Canadian Landmark Case, *Winko v. British Columbia*: Revisiting the Conundrum of the Mentally Disordered Accused

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In a previous article, we reviewed a case that lead to significant changes in the laws regarding criminal responsibility in Canada.[1] In *Regina. v. Swain*,[2] the Supreme Court of Canada struck down the mental disorder sections of the Criminal Code of Canada, providing the impetus for a more modern approach to the problem of the mentally ill offender. In response to *Regina v Swain*, a new bill was drafted (Bill C-30),[3] which proposed a scheme whereby the person found not criminally responsible was treated differently compared with the practice under the old sections of the Criminal Code of Canada. This legislation was an attempt to balance the goals of fair and humane treatment of the offender against the safety of the public; it codifies the establishment of provincial review boards, giving them jurisdiction over individuals who have been found not criminally responsible on account of mental disorder. The review boards are independent tribunals established pursuant to the Criminal Code of Canada, which stipulates that each province and territory must establish or designate a review board to oversee these individuals. Individuals subject to the jurisdiction of the review board are designated "accused" in the Criminal Code of Canada.

Prior to 1992 when these review boards became mandatory under the Criminal Code, provincial and territorial courts had to automatically detain in "strict custody" persons found "not guilty by reason of insanity" on what was known as a "warrant of the lieutenant governor." From initial detention, the accused could then cascade down to lesser levels of security, a process known as the loosening of the warrant, sometimes referred to as the LGW system.

History

While the rudiments of our Canadian legislative scheme can be traced to the writings of Sir Matthew Hale in the 17th century, its modern history commences with the case of *Rex v. Hadfield*.[4] James Hadfield had fired a shot from his horse at King George III and was subsequently found "not guilty," he be-

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ing under the influence of insanity at the time the act was committed. The criminal court of the time had two options: 1) release him into the community because he had been acquitted on the charges of attempt murder and treason, or 2) return him from whence he came (i.e., prison). Lord Kenyon, Chief Justice, recognized that prison was not the place for Mr. Hadfield nor was his return to the community the right choice. During the course of giving his judgment, the Chief Justice said the following:

> The prisoner, for his own sake, and for the sake of society at large, must not be discharged; for this is a case which concerns every man of every station, from the King upon the Throne to the beggar at the gate; people of both sexes and of all ages may, in an unfortunate frantic hour, fall a sacrifice to this man, who is not under the guidance of sound reason; and therefore it is absolutely necessary for the safety of society that he should be properly disposed of, all mercy and humanity being shown to this most unfortunate creature. But for the sake of the community, undoubtedly he must somehow or other be taken care of, with all the attention and all the relief that can be afforded him. . . for the present we can only remand him to the confinement he came from. . . [Ref. 4, p. 1354].

Hadfield was returned to prison, but as a result of the conundrum he presented the British Parliament passed the Criminal Lunatics Act,[5] which gave the court authority to commit an accused found to be not guilty by reason of insanity to "strict custody, in such place and in such manner as the court shall deem fit, until His Majesty's Pleasure is known. . . ." The Act further gave authority to His Majesty to make an order for the safe custody of such persons during his pleasure. The provisions of that Act were incorporated into the drafts of the British Criminal Code, which was never enacted but which was later adopted by Canada as its first Criminal Code of 1892. These provisions remained virtually unchanged in form until the proclamation of Bill C-30 on February 5, 1992. The main part of Bill C-30 formed what is now Part XX.1 of the Criminal Code. Section 672.38, which first appeared in the Criminal Code in 1992 and reads as follows:

> S. 672.38(1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.
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> s. 672.38(2) A review Board shall be treated as having been established under the laws of the province. 1991. c. 43, s. 4.

Within the statutory provisions of the previous legislative scheme, the lieutenant governor, the representative of Her Majesty the Queen, had custody of the mentally disordered accused. His decisions did not require input from an advisory review board; that part of the scheme was optional for each province. In Ontario, a review board had existed for more than 20 years prior to the proclamation of Bill C-30. The board was known as the Lieutenant Governor's Board of Review. That "advisory" board had no authority or jurisdiction to determine what should happen with a person whose position it had to review, but rather it was restricted to reporting to the lieutenant governor its findings, opinions, and conclusions. Persons who were subject to a lieutenant governor's warrant were kept in strict custody until the lieutenant governor's pleasure was known through warrants issued in his or her name. The system or scheme then envisaged by the Criminal Code was administered differently in different provinces.

In 1991, with the case of *Regina v. Swain,*[6] the Supreme Court of Canada struck down the scheme then set out in the Criminal Code for dealing with persons found not guilty by reason of insanity, in that it violated the rights of the accused as defined by the Charter of Rights and Freedoms.[7] The Charter of Rights and Freedoms, passed by the Canadian Parliament in 1982 as part of the repatriation of the Constitution from Great Britain, guaranteed the fundamental rights and freedoms that all Canadians can expect as citizens of Canada. The Court directed the federal government to devise a new scheme for the supervision of the mentally disordered accused within six months of its decision. That decision resulted in Bill C-30.

Present Bill C-30 Provisions (Part XX.1 of the Criminal Code)

As we noted in our account of the Swain case,[8] the Bill C-30 amendments modernized some of the language that had been used in the Criminal Code for more than 100 years. "Not guilty by reason of insanity" was changed to "not criminally responsible (NCR)." Automatic "strict custody" was eliminated. Instead, the court is now able to hold a disposition hearing immediately following the verdict and make its own disposition for the accused. The role of the lieutenant governor has been eliminated. The "advisory" boards that existed prior to 1992 were converted into adjudicative boards whose responsibilities were expanded to the actual making of the order, now referred to as a "disposition."

The new provisions of the Criminal Code provide that a jury or judge may find the accused committed the act or made the omission that formed the basis of the offense charged but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of § 16 of the Criminal Code. The jury or judge ". . . shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder." In light of this provision it would now appear to be technically incorrect to say that such an accused has been "acquitted" of the offense with which he was charged.

If the court returning a verdict that an accused is unfit to stand trial or NCR does not hold a disposition hearing, or holds a disposition hearing but makes no disposition, the accused then remains subject to whatever order for custody or judicial interim release that was in existence at the time of the verdict. That could mean either the existing or new bail order or an order requiring custody in jail or in a hospital pending a first disposition ("initial disposition") by the provincial review board.

Dispositions

As mentioned above, with the proclamation of Bill C-30, the lieutenant governor's involvement and the warrant system came to an end. Now the provincial review boards are the final decision makers. The final decisions are now referred to as dispositions. Three disposition options are now available for the accused who has been found NCR, and two options are available for the unfit accused. These options are set out below.

> 672.54. Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
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> (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, and in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
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> (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
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> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate 1991, c. 43, s. 4.

In the case of an accused who has been found unfit to stand trial, the court retains residual jurisdiction over the accused who returns to court if and when he becomes fit to stand trial. Therefore, an absolute discharge is not an option for an unfit accused. Jurisdiction is maintained over the unfit accused only so long as he or she remains unfit. Dangerousness is not a jurisdictional issue in these cases.

Pursuant to the above provisions, an accused who has been found NCR can be granted an absolute discharge by the board only when the board is satisfied that "the accused is not a significant threat to the safety of the public." If an accused is considered to be no longer a significant threat to the safety of the public and is therefore to be absolutely discharged, the board will have no further jurisdiction over the accused.

Early case law[9] decided that the provisions of § 672.54(a) meant that where the Review Board failed to find affirmatively that the accused was not a significant threat to the safety of the public it need not grant an absolute discharge. In its application, this meant that where the Review Board was uncertain about the dangerousness of the accused, jurisdiction was maintained.

For the first time since the proclamation of Bill C-30, the Supreme Court of Canada had an opportunity to examine these particular provisions of Part XX.1 of the Criminal Code of Canada in the case of *Winko v. British Columbia* (*Forensic Psychiatric Institute*).[10]

Facts of the Case

Mr. Winko was a 47-year-old, single, unemployed man living in a community residence for chronically mentally ill patients. He had been diagnosed with chronic residual schizophrenia. In 1983, he was arrested for attacking two pedestrians on the street with a knife and stabbing one of them behind the ear. Evidence at trial indicated that he had been hearing voices, which he thought were coming from these strangers, saying "Why don't you go and grab a woman and do her harm?" "You are going to the west end to kill someone." "You know you cannot kill a woman." "You are a coward." As a result of this incident, he was charged with aggravated assault, assault with a weapon, and possession of a weapon for purposes dangerous to the public peace. He was subsequently found not guilty by reason of insanity.

Following this verdict, between 1984 and 1990,

Winko was detained in strict custody at a forensic psychiatric institute. In 1990, he was cascaded into the community under certain conditions. He lived at a series of hotels, but eventually, after a short readmission to the forensic institute, he went to live in a hostel staffed by professional mental health workers.

Winko had one further brief admission in 1994, but even with occasional supervised drug holidays, he has never been physically aggressive to anyone since the offenses of 1983. In 1995, the provincial review board considered Mr. Winko's status, and the majority expressed the opinion that Winko could become a significant risk to public safety in certain circumstances and was therefore not ready for an absolute discharge; the Board did, however, order a conditional discharge. An appeal was launched with reference to section 15(1) of the Charter.[11] This is the section on Equality Rights, which reads:

> 15(1) Equality Before and Under Law and Equal Protection Protection and Benefit of Law. Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

In a companion case with which the authors were directly concerned, a different issue was primarily addressed. Denis LePage spent the majority of his adult life in institutions with a diagnosis of antisocial personality disorder. In 1966, he was convicted of manslaughter arising from the death of his aunt and was sentenced to 12 years in prison. Shortly after his release in 1975, he re-offended and was convicted of indecent assault and contributing to juvenile delinquency. In 1976, he was found outside the home of a therapist who had treated him while in custody. He was carrying firearms, bullets, and other weapons and was found not guilty by reason of insanity for possession of a weapon for a purpose dangerous to the public peace in 1977. He has remained in psychiatric hospitals or a jail since that time, mainly residing in the maximum security Oak Ridge Division of the Penetanguishene Mental Health Center (Penetanguishene, Ontario).

While at Oak Ridge, LePage became increasingly resistant to attempts to treat him and eventually refused to accept any form of treatment. He also exhibited threatening and verbally aggressive behavior and was charged with uttering death threats. He pled guilty to these offenses in 1993. Prior to sentencing, he sought, through his counsel, a declaration that §§ 672.47 and 672.54 of the *Criminal Code* were of no force and effect, as they violated his rights pursuant to §§ 7 (Life, Liberty and Security of Person) and 15(1) (Equality Rights) of the Charter. This relief was sought from the judge who was presiding over LePage's outstanding criminal charges. The sentencing hearing was adjourned at the request of LePage, and over the course of the next several months, a great deal of evidence was gathered to address the constitutional issues. As the applicant's claim in relation to § 7 of the Charter was based upon a contention that the federal government had acted unreasonably in failing to proclaim the "capping" regime into force, much of the evidence obtained related to the adequacy or work ability, in practical terms, of the unproclaimed capping provisions. "Capping of dispositions" simply defined means the maximum period that an accused could be detained would be life, in cases in which the minimum punishment provided by law is life imprisonment (i.e., first and second degree murder, high treason, and various offenses under the National Defense Act), or a maximum of 10 years or the maximum period of imprisonment for which the accused is liable, whichever is shorter, in indictable offenses. In non-indictable offenses, the cap would be two years or the maximum sentence, whichever is shorter. The accused would be released if he was not subject to detention under the provincial mental health act provisions for involuntary civil commitment.

At the sentencing hearing, LePage's arguments based upon § 7 of the Charter were dismissed, essentially on the basis that the principles of fundamental justice did not entitle him to the benefit of provisions which did not have the force of law. However, the judge, Howden J. of the Ontario Court (General Division), accepted the argument based upon § 15 of the Charter and found that § 672.54 of the Criminal Code discriminated against the NCR accused subject to Part XX.1 on the basis of their mental disability. The judge further held that the limitation on equality rights could not be justified under § 1 of the Charter and therefore ordered § 672.54 "struck down."[8] The Crown successfully appealed to the Court of Appeal for Ontario, and LePage was then granted leave to appeal to the Supreme Court.

Since the Supreme Court did not directly address capping, which was the issue in *LePage*, having dismissed the § 7 Charter challenge, this issue will not be pursued in this article. A further five-year review

of the legislation is anticipated, following which we may see changes.

R. v. Winko (and Companion Cases), Supreme Court of Canada Decision

Constitutional challenges were leveled against the disposition-making provisions of the Criminal Code.

Issues

1. Does s.672.54 of the Criminal Code, R.S.C., 1985, c. C-46, infringe the rights and freedoms guaranteed by s.15[1] of the Canadian Charter of Rights and Freedoms on the ground that it discriminates against people with a mental disorder, including people with a mental disability, who have been found not criminally responsible on account of mental disorder?

2. Does s.672.54 of the Criminal Code, R.S.C., 1985, c. C-46, infringe the rights and freedoms guaranteed by s.7 of the Canadian Charter of Rights and Freedoms on the ground that it deprives persons found not criminally responsible on account of mental disorder of their right to liberty and security of the person contrary to the principles of fundamental justice?

3. If so, can these infringements be demonstrably justified in a free and democratic society under s.1 of the Canadian Charter of Rights and Freedoms?

Held: The answer to the first two questions was no, thus rendering an answer to the third question unnecessary.

All grounds for appeal were dismissed by the court. What is unusual about this case is that for a decision which on its face did not change the *status quo*, in that all angles of appeal were dismissed, tremendous controversy has resulted.

There has been a wide range of opinion offered as to how *Winko* should be interpreted. Concerns have arisen that the decision has far ranging implications for the Review Boards across Canada and that immediate changes are required. These concerns can be broken down into three main groups: 1) jurisdictional threshold, 2) prospective assessment of significant threat, and 3) the characterization of the Review Board's function.

Set out below are the three areas of concern. Relevant excerpts from the decision are included.

Jurisdictional Threshold

The court or review board cannot maintain jurisdiction over an NCR accused who does not present as a significant threat to the safety of the public.

As mentioned above, the first appellate court to deal with this section of Part XX.1 of the Code was the British Columbia Court of Appeal in *Orlowski* in 1992. In this case, a "double negative" test was set out, with which the Review Boards gradually became comfortable: ". . . if the Board fails to find affirmatively that the accused is not a significant threat to the safety of the public it need not discharge the accused absolutely." This language appeared to create a reverse onus in that the accused was put in the position of having to prove that he was not a significant threat to the safety of the public before there was any prospect of an absolute discharge. In cases where the Review Board was not certain that the accused was not a significant threat, a discharge would not be granted.

With the Supreme Court's decision in *Winko*, the process appears to have changed. Whereas prior to *Winko*, uncertainty about threat resulted in continued jurisdiction; after *Winko* uncertainty results in a lapse of jurisdiction.

The Supreme Court stated that if the court or review board fails to positively conclude that the NCR offender poses a significant threat to the safety of the public, it must grant a conditional discharge. The Court went on to say that if the court or review board cannot resolve the issue, it must grant an absolute discharge. The Supreme Court was clear that the review board cannot avoid the responsibility of making that determination. It stated that the threat posed must be significant "both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious."[12] There is no doubt that the test articulated is considerably different from the test as set out in the Code. No explanation is offered for the departure from the words of the Code. The process of getting to the point of being able to positively state that the accused is not a significant threat to the safety of the public is quite different from that of being able to state positively that the accused is a significant threat to the safety of the public. Prior to the *Winko* decision, the review board would maintain jurisdiction over an accused until a party had satisfied the forensic burden of establishing that the accused was not a significant threat to the safety of the pubic. It is hy-

pothesized that if jurisdiction is predicated upon a positive finding of significant threat, then more absolute discharges will be granted. While preparing this article, the authors had the opportunity to review informally the figures of absolute discharges over the past year, and the foregoing hypothesis is, in fact, supported.

Nevertheless, it may well be that this change in approach will impact most significantly upon those accused presently on conditional discharges or who have committed relatively minor offenses.

Despite the Supreme Court's decision, an accused could quite properly be found a significant threat to the safety of the public if there was sufficient uncertainty surrounding his future treatment. The review board would then take into account the accused's compliance with treatment, living arrangements, abstinence from substances, and any other relevant circumstances. In other words, we should not be confusing uncertainty as it pertains to threat with uncertainty as it pertains to variables that may cause a relapse, which could result in a threat to public safety. If we are uncertain with respect to those variables related to dangerousness, it therefore follows that we can be positive about the accused constituting a threat.

Prospective Aspect of the Assessment

It appears that the decision suggests the inquiry into "significant threat" is now focused upon the accused's present condition rather than upon his prospective condition. This concern arises primarily as a result of the following excerpt. The Supreme Court stated, "It is for the court or review board acting in an inquisitorial capacity to investigate the situation prevailing *at the time of the hearing* [emphasis added]."[13]

The authors and some of our colleagues who have been consulted feel that the process of assessing significant threat is still very much a forward-looking prospective assessment. Support for this view comes from an examination of the sorts of things the Court suggests we consider. The Court includes various factors that may be called relapse prevention plans, as mentioned above.

Function of the Review Boards

Many observers are of the view that the Supreme Court has characterized the function of the review board in a different way from our previous understanding. Whereas prior to *Winko*, the board viewed itself as an essentially adjudicative tribunal, making dispositions on the basis of the evidence and submissions of the parties, there is considerable language in the decision suggesting that our role is quite different. The Supreme Court notes that the review boards are inquisitorial. The Supreme Court implies that the board has a duty not only to search out and consider evidence but also to search out and consider evidence. The Court concludes: "The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to the public safety and thereby justifying a restrictive disposition always remains with the court or review board."[14] The Court goes on to say that "as a practical matter it is up to the court or review board to gather and review all available evidence. . . ." This view raises issues as to the board's function and obligations. The implications are controversial, and divided opinions are evidenced even among the authors of this article. Two of the authors, who more commonly sit on the board, find the language of this section alarming, while the other two, who more commonly appear before the board, gave evidence at the trial stage of the proceedings that resulted in this finding, and therefore give it qualified support. However, we all agree that a better situation may have been a return to the pre-1992 practice of having an independent psychiatric assessment, an option that the Court did not address. It may be, however, that the Supreme Court merely intended to underline the importance of the review board's accessing all of the relevant evidence that is available on the issue of significant threat. The review board does have the ability to direct parties other than the accused to take action that will assist the review board in its decision making.

Conclusion

There are a number of areas of forensic psychiatric interest in the *Winko* decision by the Supreme Court of Canada. First, there is the advantage of having a single Federal Criminal Code, which means uniform jurisdiction for mentally abnormal offenders found not criminally responsible on the basis of mental disorder; this means uniformity across Canada for decisions regarding the conditional release and rehabilitation of this group of mentally abnormal offenders. This group of mentally abnormal offenders also have had their Charter rights against restrictions to their

liberty strongly endorsed. Second, the strengthening of the inquisitorial role of review boards gives them an expanded role and increased responsibility, which is in itself a positive endorsement of forensic psychiatry. Third, the guidance given by the Supreme Court in assessing significant threat in terms of relapse prevention in the treatment of the seriously mentally ill can also be seen as a positive endorsement of the role of forensic psychiatry in treating the mentally abnormal offender. It is also a signal for forensic psychiatry to complete further research into treatment outcome and risk assessment in this group of patients.

References

1. Glancy G, Bradford J: Canadian landmark cases: *Regina v. Swain:* translating M'Naughton into twentieth century Canadian. J Am Acad Psychiatry Law 27:301–7, 1999
2. Regina v. Swain, 1 S.C.R., 933, 950 (Can. 1991)
3. Bill C-30, An Act to Amend the Criminal Code and to Amend the National Defense Act and The Young Offenders Act in Consequence Thereof, S.C. c.43
4. Hadfield's Case, Re 27 St. Tr. 1281 (1800)
5. The Criminal Lunatics Act, 1800, 39, & 40 Geo. III, c. 94 (U.K.)
6. Regina v. Swain, 1 S.C.R. 933 (1991)
7. Canadian Charter of Rights and Freedoms: Pt 1. Constitution Act 1982; Canada Act 1982 (U.K.), Chap. 11
8. Glancy G, Bradford J: Canadian Landmark Cases: *Regina v Swain.* J Am Acad Psychiatry Law 27:301–7, 1999
9. Orlowski v. British Columbia (Attorney General), 75 C.C.C. (3d) 138 (B.C.C.A.) (1991)
10. Winko v. British Columbia (Forensic Psychiatric Institute), File No. 25856 (June 17, 1999, Supreme Court of Canada) and companion appeals decided for the same reasons [*R. v. LePage*; *Orlowski v. British Columbia* (Forensic Institute); *Bese v. British Columbia* (Forensic Psychiatric Institute)]
11. Canadian Charter of Rights and Freedoms: Pt 1. Constitution Act 1982, Canada Act 1982 (U.K.) Chap. 11, Sect. 15(1)
12. Winko v. British Columbia (Forensic Psychiatric Institute) (June 17, 1999); SCC Fine No. 25856
13. *Supra,* p 70
14. *Supra,* p 54