Chapter 10 : Appeals

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I. Introduction

This chapter deals with appeals from a verdict of not criminally responsible on account of mental disorder. It examines the procedures followed and legal tests applied when the accused or the prosecution decides to appeal the verdict. It also briefly examines other ways that the issue of mental disorder may be raised on appeal. For example, Reference cases initiated by the Attorney General to the Court of Appeal have been occasionally used. Further, the court may raise the issue of mental disorder. The chapter also looks at the powers of the courts of appeal once they have heard an appeal of the verdict.

This chapter deals specifically with appeals from the special verdict. It does not cover appeals from dispositions (see Chapter Twelve) or appeals on fitness issues (see Chapter Five).

II. Appeals from the Verdict of Not Criminally Responsible on Account of Mental Disorder

A. Summary Convictions

1. Sections 813 and 822

When there is a verdict of guilty or a verdict of not criminally responsible on account of mental disorder, the disposition (sentencing) stage follows. In the latter situation, the disposition options for the judge or the review board are outlined in sections 672.54 and 672.58. Clearly, under this legislation, any party may appeal a disposition under sections 672.72 to 672.78.

Although there are specific provisions in the legislation that outline the effect of a verdict of not criminally responsible on account of mental disorder (NCRMD), there are no specific provisions dealing with an appeal by any party from the verdict. One must resort to the general appeal provisions in Part XXVII (Summary Convictions) of the *Criminal Code*[1] to find out what statutory rights the parties might have.

There are basically two forms of appeal available for a summary conviction offence: an appeal under s 813 to an appeal court (in Alberta, the Court of Queen's

[1] RSC 1985, c C-46. (hereinafter *Criminal Code*).

Bench) and a "summary appeal on transcript or agreed statement of facts" under s 830 directly to the provincial Court of Appeal. Under s 813, either the Crown or the accused may appeal from a decision of a provincial court to a court designated by s 812. Until 1976, the appeal took the shape of a completely new trial (a trial *de novo*). It was thought necessary to have a new trial because many of the magistrates did not have legal training and because there was usually no formal transcript or record of the trial. The requirement of having a new trial on appeal was modified because these concerns have been resolved.[2] The option of having a new trial remains available under ss 822(4) - (7) in exceptional circumstances.

Under s 813, an accused may appeal from a conviction or order made against him/her or against the sentence passed on him/her, or against a verdict of unfit to stand trial (UST) or NCRMD. The prosecutor may appeal from an order that stays (stops) proceedings on an information (a charging document), or dismisses an information, as well as against the sentence pronounced on the accused, or against an UST or NCRMD verdict. Before the 1992 amendments to the *Criminal Code*, under s 813 (summary conviction appeal), neither the defendant nor the prosecutor had the express right to appeal a finding of not guilty on account of insanity. After the 1992 amendments, in summary conviction proceedings, both the Crown and the accused have the express right to appeal from the verdict of NCRMD under s 813(a)(iii) and (b)(iii). The relevant portions of s 813 read:

> 813. Except where otherwise provided by law,
> (a) the defendant in proceedings under this Part may appeal to the appeal court
> ...
> (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and
> ...
> (b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
> ...
> (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial…

[2] Griffiths, Curt & Simon Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 212 (hereinafter Griffiths & Verdun-Jones).

The powers of the appeal court where there is a summary conviction appeal under s 813 are outlined in ss 603 to 689 (discussed below).

2. Section 830

Section 830 provides for a summary appeal directly to the provincial court of appeal on a transcript or agreed statement of facts. This type of appeal is much more limited than the s 813 appeal. It is concerned only with questions of law. This means that the facts of a case cannot be an issue. Previously, the right of any party to appeal a verdict of not guilty by reason of insanity was not addressed under this section. However, the amendments now expressly recognize such a right. The section provides (in part):

> 830. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or unfit to stand trial or other final order or determination of a summary conviction court on the ground that:
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> (a) it is erroneous in point of law;
>
> (b) it is in excess of jurisdiction; or
>
> (c) it constitutes a refusal or failure to exercise jurisdiction.

Since the issues raised on this type of appeal are much more limited, the powers of the appeal court are also more limited. They are outlined in s 834. The appeal court may either "affirm, reverse, or modify the conviction, judgment or verdict of acquittal or other final order or determination", or alternatively it may remit the matter back to the trial court with the appeal court's opinion on the matter of law raised and may "make any other order in relation to the matter...that it considers proper." One should note that the appeal court does not have the power to order a new trial under these provisions.[3]

3. Appeal to the Provincial Court of Appeal

After the summary convictions matter has been dealt with by an appeal under s. 813, a further appeal may be taken to the provincial Court of Appeal under s. 839(1)(a) with leave of the Court of Appeal, on a question of law alone. This appeal is heard and determined in accordance with ss 673 - 679, with the necessary modifications.

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[3] Griffiths & Verdun-Jones, at 214.

4. Appeal to the Supreme Court of Canada

The *Criminal Code* does not make any provision for an appeal from the decision of a provincial court of appeal to the Supreme Court of Canada in a summary convictions matter.[4] However, under subsections 40(1) and 40(3) of the *Supreme Court Act,*[5] "an appeal lies to the Supreme Court from any final or other judgment of the highest court of final resort in a province...acquitting or convicting or setting aside or affirming a conviction or acquittal...in respect of a question of law or jurisdiction, of an offence other than an indictable offence."[6] Whether a verdict of NCRMD would be covered under this section as being an "acquittal" is an issue that is discussed below under 2. The Right of the Crown to Appeal a Verdict of Not Criminally Responsible on Account of Mental Disorder (Indictable Offences).

B. Indictable Offences

1. General

The general appeal procedures are simpler for indictable offences. All appeals from the decisions of trial courts are taken to the provincial Court of Appeal. Both the accused and the prosecutor may appeal, but the prosecutor's rights of appeal are more limited than those of the accused.[7] The powers of the Court of Appeal (discussed below) are outlined in sections 683 to 689.

Sections 691 to 695 govern appeals from the provincial Court of Appeal to the Supreme Court of Canada. An accused who is convicted of an indictable offence, and whose conviction is affirmed by the court of appeal, may appeal to the Supreme Court on any question of law on which a judge of the court of appeal dissents or on any question of law, if the accused obtains leave of the Supreme Court.[8] A person who is acquitted of an indictable offence (other than by reason of a verdict of NCRMD) and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada as a matter of right.[9] The Crown may appeal against the decision of the court of appeal to set aside a conviction in an appeal taken by D under s 675 or to dismiss an appeal by the Crown under ss 676(1)(a), (b), (c) or (3). The appeals are a matter of right on a question of law on which a judge of the court of appeal has dissented or on any

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[4] Griffiths & Verdun-Jones, at 214.
[5] RSC 1985, c S-26.
[6] Griffiths & Verdun-Jones, at 214, citing RE Salhany, *Canadian Criminal Procedure,* 4th edition (Aurora, Ontario: Canada Law Book Inc, 1984) at 518.
[7] Griffiths &Verdun-Jones, at 214. See sections 675 and 676.
[8] *Criminal Code,* at s 691(1).
[9] *Criminal Code,* at s 691(2).

question of law with leave of the Supreme Court of Canada.[10]

If a person has been found NCRMD and this verdict is affirmed by the court of appeal or if a verdict of guilty is entered by the court of appeal against the person, he/she may appeal to the Supreme Court of Canada under s 692. The powers of the Supreme Court of Canada in relation to indictable offences are the same as those available to the provincial Court of Appeal.

2. The Right of the Crown to Appeal a Verdict of Not Criminally Responsible on Account of Mental Disorder (Indictable Offences)

Although there are specific provisions in the 1992 legislation that set out the effect of a verdict of NCRMD, at the time, there were no specific provisions dealing with an appeal by any party from the verdict. One must look to the general appeal provisions in Part XXI (Appeals—Indictable Offences) of the *Criminal Code* to find out what statutory rights the parties might have.

Appeals from verdicts of guilty, not guilty, and NCRMD are discussed in Part XXI. The 1992 amendments to the *Criminal Code* resulted in some changes in the wording of the various appeal provisions. A person convicted of an offence, a person found unfit to stand trial, and a person found NCRMD continued to have the right to appeal under s 675. At the time, the wording of s 676 (as amended) clearly granted the Crown the right to appeal a finding that the accused was unfit to stand trial (s 676(3)), as well as the right to appeal a verdict of acquittal (s 676(1)(a), but did not specify the right to appeal a verdict of NCRMD. There was much controversy as to whether NCRMD could be interpreted as an "acquittal" for the purposes of this section and whether the Crown could appeal.[11] Due to later amendments to the provision, it is now clear that the Crown also has the right to appeal a verdict of NCRMD by a trial court, as long as the ground of appeal involves a question of law alone.

It is not always obvious whether an issue constitutes a question of law or a question of fact. In *R v SH*,[12] the accused was charged with sexual assault, and acquitted due to automatism caused by a "disease of the brain". The Crown submitted an appeal with the position that the accused's automatism was caused by a "disease of the mind", and therefore should have been given an NCRMD verdict. The Crown did not dispute the finding by the trial judge that the accused's actions were caused by a state of automatism. The Court of Appeal held that whether or not the accused had a disease of

[10] *Criminal Code,* at s 693(1).
[11] See: L. McKay-Panos "Appeals by the Crown from a Verdict of Not Criminally Responsible on Account of Mental Disorder in Proceedings Upon Indictment" (1992), 14 CR (4th) 353.
[12] *R v SH*, 2014 ONCA 303.

the mind is a question of law and not fact. Where The Court of Appeal can accept the facts as found by a trial judge, but reach a different legal conclusion, the Crown may appeal. Generally, however, it has been made quite clear that a finding that an accused is mentally disordered at the time of the offence is a finding of fact. As such, the court of appeal will not interfere with this finding unless the trier of fact reached an unreasonable decision, or was misdirected in law or applied an erroneous principle of law.[13]

III. References

Although it is traditionally the practice that the Crown or the accused launch an appeal, the Minister of Justice has raised the issue of mental disorder in a reference question to the Ontario Court of Appeal. In *R v Gorecki (No 2),*[14] the accused had been charged with the murder of his wife. The accused's psychiatrist had advised him that he might have a defence of insanity, but the accused refused to permit his lawyer to advance this theory. At trial, the only defence raised was accident. The accused was convicted. His appeal to the Court of Appeal and application for leave to appeal to the Supreme Court of Canada were dismissed. The accused then applied to the Minister of Justice under s 690 of the *Criminal Code* (this section has since been repealed) for an order referring the matter to the Court of Appeal for hearing as if it were an appeal on the issue whether at the time of the offence the accused was insane. Evidence given at the reference hearing indicated that the psychiatrist who examined the accused after his conviction felt that the accused had no real insight into his condition because of his mental illness and that he did not consider himself insane.

The Court of Appeal of Ontario directed a new trial. Because there had already been an unsuccessful appeal, the proceedings at the reference were limited to the ground upon which the Minister referred the case. The Court of Appeal stated that although it had the discretion to admit fresh evidence on appeal under s 683, it would not permit such evidence to be adduced where an accused for tactical reasons deliberately refrained from calling the evidence at trial. However, because the matter was referred by the Minister under s 690, the court would consider the case on its merits. Because the circumstances of the case were unusual and because the accused's mental condition may have prevented him from deliberately and rationally deciding not

[13] *R v Fisher* (1973), 12 CCC (2d) 513 (SC), leave refused (1973), 12 CCC (2d) 513n (*Fisher*).
[14] *R v Gorecki (No 2)* (1976), 32 CCC (2d) 135 (Ont CA).

to advance the defence of insanity, the evidence of the accused's mental condition at the time of the offence was admitted. There was evidence of a disease of the mind that a jury should consider and that might have affected the verdict. The evidence, however, was not conclusive, so the Court of Appeal directed a new trial. In addition, the court ordered that the issue of insanity would be the only defence that the accused could raise at the new trial because the other issues had already been concluded by the trial and appeal.[15]

Although it was once possible to raise the issue of mental disorder in a reference, now that s 690 has been repealed, the issue of mental disorder is now heard by the courts of appeal through appeals by the Crown or by the accused. Once an appeal has been launched, the court of appeal has powers as provided in s 686 (whether the offence is indictable or a summary conviction). If the appeal is from a conviction or a verdict of NCRMD, the court of appeal can dismiss the appeal, order a new trial or substitute a verdict of acquittal. The court of appeal has the jurisdiction under s 686(1)(d) to set aside a conviction and find the appellant not criminally responsible on account of mental disorder. If the Crown appeals from a verdict of NCRMD (because it is considered like an acquittal), the court of appeal may dismiss the appeal, order a new trial, or enter a verdict of guilty if the matter was heard by a judge alone who made an error of law (s 686(4)).

IV. Issue of Mental Disorder First Raised on Appeal

Even if the issue of mental disorder has not been raised at trial, it may be raised on appeal (s 686(1)(d)). If the issue of mental disorder is raised for the first time on appeal, the court will examine the issue and if it is satisfied that the appellant was not criminally responsible at the time of the wrongful act, it will exercise its power to quash the conviction and substitute the special verdict of NCRMD (formerly not guilty on account of insanity).

In *R v Irwin,*[16] the accused was convicted of murdering her infant. The only defence advanced by the accused was that the child was killed by a stranger. On appeal, the issue of insanity was raised by the court on its own motion. The court of appeal ordered the accused to be examined by a psychiatrist and heard evidence from the

[15] *Quaere* whether this procedure would be possible today, in light of the SCC decision in *Swain* which held that the common law rule permitting the Crown to lead evidence of insanity over the objection of the accused violated s 7 of the *Charter of Rights* and was therefore not permitted.

[16] *R v Irwin* (1977), 36 CCC (2d) 1 (Ont CA).

psychiatrist. There was no doubt that the accused killed her son, but the psychiatric evidence introduced indicated that the accused was suffering from a personality disorder, post partum depression and other difficulties. The court allowed the appeal and found the accused not guilty by reason of insanity.

In *R v Trecroce,*[17] the accused was charged with murder as a result of the death of his wife. He had raised several defences at trial, but not insanity. Several grounds of appeal were raised, but insanity was not included. After examining psychiatric reports that were available on the accused, the court of appeal decided to receive oral evidence from two experts under s 683, which empowers the court of appeal to receive evidence where it considers it in the interests of justice. After hearing evidence of two experts, the Court found that the appellant was suffering from a mental disorder, and was likely suffering from the same disorder when the offence occurred. However, the Court found that the evidence was not of such strength as to warrant the Court exercising the power conferred on it by s 686(1)(a)(iii) to set aside the conviction on the ground that there was a miscarriage of justice. In the result, the court ordered that the psychiatric reports and a transcript of the evidence of the two experts be forwarded to the penitentiary authorities in order to assist in the treatment of the accused. The appeal was dismissed.

V. Powers of Courts of Appeal

Whether the matter proceeded upon indictment or upon summary conviction, the powers of the court of appeal are outlined in s 686.[18] Subsection 686(1)(a) outlines the three bases upon which an appeal by the accused may be allowed: where the verdict is unreasonable or unsupportable; where there has been an error of law by the trial judge; or on any ground where there has been a miscarriage of justice. If the court of appeal allows the appeal, s 686(2) requires the conviction be quashed, and either an acquittal entered or new trial ordered. Where appropriate, a verdict of NCRMD may be substituted on appeal, under s 686(1)(d). For example, if mental disorder is raised at trial but there has been an error of law such as a misdirection to the jury, and the court of appeal is satisfied that a proper direction would have resulted in a verdict of NCRMD, it will substitute that verdict.

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[17] *R v Trecoce* (1980), 55 CCC (2d) 202 (Ont CA).

[18] Section 822 provides that subsections 683 to 689 (except 683(3) and 686(5)) apply with the necessary modifications to summary convictions taken under s 813.

In *R v Barnier,*[19] the accused was charged with murder and raised the defence of insanity. The trial judge instructed the jury that the words "appreciating" and "knowing", as they appeared in s 16(2) of the *Criminal Code*, had the same meaning. Earlier in the trial, two psychiatrists called by the Crown stated that they had found the accused to be insane, but after they were instructed to read the judgment in *R v Schwartz,*[20] using the interpretation provided by the judge, they reversed themselves and found the accused not to be insane. The jury found the accused guilty. The Court of Appeal of British Columbia applied s 686(1)(d) (as it now is) and set aside the conviction, finding the accused not guilty by reason of insanity.

In *R v Landry,*[21] the accused was charged with first degree murder in the killing of a man whom he had assaulted three years earlier. He admitted planning the killing and having purchased a firearm for that purpose. At trial, the accused pleaded insanity. There was evidence that he suffered from a severe psychosis that made him believe that he was God and that he had a mission to destroy all evil forces on earth. He also believed that the victim was Satan and that he had to kill him in order to effectively rid the world of evil. The trial judge instructed the jury that the accused should not be convicted if he lacked the capacity, because of a disease of the mind, to appreciate the nature or quality of the act or to know that the act was *legally* wrong. The accused was convicted.

The Court of Appeal of Quebec unanimously set aside the conviction in light of the evidence and substituted a verdict of not guilty by reason of insanity. The Supreme Court of Canada held that the Court of Appeal had correctly exercised its jurisdiction under s 686(1)(d) (as it now is). The defence of insanity was raised at trial, and there was an error of law in the form of a misdirection about the necessity of knowing that the act was legally instead of morally wrong under s 16. If the jury had been properly instructed about the test, a verdict of not guilty by reason of insanity would have been the result. Since there was a misdirection, it was not necessary to consider whether the verdict was unreasonable or could not be supported by the evidence.

In *R v Zilke,*[22] the accused was charged with first degree murder and at trial relied upon the defence of insanity. The evidence indicated that for several years the accused had been suffering from serious paranoia. He believed that his fellow workers

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[19] *R v Barnier,* [1980] 1 SCR 1124. See also: *R v Kane* (1975), 6 APR 13 (NSSCAD); *R v Winters* (1985), 51 Nfld & PEIR 271 (Nfld CA); *R v Kjeldsen,* [1981] 2 SCR 617.
[20] *R v Schwartz (*1976), 29 CCC (2d) 1 (SC) (hereinafter *Schwartz*).
[21] *R v Landry (*1991), 2 CR (4th) 268 (SC).
[22] *R v Zilke* (1978), 44 CCC (2d) 521 (Sask CA).

were going to kill him or make him into a killer and he constantly heard voices. Two psychiatrists testified that he was suffering from a disease of the mind, and both stated that he was not capable of appreciating the nature and quality of the act. The trial judge first instructed the jury as to first and second degree murder and then followed with the defence of insanity. The jury convicted the accused.

The Saskatchewan Court of Appeal held that the trial judge should have first instructed the jury as to the defence of insanity. Since all of the independent evidence supported the defence of insanity, the verdict of the jury was unreasonable and could not be supported by the evidence. The Court of Appeal held that if the jury had been properly instructed, the verdict would have been not guilty on account of insanity. The conviction was set aside and the appellant was found not guilty on account of insanity.

If the issue of mental disorder has been raised at trial, and if the court of appeal is *not* satisfied that, without the misdirection, the inevitable verdict would have been not guilty by reason of insanity, it will decline to act under s 686(1)(d), but will order a new trial under s 686(1)(a) and s. 686(2).[23]

Where there has been no misdirection at trial, the court of appeal may allow an appeal against a conviction or a verdict that the accused is not criminally responsible on account of mental disorder if it is of the opinion that the verdict is unreasonable or cannot be supported by the evidence.[24] In *R v Scono,*[25] the accused was convicted by a jury of two counts of attempted murder. Following psychiatric evidence and agreement by both counsel for the accused and the Crown, the trial judge strongly urged the jury to return a verdict of not guilty by reason of insanity. The jury did not follow the urging of the trial judge and returned a verdict of guilty. The Ontario Court of Appeal held that the verdict was unreasonable and could not stand. The court used its powers under s 686(1)(d) (as it now is) to set aside the conviction and find the appellant not guilty on account of insanity.

However, where there has been no error of law and the verdict cannot be said to be unreasonable or unsupported by the evidence, the court will decline to interfere with the verdict.[26] In *Fisher,* the accused raised the defence of insanity at his murder trial.

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[23] *R v Cooper* (1978), 40 CCC (2d) 145 (Ont CA), reversed (1980), 51 CCC (2d) 129, 13 CR (3d) 97 (SCC); *R v Baltzer* (1974), 27 CCC (2d) 118 (NSCA); *R v Logan* (1944), 82 CCC 234 (BCCA).

[24] *Criminal* Code, at s 686(1)(a)(i). See unreasonable verdict test in *R v P(R),* [2012] 1 SCR 746.

[25] (1986), 13 OAC 23 (Ont CA). See also: *R v Kelly* (1971), 6 CCC (2d) 186 (Ont CA), *R v Futo* (1980), 4 WCB 437 (Ont CA); *R v Scott* (1993), 27 CR (4th) 55 (Ont CA).

[26] *R v Wolfson,* [1965] 3 CCC 304 (Alta CA); *R v Prince* (1971), 6 CCC (2d) 183 (Ont CA), leave refused (1971), 6 CCC (2d) 183n (SCC); *Fisher*; *Boivin v The Queen* (1970), 14 CRNS 140 (SCC); *R v Mailloux* (1985), 25 CCC (3d) 171 (Ont CA), aff'd (1988), 45 CCC (3d) 193 (SCC) (hereinafter *Mailloux*).

The accused elected to be tried by judge alone. Two experts testified that the accused was insane at the relevant time. One testified that he was not. The trial judge held that the accused had failed to establish insanity. The Alberta Court of Appeal dismissed his appeal from conviction. The Court of Appeal held that unless the trial judge reached an unreasonable decision, or misdirected himself in law or applied an erroneous principle of law, the Court of Appeal would not interfere with his decision. The Court held that it could not be said that the decision of guilty was unreasonable in that it was a conclusion that no judge acting judicially could have reached.

In *Mailloux,* the accused was charged with two counts of second degree murder as the result of the shooting of a woman and a four year old child. Defence psychiatrists testified that the accused had a paranoid personality that had become aggravated by drug use, resulting in toxic psychosis. They testified in chief that the accused was not capable of appreciating the nature and quality of his acts and of knowing that they were wrong. However, on cross-examination, the defence experts said that he was indeed capable of appreciating the nature and quality of his acts and of knowing that they were wrong. The accused was convicted but argued on appeal that the Ontario Court of Appeal should substitute a verdict of not guilty by reason of insanity pursuant to s 686(1)(d) (as it now is). The Ontario Court of Appeal held that it was not at liberty to come to its own conclusion on the issue of insanity and that it ought not to interfere with the verdict of the jury unless the court was satisfied that the verdict was not one that a jury acting judicially and properly instructed could have reached.

The Supreme Court of Canada dismissed the accused's appeal. The Supreme Court of Canada discussed the interaction of the various subsections of s 686:[27]

> I am therefore of the view that s. 613(1)(a) [686(1)(a)] governs the determination in appeal of issues of insanity and that s. 613(1)(d) [686(1)(d)] operates in two ways: first, to enable [the] court of appeal to determine the issue as would have a trial court when the issue has not been raised below; and second, to enable the court, whether acting under s. 613(1)(a) or (d) [686(1)(a) or (d)], to enter, in the appropriate case, a verdict of 'not guilty on account of insanity'.

Thus, the courts of appeal have fairly extensive powers to substitute a verdict of not criminally responsible on account of mental disorder or to direct a new trial on the issue. Where the accused appeals from a conviction or a verdict of not criminally

[27] *Mailloux,* at 202.

responsible on account of mental disorder, the court of appeal has the jurisdiction to substitute an acquittal, dismiss the appeal or to order a new trial. As of 2002, it is now clear that as per s 676 of the *Criminal Code*, the Crown has the right to appeal from a verdict of NCRMD where the appeal is on an indictment and involves a question of law alone.

VI. Conclusion

The general public may not really understand the nature of the verdict "not guilty on account of insanity".[28] Consequently, there may be occasions where the Crown determines it is necessary to appeal a finding of NCRMD. Further, there may be situations where the accused wishes to appeal this verdict.

The accused may appeal this finding and in matters where the Crown has proceeded upon indictment, the Crown is also able to appeal this verdict. This is because the new provisions of the *Criminal Code* purport to introduce a hybrid verdict and also address the Crown's right to appeal the new verdict.

[28] Canada, Minister of Justice and Attorney General, *Information Paper,* September, 1991 at 3.

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