

Canadian Landmark Case: *Regina v. Swain*: Translating M'Naughton into Twentieth Century Canadian

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Since their adoption in 1892, the insanity laws in the Criminal Code of Canada have utilized a modified M'Naughton rule. The Department of Justice began work in the 1970s to update these laws. In 1983, soon after the Canadian Charter of Rights and Freedoms was proclaimed, the case of *Regina v. Swain* provided the impetus for this change. In 1990 the Supreme Court of Canada struck down the old law, giving parliament a specific time to pass new legislation. Bill C-30 modernized the language of the Criminal Code and introduced a number of procedural safeguards to protect the rights of the accused.

The law regarding insanity in the Criminal Code of Canada dated back to 1892 and remained unchanged until Bill C-30 received royal assent on December 13, 1992. This bill significantly changed the procedures and the language of the mental disorder sections of the Criminal Code. The legal aspects of criminal responsibility and insanity were based on the M'Naughton rules but were a modified version of the original test. The principle difference in practice was the substitution of the word "appreciating" the

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nature and quality of the act for the word "know" that was used by the judges who were appointed by the House of Lords to rectify the law on insanity after the trial of Daniel M'Naughton in 1843. As Canada has a federal Criminal Code, the law with regard to criminal responsibility applies in all Canadian provinces and territories.

The law (Section 16 of the Criminal Code of Canada) previously read:

16.(1) No person shall be convicted of an offense in respect of an act or omission on his part while that person was insane.

(2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.

(4) Everyone shall, until the contrary is proved, be presumed to be and to have been sane.¹

The reader will immediately note the archaic language such as “natural imbecility” and even “insane.”

The Criminal Code then addressed the disposition of the accused in rather vague terms. The code provided for the automatic detention of the accused “at the pleasure of the Lieutenant Governor,” which resulted in an order from the trial judge that the insanity acquittee “be kept in strict custody. . . until the Lieutenant Governor’s pleasure was known.” The law allowed for the Lieutenant Governor, the representative of the Queen, to appoint an advisory board to review the cases of those held in custody, according to a 1969 amendment.² This advisory board was generally chaired by a retired senior judge and included two psychiatrists, a lawyer, and a lay member, for a five-member board. Their mandate was to review each case within the first few months after a not guilty by reason of insanity (NGRI) finding and thereafter on an annual basis. There were few procedural guarantees in the Criminal Code, although custom dictated a set of rules and procedures that developed as time went on.³ These procedures, which were developed in the Province of Ontario, were not uniformly followed by the other provinces. The Criminal Code allowed the Lieutenant Governor to order the ac-

cused to safe custody or, on the other hand, “if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribed.”⁴

Regina v. Swain

Owen Swain, a father of two infant children, had been acting bizarrely for some days. One day in October 1983, his behavior became increasingly bizarre, and the police were called because he was attacking his wife and two infant children. There was a standoff for some time prior to his eventual arrest. During this time, he carved a cross on his wife’s chest and on one of his children and was seen swinging both of his infant children over his head, holding on to the children’s feet. He was talking quickly, and at times unintelligibly, and there was a clear ritualistic content to his speech. He admitted later that he believed his family was possessed by devils and the purpose of his behavior was to exorcise them.

He was transferred from jail to the Penetanguishene Mental Health Center, a maximum security hospital. This was effected by using an unusual procedure in a case such as this, that is, an application for psychiatric assessment under the Mental Health Act of Ontario, as opposed to using the section of the Criminal Code that allowed for an assessment for fitness to stand trial. At the mental health center, he was diagnosed as suffering from a schizophreniform disorder and treated with antipsychotic medication. He demonstrated a good response to the medica-

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tion and by December 19, 1983, he was well enough to be returned to jail. Shortly thereafter, in an equally unusual outcome in these cases, he was granted bail with the condition that he continue to take medication and see a community psychiatrist.

He continued to live in the community and to take medication for a period of approximately 18 months prior to his trial. He came to trial on May 3, 1985 in the District Court of Ontario. In the course of the trial, the Crown sought to adduce evidence of his insanity over the objections of defense counsel. This evidence was ruled admissible by the trial judge. On the basis of this evidence, he was found not guilty by reason of insanity of assault and aggravated assault. The normal procedure at this stage would provide for automatic indefinite detention "until the pleasure of the Lieutenant Governor is known." The defense counsel moved that this section of the Criminal Code violated the Canadian Charter of Rights and Freedoms.⁵ The judge held that the defendant's constitutional rights were not infringed and ordered him to be kept in strict custody in a medium security hospital until the Lieutenant Governor's pleasure was known. Two days later, the Lieutenant Governor issued a warrant detaining the appellant at the Clarke Institute of Psychiatry with an order for a psychiatric assessment and a report in writing to be sent to the Advisory Review Board within 30 days. Counsel did not have the opportunity to make submissions with respect to this decision, which was to be made by the Chair of the Advisory Review Board.

Mr. Swain was duly sent for psychiatric examination and assessment to the Clarke Institute of Psychiatry for a 30-day period, and one of the authors (G.G.) wrote a report to the Lieutenant Governor's Advisory Review Board enunciating the results of the assessment. A review hearing was held and evidence was heard from the assessing psychiatrist as well as other psychiatrists who had been involved previously with Mr. Swain. On the advice of the Lieutenant Governor's Advisory Review Board, the Lieutenant Governor issued a warrant to the administrator of the provincial psychiatric hospital to permit Mr. Swain to gradually enter the community, with conditions, in a supervised manner, and with close follow-up.

Mr. Swain appealed to the Ontario Court of Appeal, and this case was heard in September 1985.

Constitutional Questions The constitutional questions in terms of the Canadian Charter of Rights and Freedoms are as follows:

1. Whether the insanity section of the Criminal Code was *intra vires*. In other words, whether ordering somebody into custody for treatment was more properly under provincial jurisdiction and, therefore, outside of federal power.

2. Whether the common-law criteria permitting the Crown to adduce evidence of the accused's insanity violated the Charter.

3. Whether the statutory power to automatically detain a person found not guilty by reason of insanity violated the Charter.

Ontario Court of Appeal Findings

The Ontario Court of Appeal dismissed the appeal on all grounds. However, the court found by a two-to-one decision, and there was a strong dissenting opinion.⁶ In fact, the judgment itself appeared to criticize the legislation, although it did not strike it down. The case was appealed to the Supreme Court of Canada.

Supreme Court of Canada Decision

In February 1990, the case was heard before the Supreme Court of Canada, which rendered a decision in May 1992.

In this decision, there were three judges concurring and one strongly dissenting. The Court ruled that the common-law rule permitting the Crown to adduce evidence violated Section 7 of the Charter. This section protects the right not to be deprived of life, liberty, or security except in accordance with the principles of fundamental justice. The Court proposed a solution that would allow the Crown to independently raise insanity only *after* a verdict of guilty has been made but *prior* to the conviction being entered. The Court felt that it could raise a new common-law rule to replace the old one, substituting a rule that is consistent with the Charter.⁷ The judgment, written by Chief Justice Lamer, noted that it is not appropriate for the state to deny an accused the right to control his or her own defense. Thus, an accused who has not been found unfit to stand trial must be considered capable of conducting his or her own defense. The insanity law, the Court stated, is part of the conduct of an accused's defense. The Court noted that this is not an absolute rule and may be broken in circumstances where the accused puts

his or her mental capacity into question. Although the admissibility of evidence of insanity will be a matter for the trial judge to determine, the principles of fundamental justice are violated when the Crown raises and adduces evidence of insanity over the wishes of the accused. The Court argued that the Crown's action in raising the issue of insanity may be considered justifiable in that the objective was to avoid unfair treatment of the accused, while maintaining the integrity of the criminal justice system by avoiding the conviction of the insane accused. In addition, a second objective was to protect the public from people who may be dangerous and who may require hospitalization. The Court agreed that there was a rational connection between the objectives and the means chosen to achieve them. In other words, allowing the Crown to raise the issue of insanity means that the integrity of the criminal justice system is protected because it avoids the conviction of an insane person and at the same time, in certain circumstances, may protect the public from mentally disordered people who are dangerous and require hospitalization. The Court, therefore, came up with a compromise as stated above.

On the question of whether the automatic detention of a person found not guilty by reason of insanity violates the Charter, the Court wrote that automatic detention does indeed deprive the defendant of his or her right to liberty.

The Court reasoned that the trial judge does not have any discretion when automatically ordering strict custody as there is no hearing on the defendant's current

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mental state. Even though there may be subsequent hearings, the Court noted that this cannot change the fact that the trial judge does not have the benefit of a hearing prior to the initial detention. The Court, therefore, believed that this section violates Section 7 of the Charter (the right to life, liberty, and security) and also Section 9, which is the right not to be arbitrarily detained or imprisoned. They noted that this detention was, in fact, *arbitrary*, arguing that the lack of a hearing “. . . deprives the Appellant of his Section 7 right to liberty in a way that is not in accordance with the principles of fundamental justice. His Section 9 right not to be detained arbitrarily is restricted because there are no criteria for the exercise of the trial judge’s power to detain.”⁸

The Court commented that the assumption that persons found NGRI are dangerous “may well be rational but is not always valid.”⁹ They note that automatic detention, which provides for an indeterminate length of time, even if in practice a full hearing is effected as soon as possible, does not meet the “minimal impairment component”⁹ to make a Section 7 restriction justified.

It is interesting that in the Swain case the judge did actually hear from two psychiatrists and one social worker, as well as some lay people, the summation of which suggested that Mr. Swain could function if he took his medications and that he was not a danger to himself or others. However, it seems that the judge could not take this into consideration.

The dissenting opinion by Madame Justice L’Heureux-Dubé stated that the common-law rule allowing the Crown to

adduce evidence of insanity is a principle of fundamental justice consonant with and reflective of the values embodied in Section 7. She believed that the common-law rule was crafted with precision when viewed “within the broad context in which it operates. . . and its application in any given case, is consonant with the principles of fundamental justice.”¹⁰ She reasoned that the Crown’s ability to raise evidence of insanity “over and above the wishes of the accused will occur only in circumstances where the guilt of the accused is in no serious doubt, the evidence of insanity is overwhelming, the offense is of a serious nature and the accused represents a continuing threat to society due to his or her present dangerousness.”¹¹ She believed, therefore, that the application was already severely limited.

She also opined that the legislative scheme is consistent with the guarantees set out in the Charter. She stated that the assumption that those found NGRI may still be dangerous is “one of common practical sense.”¹² She did not conclude that the detention was arbitrary because it operates in a restricted fashion.

At the end of his ruling, the Chief Justice commented on the “rest of the legislative scheme,” that is, the parts of the Criminal Code that deal with the appointment of an Advisory Review Board and when the Review Board should meet. He noted that because of the way that the constitutional question had been put, the Attorney General of Canada and the Attorneys General of the provinces were not notified and, therefore, did not intervene. He therefore declined to deal with the issues relating to them. However, he

noted that "the lack of procedural safeguards. . . do in my opinion, attract suspicion."¹³

In conclusion, the Court declared the appropriate section of the Criminal Code to be of no force or effect. However, because of the serious consequences that would compel all insanity acquittees to be released into the community, the Court granted a period of temporary validity of six months. Due to logistical reasons, the Ministry of Justice applied to the Court for an extension, which was subsequently granted.

Legislation and Background In 1976, the Law Reform Commission of Canada had reported on the provisions of mentally disordered offenders.¹⁴ The report was quite critical of the law as it stood, emphasizing its lack of clarity. It was stated that the procedure for determining the disposition of defendants with mental disorders offended a number of basic tenets of criminal justice. They noted that dispositions were not made openly or according to known criteria, were not reviewable, and were not of determinant length.¹ As a result of this report, the Federal Department of Justice began a consultation and research process and in 1982 set up the Mental Disorder Project, whose brief was to prepare a set of recommendations that could be used as the basis for amending legislation.

Another important issue in 1982 was the Canadian Charter of Rights and Freedoms,⁵ which was proclaimed that year. It was thought that the Charter might have a significant impact on the treatment of insanity acquittees, which, of course, was prescient in the light of the *Swain* deci-

sion. Work continued on this issue within the Department of Justice, although a draft bill was held, apparently pending the disposition of the *Swain* case.

Following the *Swain* case, the Department of Justice worked post haste to prepare Bill C-30, the Mental Disorder amendments to the Criminal Code of Canada.¹⁵ This bill contained drastic amendments to the Criminal Code. It not only attempted to modernize the language of the legislation but included amendments to change the circumstances in which the court might order a psychiatric assessment and introduce new evidentiary protection for the accused. This included taking out the very term "not guilty by reason of insanity" and replacing it with "not criminally responsible on account of mental disorder (NCR-MD)."

It also spelled out the criteria for unfitness to stand trial. It suggested broadening the range of dispositions available to a court upon a finding of either unfit to stand trial or not criminally responsible.

It also abolished the role of the Lieutenant Governor and established a new Provincial Review Board. It clearly enunciated the members of the Board and the powers and procedures employed by the Board, including the right of appeal.

Most controversially, the legislation sought to impose outer limits or "caps" on the length of time a mentally disordered accused could be held under the authority of criminal law, based on the severity of the offense. It is of note that the capping provisions, as well as a separate category for the "dangerous mentally accused," have not yet been enacted some six years later. However, we are at this very mo-

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ment awaiting a decision in a case that addresses these issues.

Bill C-30 received royal assent on December 13, 1992 and was proclaimed into law. As noted above, certain provisions were not enacted but were held in abeyance pending further consultation; we are still awaiting that eventuality.

Conclusions

The *Swain* case modernized the legal aspects of mental disorder in the Criminal Code of Canada by updating the language and ensuring that the Charter was not breached. Specifically, Bill C-30 introduced due procedural safeguards ensuring that the disposition of persons found not criminally responsible on account of mental disorder did not result in indeterminate detention without a hearing before a tribunal with decision-making powers. In addition, the verdict of not guilty by reason of insanity was changed to "not criminally responsible on the basis of mental disorder (NCR-MD)." Forensic psychiatric assessments were defined as for the purpose of assessing fitness to stand trial or criminal responsibility due to a mental disorder and for sentencing. A limited privilege was granted to cover court-ordered assessments, and the disposition of NCR-MD required a least restrictive alternative presumption. *Swain* did not change the basis to law in that a modified M'Naughton test still applies.

At the time of this writing, the Supreme

Court of Canada is considering another charter case in the area of mental disorder, known as *Regina v. Denis Lucien LePage*, and a decision is expected shortly.

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