disorder regime.”<sup>137</sup> Requiring notice to be given at the victim’s request if an NCRMD accused is about to be released under clause 672.5(5.2) would be an improvement. However, requiring that a court or Review Board consider making a no contact order between the NCRMD accused and the victim will likely result in little change to the existing regime because this is already taken into account by Review Boards when making appropriate designations.<sup>138</sup> Latimer and Lawrence found that 20.7% of NCRMD dispositions from 1992 to 2004 had conditions attached that ordered no communication with the victim and others or banned the offender from attending certain locations.<sup>139</sup> There is a danger that the court, when deciding whether to classify a NCRMD accused as ‘high-risk,’ could place undue emphasis on the victim impact statement under clause 672.541 and neglect the fact that the sole concern should be the substantial likelihood that the offender will use violence that could endanger another person. The Conservative government has promoted Bill C-14 with the rhetoric that it will significantly enhance the needs and rights of victims; however, the amendments appear to make little change to this aspect of Part XX.1.

Thirdly, the legislation is likely unconstitutional under both sections 7 and 9 of the *Charter*. The majority of the SCC in *Winko* upheld Part XX.1 because it struck the appropriate balance between the protection of the public and the liberty interests of the NCRMD offender; however, the proposed amendments shift this balance away from protecting the rights of the accused.<sup>140</sup> The Honourable Irwin Cotler argued, “[...] the government is seeking to enact legislation that will invite protracted, expensive, and avoidable constitutional litigation.”<sup>141</sup> While NCRMD accused are brought within the criminal sphere by committing criminal offences, this inclusion does not permit the state to set up a scheme that blatantly violates their constitutional rights.

If Bill C-14 receives Royal Assent, there will likely be claims brought under section 7 of the *Charter*, which provides that “everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>142</sup> The liberty issue will likely be quickly resolved. Part XX.1 permits the state to deprive an NCRMD accused of their liberty; but such deprivation must conform to the principles of fundamental justice.<sup>143</sup> It will likely be successfully argued that because Bill C-14 is overbroad, it does not conform to these principles. Overbreadth is concerned with whether “[...] the means chosen by the state are broader than necessary to achieve the state objective.”<sup>144</sup> As stated above, the purpose

136 See, for example, *Debates of the Senate*, 41st Parl, 2nd Sess, vol 149 No 24 (9 December 2013) at 669 (Hon Paul E McIntyre).

137 *House of Commons Debates*, *supra* note 131 at 14483 (Hon Rob Nicholson).

138 Bill C-14, *supra* note 2, cl 672.542.

139 Latimer, *supra* note 81 at 27.

140 *Winko*, *supra* note 1 at 686.

141 *House of Commons Debates*, *supra* note 131 at 14506 (Hon Irwin Cotler).

142 *Charter*, *supra* note 16, s 7. See *R v Morgentaler*, [1988] 1 SCR 30 and *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 for the test for a section 7 violation.

143 *Winko*, *supra* note 1 at 670.

144 *Ibid* at 673.

behind Part XX.1 is to deal appropriately with both the safety of the public and the liberty needs of the NCRMD accused. The proposed amendments to section 672.54 and the new ‘high-risk’ classification of NCRMD accused are two examples of overbreadth within Bill C-14.

Section 672.54 in its altered form will likely be found to be overbroad. The provision currently is “[...] a clear example of the principle of ‘balance’ between the rights of the accused and the protection of society.”<sup>145</sup> In previously upholding the constitutionality of section 672.54, the SCC emphasized that, where an accused is found to pose a significant threat, only the least onerous and restrictive disposition can be ordered.<sup>146</sup> The new section will replace the requirement that the disposition be ‘the least onerous and least restrictive’ with the requirement that it be ‘necessary and appropriate in the circumstances.’ This amendment is a fundamental change to Part XX.1. Courts and Review Boards will be permitted to craft dispositions that are not the ‘least onerous and least restrictive’ and therefore the NCRMD accused’s liberty may be restricted more than is necessary to protect the public.<sup>147</sup> The ‘least onerous and least restrictive’ requirement is likely integral to the constitutionality of section 672.54.

As well, the ‘high-risk’ classification is overbroad in its application to NCRMD accused. The constitutionality of Part XX.1 was bolstered because it was a “[...] flexible scheme that is capable of taking into account the specific circumstances of the individual NCRMD accused.”<sup>148</sup> The new designation endangers this flexibility. Under clause 672.64(3), if a ‘high-risk’ designation is established, there is no discretion to order anything other than a hospital detention order with restrictive conditions.<sup>149</sup> The Review Board is then bound by this disposition under clause 672.47(4).<sup>150</sup> The ‘high-risk’ classification ignores the individual characteristics of a NCRMD accused by requiring that he or she be subject to a restrictive hospital detention order. It will likely be held that this proposed scheme is overbroad because it uses means that are broader than necessary to protect public safety while disregarding the rights of a NCRMD accused. Both the alterations to section 672.54 and the creation of the ‘high-risk’ NCRMD accused category likely violate section 7 of the *Charter*.

It is also likely that Bill C-14 will attract claims alleging a breach of section 9 of the *Charter*, which provides that “everyone has the right not to be arbitrarily detained or imprisoned.”<sup>151</sup> Francoise Boivin, a member of the opposition government, put forth that as a result of Bill C-14, “[she] can see [the government] keeping someone in prison who will file a writ of [*habeas corpus*].”<sup>152</sup> There will likely be claims of arbitrary detention because of the potential length between reviews of dispositions for ‘high-risk’ accused. Under clause 672.81(1.32), the Review Board has the ability to extend the review of a disposition for a ‘high-risk’ NCRMD accused to a maximum of 36 months with the only criterion being that the accused’s condition is unlikely to improve and detention remains necessary.<sup>153</sup> In *Winko*, the majority of the SCC held that the mandatory annual review of a disposition was an integral part of safeguarding the NCRMD accused’s liberty.<sup>154</sup> A ‘high-risk’ NCRMD accused whose disposition is not reviewed for three

145 Tollefson, *supra* note 3 at 86.

146 *Winko*, *supra* note 1 at 669-670.

147 See Barrett, *supra* note 3, ch 1 at 32. See also *Winko*, *ibid* at 673.

148 *Winko*, *ibid* at 666.

149 Bill C-14, *supra* note 2, cl 672.64(3).

150 *Ibid*, cl 672.47(4).

151 *Charter*, *supra* note 16, s 9.

152 *House of Commons Debates*, *supra* note 131 at 14489 (Francoise Boivin).

153 Bill C-14, *supra* note 2, cl 672.81(1.32).

154 *Winko*, *supra* note 1 at para 72.

years risks being arbitrarily detained because his or her mental condition could improve over the time period and he or she could cease to pose a significant threat to society. If this improvement occurred, the state would cease to have jurisdiction to detain them. It is essential to the integrity of Part XX.1 that a NCRMD offender's disposition be reviewed regularly so that they are detained only if they currently pose a threat to the public.

Bill C-14 is also likely to be unconstitutional because the legislation punishes 'high-risk' NCRMD accused. In *R v Owen*, the majority of the SCC held that "[i]t is of central importance to the constitutional validity of this statutory arrangement that the individual, who by definition did not at the time of the offence appreciate what he or she was doing, or that it was wrong, be confined only for reasons of public protection, not punishment."<sup>155</sup> Clause 672.64(1)(b) will permit the court to designate an accused as 'high-risk' if the characteristics of the index offence indicate a risk of grave harm to another person.<sup>156</sup> This provision focuses on the criminal act to the exclusion of the present mental condition of the accused. Grant, in her study of the British Columbia Review Board between 1992 and 1994, found that "[...] there was no relationship between a finding of significant threat and the underlying index offence."<sup>157</sup> The nature of the index offence should have nothing to do with the determination of whether an accused should be designated as 'high-risk.' The state is attempting to punish offenders who were found NCRMD for heinous acts by imposing restrictive hospital detention orders. If it were found that aspects of Part XX.1 had a punitive purpose, the constitutionality of indeterminate detention would be called into question.

Fourthly, Bill C-14 severely restricts the ability of a Review Board to delegate authority to a psychiatric hospital to manage a 'high-risk' NCRMD accused and provide individualized treatment. Pursuant to clause 672.56(1.1), a hospital's ability to vary restrictions on the liberty of a 'high-risk' NCRMD accused will be subject to the restrictions in clause 672.64(3).<sup>158</sup> A hospital will be unable to permit the offender to be absent from the facility grounds unless it is for treatment reasons or until the 'high-risk' designation is overturned by a superior court. Hospitals should be able to increase or restrict the conditions attached to a NCRMD accused's disposition according to their mental condition. This flexibility "[...] increases the effectiveness of the disposition as it enables the [h]ospital to fine tune the disposition in a manner that best suits the day-to-day needs of the accused's treatment plan."<sup>159</sup> Hospitals are best situated to assess a NCRMD accused's mental state on a regular basis; therefore, their capacity to alter disposition conditions should not be restricted.

Fifthly, a 'high-risk' designation is not needed to protect the public from NCRMD accused. Bill C-14 is fear-based and is not supported by empirical evidence about NCRMD accused. Historically, mentally disordered offenders have been stereotyped as being dangerous and violent.<sup>160</sup> As discussed in Part IV, murder cases involving

155 *R v Owen*, 2003 SCC 33 at para 25, [2003] 1 SCR 779. See also *R v Bouchard-Lebrun*, 2011 SCC 58 at paras 52-53, [2011] 3 SCR 575.

156 Bill C-14, *supra* note 2, cl 672.64(1)(b).

157 Grant, *supra* note 84 at 434. See also Anne G Crocker et al, "Individuals Found Not Criminally Responsible on Account of Mental Disorder: Are We Providing Equal Protection and Equivalent Access to Mental Health Services Across Canada?" (2010) 29:2 Can J Commun Ment Health 47 at 50 (MetaPress) where the authors stated that research consistent with Canadian legislation demonstrates that the seriousness of the index offence should not be a factor used to determine a NCRMD disposition.

158 Bill C-14, *supra* note 2, cl 672.56(1.1).

159 Barrett, *supra* note 3, ch 9 at 61.

160 See Standing Committee, *supra* note 62 at 24. See also Julio Arboleda-Florez, "Considerations on the Stigma of Mental Illness" (2003) 48:10 Can J Psychiatry 645 at 647 (Medline) for a discussion of the longstanding stereotype that those who have a mental illness are violent and dangerous.

mentally disordered offenders like Schoenborn make it easy to perpetuate the belief that the government needs to ‘get tough’ on these dangerous criminals. In reality, they comprise a small percentage of the offending population and Part XX.1 is effective in managing the risk they pose. Crocker’s 2013 study found that only 8.1% of NCRMD accused had committed a serious violent offence.<sup>161</sup> Compared with accused found NGRI between 1975 and 1984, NCRMD offenders between 1992 and 1998 in British Columbia were charged with a lesser number of murder or attempted murder index offences and a greater number of assault and nuisance-type offences.<sup>162</sup> Between 1992 and 1994 in British Columbia, a total of 13 accused who were found NCRMD were charged with murder or attempted murder.<sup>163</sup> From 1992 to 2004 nationwide, assault was the most common serious violent index offence that NCRMD accused were charged with, comprising 40.7% of cases within Review Board systems.<sup>164</sup> The empirical studies that have been conducted illustrate that only a minority of NCRMD accused would be subject to a ‘high-risk’ classification.

Several studies have found that Review Boards are not lenient with NCRMD offenders.<sup>165</sup> Nationwide from 1992 to 2004, Latimer and Lawrence found that 51.7% of NCRMD accused were given a detention order and violent offences were more likely to lead to a detention order than sexual or non-violent offences.<sup>166</sup> All NCRMD accused during this time period were in the Review Board system for at least six months and 60% stayed subject to Review Board jurisdiction for longer than five years.<sup>167</sup> At the initial Review Board hearing in British Columbia, 49.3% of NCRMD accused were given a conditional discharge, 41.7% were given a custody order, and 2.5% were given an absolute discharge.<sup>168</sup> It is important to note that conditional discharge orders often contain the condition that the accused reside in a psychiatric hospital.<sup>169</sup> Crocker’s 2013 study found that, at the end of the study period, 50.8% of offenders found NCRMD for a serious violent offence were still under the jurisdiction of the Review Board.<sup>170</sup> Harsher legislation in regard to NCRMD accused is not needed because Review Boards grant detention orders in the majority of NCRMD cases and offenders are detained for substantial periods of time if they pose a significant threat to the public.

Finally, Bill C-14 will likely have a negative effect on both the criminal justice and the mental health system. In regard to the criminal justice system, it is probable that fewer accused will choose to plead the defence because of the possibility of the ‘high-risk’ designation and the restrictive detention order that comes with it. Currently in British Columbia, over 90% of serious crimes resulting in a NCRMD verdict do so by

161 Crocker, “Description”, *supra* note 86 at 13. This study examined all accused found NCRMD in the timeframe of 2000 to 2005 in British Columbia, Ontario, and Quebec.

162 Livingston, *supra* note 82 at 411. See also Desmarais, *supra* note 86 at 5 where in a study of 592 randomly sampled NCRMD offenders in British Columbia, Ontario and Quebec, it was found that homicide or attempted murder were the least common index offences (15%) committed by NCRMD offenders, while the majority of the index offences were assaults (39%) and ‘all other offences’ (45%).

163 Grant, *supra* note 84 at 427.

164 Latimer, *supra* note 81 at 17.

165 See, for example, Latimer, *ibid*; Livingston, *supra* note 82; Grant, *supra* note 84; Crocker, “Description”, *supra* note 86.

166 Latimer, *ibid* at 24, 26. Homicide, attempted murder, major assault (level II, III), assault (level I), robbery, criminal harassment, threats, and ‘other violent offences’ were classified as violent offences in the study.

167 *Ibid* at 32.

168 Livingston, *supra* note 82 at 411-412. This study examined NCRMD accused in British Columbia from 1992 to 2004.

169 Grant, *supra* note 84 at 429-430.

170 Crocker, “Description”, *supra* note 86 at 21-22.

agreement of counsel.<sup>171</sup> If the proposed changes are enacted, it is likely that there will be an increase in the quantity and length of trials, as accused will be unwilling to consent to being subject to a hospital detention order with restrictive conditions if they could be designated as ‘high-risk.’ This unwillingness may result in more mentally ill individuals languishing in the prison system without access to treatment. A backlog of cases could also arise in the court system as courts will be the only bodies able to hold a ‘high-risk’ designation hearing and to reverse the designation if a Review Board requests. The proposed legislation is likely to be detrimental to the interests of mentally ill individuals who are involved in the criminal justice system.

As well, the mental health system will suffer if Bill C-14 comes into force. The influx of ‘high-risk’ NCRMD accused who will be required to be held in detention until their designation is reversed will put pressure on already strained resources. The Honourable Irwin Cotler raised this concern: “[i]t is by no means clear that our system is at present capable of dealing with greater numbers of NCR accused who are institutionalized for longer periods of time and we risk complicating their recovery by straining the resources of the institutions and the individuals who are treated.”<sup>172</sup> The government must ensure that the mental health system has appropriate resources in place to be able to accommodate the greater number of ‘high-risk’ NCRMD accused that will be detained in psychiatric hospitals as a consequence of Bill C-14.

## CONCLUSION

The implementation of Bill C-14 would be a step backwards for mentally ill offenders in Canada. In promoting the new legislation, the Conservative government has fostered the view that changes are needed because Part XX.1 of the *Criminal Code* has been inadequately managing dangerous NCRMD accused. However, empirical evidence illustrates that Part XX.1 has been effectively dealing with NCRMD accused for decades. Individuals who successfully plead the onerous mental disorder defence have proven that they are not blameworthy in the eyes of the law. Therefore, liberty should only be restricted to the extent that any risk posed to the public by the NCRMD offender needs to be managed. As explained by the majority of the SCC in *Winko*, “[j]ustice requires that the NCR accused be accorded as much liberty as is compatible with public safety. The difficulty lies in devising a rule and a system that permits this to be accomplished in each individual’s case.”<sup>173</sup> Bill C-14 will neglect the individual needs of the NCRMD offender and prioritize the protection of the public. ‘High-risk’ NCRMD accused will face the prospect of a restrictive detention order without consideration of their present mental condition. Bill C-14 is unneeded and will damage the rights of mentally disordered offenders in Canada.

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171 Lyle D Hillaby, “Mental Disorder Prosecutions Overview,” in *Criminal Law and Mental Health Issues* (Vancouver: Continuing Legal Education Society of British Columbia, 2008) 1.1.1 at 1.1.10.

172 *House of Commons Debates*, *supra* note 131 at 14507 (Hon Irwin Cotler).

173 *Winko*, *supra* note 1 at 640.