Chapter 12: Sentencing

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I. Introduction

This chapter covers several topics related to sentencing of mentally disabled persons First, there is an extensive review of the procedures involved when a person is found unfit to stand trial or not criminally responsible on account of mental disorder. Included in this discussion are issues such as court ordered treatment of persons found unfit to stand trial, procedures at disposition hearings, reviews of dispositions, transfers of detainees or persons subject to dispositions and appeals from disposition or placement decisions. This section also examines the Dangerous Mentally Disordered Accused provisions and well as Dual Status Offenders (offenders subject to both a disposition and a criminal sentence).

Next, the chapter outlines the factors that may influence a judge who is sentencing a mentally disabled person who has been found guilty of a criminal offence. It examines the special considerations that might be necessary when sentencing a mentally disabled person. In some cases, the person's sentence is reduced because he/she has a mental disability, because he/she needs treatment or because of the probable adverse effects of imprisonment. In other cases, the mentally disabled offender's sentence is comparatively longer because the sentencing court determines that the need to protect society outweighs the other factors.

The sentencing section of the chapter is completed with a discussion of judicial recommendations or requirements for treatment, probation orders and hospital orders.

II. Dispositions and Reviews

A. Persons Found Unfit to Stand Trial or Not Criminally Responsible on Account of Mental Disorder

1. Persons Found Unfit to Stand Trial

(a) General

Where a person is found to be unfit to stand trial, s 672.31 of the *Criminal Code* requires any plea that has been taken to be set aside and any jury to be discharged.[1] Section 672.32 of

[1] *Criminal Code of Canada*, RSC 1985 c C-46, [*Criminal Code*], s 672.31.

the *Criminal Code* cautions that he/she may be found fit to stand trial at a later date.[2] Under s 672.48, a Review Board making or reviewing a disposition in respect of an accused found unfit to stand trial must determine whether the accused has become fit and if so, send the accused back to court.[3] If the court has not yet made a disposition, s 672.47 requires the first hearing of the Review Board to take place within 45 days or, with an extension by the court, a hearing within 90 days.[4] The hearing must take place within 90 days if the court has made a disposition other than an absolute discharge.[5] If the court has granted an unfit accused an absolute discharge, the matter is closed and will not go before a Review Board.

If a Review Board determines that the accused remains unfit to stand trial, s 672.33 provides for periodic inquiries by the court into whether there remains sufficient evidence to hold a trial.[6] This is called a *prima facie* case. Section 672.33(1) provides that the inquiry must take place within two years of the verdict of unfit to stand trial and every two years after that, until the accused is either acquitted or tried. However, s 672.33(1.1) states that: "[d]espite subsection (1), the court may extend the period for holding an inquiry where it is satisfied on the basis of an application by the prosecutor or the accused that the extension is necessary for the proper administration of justice."[7]

The accused may apply for an earlier inquiry on the basis that there is reason to doubt that a *prima facie* case exists.[8] When the court holds an inquiry into the matter, the burden falls on the prosecution to show that there is sufficient evidence to put the accused on trial.[9] If, following completion of the inquiry, the court is satisfied there is not sufficient evidence to put the accused on trial, the court must acquit the accused.[10] If there is sufficient evidence that the accused has subsequently become fit to stand trial, the court may direct that a trial take place. If there remains a *prima facie* case against the accused but he or she remains unfit to stand trial, the accused will neither be tried nor acquitted, necessitating another inquiry within two

[2] *Criminal Code*, s 672.32.
[3] *Criminal Code*, s 672.48.
[4] *Criminal Code*, s 672.47(1) and (2).
[5] *Criminal Code*, s 672.47(3).
[6] *Criminal Code*, s 672.33.
[7] *Criminal Code*, s 672.33(1.1); see also: *R v Karimian-Kakolaki*, 2016 ONSC 8013 (CanLII).
[8] *Criminal Code*, s 672.33(2).
[9] *Criminal Code*, s 672.33(3).
[10] *Criminal Code*, s 672.33(6).

years.

Section 672.851 sets out the procedure for a stay of proceedings in cases where the accused has been found unfit to stand trial, is no significant threat to public safety, and is unlikely to ever be fit to stand trial. Section 672.851(1) provides that a Review Board may, on its own motion, make a recommendation to a court of competent jurisdiction to hold an inquiry to determine if a stay of proceeding should be ordered in a case of an accused found unfit to stand trial.[11] The Review Board must have held a hearing under ss 672.81 or 672.82 in respect of the accused and must be of the opinion that the accused: (a) remains unfit to stand trial and is not likely to ever become fit to stand trial, and (b) does not pose a significant threat to the safety of the public.[12] The Review Board's decision regarding whether to make a recommendation for inquiry may be based on "any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(a)."[13]

If the Review Board makes a recommendation to hold an inquiry under s 672.851(1), it must provide notice to the accused, the prosecutor, and any party that has a substantial interest in protecting the accused's interests.[14] The court should decide, as soon as practicable after receiving the Review Board's recommendation, whether to hold an inquiry.[15] However, if the Review Board recommends an inquiry be held, the court is not compelled to do so. Subsection 672.851(4) provides that a court may, on its own motion, conduct an inquiry to determine whether a stay of proceedings should be ordered if the court is of the opinion that: (a) the accused remains unfit to stand trial and is not likely to every become fit to stand trial, and (b) the accused does not pose a significant threat to the safety of the public.[16] If a court decides to hold an inquiry, either on its own motion or on the recommendation of a Review Board, it must order an assessment of the accused.[17]

Section 672.851(7) sets out the elements on which a court may order a stay of

[11] *Criminal Code*, s 672.851(1).
[12] *Criminal Code*, ss 672.851(1)(b)(i) and 672.851(1)(b)(ii).
[13] *Criminal Code*, s 672.851(1)(b).
[14] *Criminal Code*, s 672.851(2).
[15] *Criminal Code*, s 672.851(3).
[16] *Criminal Code*, s 672.851(4).
[17] *Criminal Code*, s 672.851(5).

proceedings. It states:

> (7) The court may, on completion of an inquiry under this section, order a stay of proceedings if it is satisfied
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> (a) on the basis of clear information, that the accused remains unfit to stand trial and is not likely to ever become fit to stand trial;
> (b) that the accused does not pose a significant threat to the safety of the public; and
> (c) that a stay is in the interests of the proper administration of justice.[18]

Section 672.851(8) sets out the factors to be considered in determining whether ordering a stay is in the interests of the proper administration of justice. It states that, in addition to the submissions of the prosecutor, accused, and all other parties, the court should consider:

> (a) the nature and seriousness of the alleged offence;
> (b) the salutary and deleterious effects of the order for a stay of proceedings; including any effect on public confidence in the administration of justice;
> (c) the time that has elapsed since the commission of the alleged offence and whether an inquiry has been held under s 672.33 to decide whether sufficient evidence can be adduced to put the accused on trial; and
> (d) any other factor that the court considers relevant.[19]

If the court orders a stay of proceedings, any disposition made with respect to the accused will cease to have effect.[20] If the court does not order a stay, the finding of unfit to stand trial and any disposition made in respect of the accused will remain in force until the Review Board conducts a further hearing and makes a disposition in respect of the accused under s 672.83.[21]

Section 672.852 provides that the Court of Appeal may allow an appeal against an order for a stay of proceedings made under s 672.851(7) if they believe the order is unreasonable or cannot be supported by the evidence.[22] If an appeal is allowed, the Court of Appeal may set aside the order for stay of proceedings and restore both the finding that the accused is unfit to

[18] *Criminal Code*, s 672.851(7).
[19] *Criminal Code*, s 672.851(8).
[20] *Criminal Code*, s 672.851(9).
[21] *Criminal Code*, s 672.851(9).
[22] *Criminal Code*, s 672.852(1).

stand trial and the disposition made in respect of the accused.[23]

Section 672.851 was adopted following the 2004 Supreme Court of Canada (SCC) decision *R v Demers.*[24] In that case, the appellant, Rejan Demers, was charged with sexual assault of a seven-year-old boy. Demers was found unfit to stand trial, having been diagnosed with a moderate intellectual impairment caused by Down's syndrome. In May 1997, he was conditionally discharged by the Review Board under s 672.54. Every year since then, the board issued a similar decision. Demers sought a stay of proceedings from the Quebec Superior Court, based on infringement of his rights under ss 7, 11(b) and 15(1) of the *Charter*.[25] The Court dismissed his motion for a stay and declared s 672.54 of the Code to be constitutional. Demers appealed to the SCC.

The SCC considered whether ss 672.33, 672.54 and 672.81(1) of the *Criminal Code* were overbroad and thus offended the principles of fundamental justice. Absolute discharge, which is the least onerous disposition available under s 672.54, is not available to an accused who is found unfit to stand trial. This is justified with respect to an accused who does not suffer from permanent mental disability, because it can advance the assessment and treatment of the accused, thus rendering him/her fit for trial at a future date. It can also achieve the goal of protecting the public when an accused presents a risk of harm to the community.

In the case of an accused who suffers from permanent mental disability and is not a significant threat to public safety, however, "[s]ociety's interest in bringing accused persons to trial cannot be accomplished, nor can society's interest in treating the accused fairly."[26] The SCC noted that under the legislative scheme, "[p]ermanently unfit accused are subject to indefinite conditions on their liberty…resulting from the disposition orders of the Review Board or the court, who do not even have the power to adopt a psychiatric assessment in order to adapt a disposition to meet the permanently unfit accused's current circumstances."[27] The Court held that the legislative scheme was overbroad with respect to permanently unfit accused who do

[23] *Criminal Code*, s 672.852(2).
[24] *R v Demers,* [2004] 2 SCR 489 [*Demers*].
[25] *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*].
[26] *Demers* at para 55.
[27] *Demers*.

not pose a significant threat to public safety, because it infringed their s 7 *Charter* right to liberty.[28] The SCC in *Demers* ordered the impugned provisions be declared invalid and suspended for a period of 12 months to allow Parliament to amend the legislation.[29] This led to the addition of s 672.851 to the *Criminal Code*, which provides for the Review Board to apply court to allow for a stay of proceedings in cases where an accused has been found unfit to stand trial and is unlikely ever to be fit to stand trial and is no significant threat to public safety.

(b) Treatment

When making a disposition under s 672.54, the court (or Review Board) is generally not empowered to order the accused to submit to any form of treatment, nor to order that any psychiatric or other treatment be carried out.[30] However, s 672.55(1) also provides that "the disposition may include a condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused."[31] This is not a true exception to the prohibition against the court and Review Board prescribing treatment.[32] Rather, it should be interpreted as an example of the Review Board's supervisory power over treatment decisions.[33] Therefore, s 672.55(1) should be given and narrow and limited application and scope.[34]

If the court has not made a disposition under s 672.54, the court may, on application of the prosecutor, order the accused to submit to treatment for a period of up to 60 days, subject to conditions the court considers appropriate.[35] If the accused is not in custody, the court may order that he/she submit to treatment by a specified person or at a specified hospital.[36] The accused must be notified in writing and as soon as practicable, that the prosecutor intends to apply for a treatment order.[37] Once he/she receives notice, the accused may challenge this

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[28] *Demers*.
[29] *Demers* at para 60.
[30] *Criminal Code*, s 672.55(1).
[31] *Criminal Code*, s 672.55(1).
[32] *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 SCR 32 at para 50, 206 CCC (3d) 161 [*Mazzei*].
[33] *Mazzei*.
[34] *Mazzei* at para 55.
[35] *Criminal Code*, s 672.58.
[36] *Criminal Code,* s 672.58.
[37] *Criminal Code*, s 672.6(1).

application.[38] If the prosecutor files an application for a court order directing the treatment of an accused under s 672.58, he/she must notify the accused immediately by serving a copy of the application on the accused and on the accused's counsel.[39]

There are some limits upon the court in ordering treatment of a person found unfit to stand trial. The court cannot require that the accused undergo mandatory treatment unless the court is satisfied, on the basis of the testimony of a medical practitioner, that a specific treatment should be administered to the accused for the purpose of making the accused fit to stand trial.[40] Further, the court cannot require the performance of psychosurgery or electro-convulsive therapy or other prohibited treatment.[41] A third limit on the court is that the hospital or individual designated to treat the accused must consent to the treatment disposition.[42]

The prosecutor who files an application for an order directing the treatment of an accused under s 672.58 must notify the accused of the application by serving a copy personally on the accused and her counsel.[43] Where the court has not made a disposition with respect to a person found unfit to stand trial, then only the court, not a Review Board, may direct treatment of the accused.[44] Interestingly, the consent of the accused or her authorized representative is not required for a treatment order. The court may order treatment under s 672.58 without the accused's consent.[45] This provision may be open to challenge.[46]

The Canadian Mental Health Association (CMHA) has expressed concern that Parliament has given the interest of the judicial system in bringing an unfit person to trial priority over the

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[38] *Criminal Code,* s 672.6(2).
[39] *Notice of Application for Treatment Regulations,* SOR/92-665 [available on Westlaw Canada].
[40] *Criminal Code,* s 672.59(1).
[41] *Criminal Code,* s 672.61.
[42] *Criminal Code,* s 672.62(1). In *R v Conception*, [2014] 3 SCR 82, 2014 SCC 60 (CanLII) Supreme Court of Canada held that a treatment disposition should not be made under s 672.58 without consent from the relevant hospital under s 672.62(1). The Court stated that consent to treat a patient when a bed becomes available in 6 days was not consent to accept the patient for treatment 'forthwith'.
[43] *Notice of Application for Treatment Regulations,* SOR/92-665, s 3.
[44] *Evers v British Columbia (Director of Adult Forensic Psychiatric Services)*, 2009 BCCA 560 at para 69, 249 CCC (3d) 178.
[45] *Criminal Code,* s 672.62(2).
[46] Generally, at common law, a person has the right to refuse treatment. However, under the *Mental Health Act*, RSA 2000 c M-13 [*Mental Health Act*], an involuntary patient who is found incompetent to consent to treatment may be subjected to treatment after certain procedural requirements have been met. This issue is discussed in Chapter Thirteen, Mentally Disabled Persons in Prisons and Jails, under Right to Refuse Treatment in Prison and Jail.

right of a person to refuse treatment.[47] Because the purpose of the treatment is not necessarily therapeutic (i.e., its goal is to render the person fit to stand trial), the CMHA asserts that the accused's right to refuse treatment should take priority.[48]

Glancy suggests that it may be tactically advisable to consent to treatment during the original fitness assessment, especially where the accused has been charged with a relatively minor offence.[49] If the accused has undergone treatment during the fitness assessment, this may assist counsel to make representations against the advisability of further treatment during the disposition stage at the end of trial. If the charges are relatively minor, further detention for the ultimate purpose of determining the appropriate disposition might not be necessary.[50]

A treatment order under s 672.58 may be appealed to the Court of Appeal. Appeals of treatment orders are discussed below under Section 6: Appeals from Dispositions and Placement Decisions.

(c) Persons Found Unfit to Stand Trial and Review of Evidence

As discussed above, s 672.33(1) provides that when an accused is found unfit to stand trial, the court must make inquiries every two years after the verdict is rendered to determine whether the accused has become fit to stand trial.[51] In certain circumstances the court may stay the period for holding an inquiry, or it may hold an inquiry on application of the accused if there is reason to doubt there is a *prima facie* case against the accused.[52] If an inquiry is made under s 672.33, the prosecutor bears the burden of proof for showing that sufficient evidence can be adduced to put the accused on trial.[53] During the inquiry, the court must admit as evidence: (a) any affidavit containing evidence that would be admissible if given by the person making the affidavit as a witness in court; or (b) any certified copy of the oral testimony given at a previous inquiry or hearing held before a court in respect of the offence with which the accused is

[47] See: "Recommendations by the Canadian Mental Health Association" (1992) 1(2) Health Law Rev 12 at 14.
[48] "Recommendations by the Canadian Mental Health Association" (1992) at 14.
[49] T. Glancy, "The New Insanity Provisions", in Criminal Trial Lawyers Association, *Three Short Snappers and the Post-Sentence Process*, November 21, 1992, Edmonton, Alberta at 6 [*Glancy*].
[50] *Glancy*, at 6.
[51] *Criminal Code*, s 672.33(1).
[52] *Criminal Code*, ss 672.33(1.1) and (2).
[53] *Criminal Code*, s 672.33(3).

charged.[54] If the court is satisfied after completion of the inquiry that sufficient evidence cannot be adduced to put the accused on trial, they must acquit the accused.[55]

2. Persons Found Not Criminally Responsible on Account of Mental Disorder

(a) General

Pursuant to s 672.54 of the *Criminal Code*, if an accused is found not criminally responsible on account of mental disorder or unfit to stand trial, the court may make a disposition or defer the disposition to the Review Board established under those provisions.[56] The court may hold a disposition hearing on its own motion, but it *must* hold a disposition hearing if either the accused or the prosecutor applies for one.[57] Section 672.54 states:

> 672.54 When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, 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:
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> > (a) where the 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 by 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.[58]

Where a court finds that an accused is not criminally responsible on account of mental disorder, the court or Review Board may choose one of three dispositions: an absolute discharge, a

[54] *Criminal Code*, s 672.33(4).
[55] *Criminal Code*, s 672.33(6).
[56] *Criminal Code*, s 672.45.
[57] *Criminal Code,* s 672.45.
[58] *Criminal Code,* s 672.45.

conditional discharge (i.e., living in the community with conditions) or detention in hospital (with or without conditions).[59]

The court must choose the disposition that is least onerous and intrusive to the accused. Until 2014, the direction that dispositions ought to be the "least onerous and least intrusive" to the accused was explicit in the text of s 672.64. The passage of the *Not Criminally Responsible Reform Act*[60] removed that language and replaced it with the current wording, which requires that dispositions be "necessary and appropriate in the circumstances." Generally speaking, courts have continued to apply the "least onerous and least intrusive" test to dispositions, and also continue to rely on case law developed under the prior wording. The Ontario Court of Appeal has held that the "necessary and appropriate disposition" is also the least onerous and least restrictive option. It has viewed the shift in language as clarifying, rather than modifying, the law.[61] The British Columbia Court of Appeal has also adopted this approach.[62] However, the Alberta Court of Appeal has expressed the opinion that the amendments remove the "least onerous and least restrictive" standard.[63]

While the Supreme Court of Canada has not yet considered the new wording, the "least onerous and least intrusive" standard has been critical to several Supreme Court of Canada decisions that upheld the constitutionality s 672.54.[64] Any departure from the "least onerous

[59] This discretion to order an absolute or conditional discharge is eliminated in cases where the accused is determined to be a high-risk offender, a designation discussed in more detail below. See *Criminal Code,* s 672.64(3).
[60] SC 2014, c 6 [*NCR Reform Act*].
[61] *Re Osawe*, 2015 ONCA 280 at para 45 FN 3 (CanLII); *Re Ahmed-Hirse*, [2014] ORBD No. 1876 at para 36; *Ontario (Review Board) v Ranieri*, 2015 ONCA 444 (CanLII) at paras 19, 20; *Re Carrick*, 2015 ONCA 866 (CanLII) at para 15; *Re Ohenhen*, 2018 ONCA 65 (CanLII) at para 66.
[62] *Nelson v British Columbia (Adult Forensic Psychiatric Services),* 2017 BCCA 40 (CanLII) at para 26. See also *R v Schoenborn*, 2017 BCSC 1556 (CanLII) [*Schoenborn*] at para 14: "The requirement that the disposition be "necessary and appropriate" has been interpreted to mean that the disposition must be the least onerous and least restrictive one available in the circumstances (as the language of s 672.54 used to provide), having regard to the considerations the court or Review Board must take into account…"
[63] *R v CR*, 2017 ABCA 318 (CanLII) at paras 14, 15. The statement was in *obiter,* as the relevant test for a disposition was not at issue in this case. However, the amendment and perception that this wording changed the applicable standard influenced the Court's approach to the application.
[64] *Winko* at paras 47, 48, 55, 62, 69, 70, 87, 91; Robert Lacroix, Roy O'Shaughnessy et al, "Controversies Concerning the Canadian *Not Criminally Responsible Reform Act*" (2017) 45:1 J Am Acad Psychiatry Law 44 [Lacroix].

and least restrictive" approach will raise considerable questions regarding compliance with *Charter* ss 7, 9, and 15(1).[65]

In making a disposition, the decision-maker must take into account the following factors: the need to protect the public from dangerous persons, the mental condition of the accused, the accused's reintegration into society, and other needs of the accused.[66] Protection of the public is the paramount consideration.[67] Courts and Review Boards have treated the paramountcy of public safety as a factor making it more difficult for NCR accused to achieve absolute discharges, or to be successful in a variety of applications.[68]

As the Supreme Court of Canada has not yet ruled on the implications of the amendments to s 673.54 in 2014, the general principles regarding the interpretation of this section were largely formulated prior to the amendments. The following discussion is mostly based on interpretation of s 672.54 before 2014. Lower courts, for the most part, have held that the general principles of interpretation of this section, save for the new "High-Risk Accused" provisions (discussed below), generally apply.[69]

After the initial passing of the *Criminal Code* provisions dealing with mental disorder in 1991, Review Boards and courts made some interesting disposition decisions under s 672.54. For example, in *R v Trueman* (1992), the Manitoba Court of Queen's Bench found Ms Trueman not criminally responsible on account of mental disorder.[70] Trueman was charged with first degree murder after the death of her four-year-old son. The court found that she was suffering from an acute psychosis that rendered her incapable of appreciating the nature and quality of her act or of knowing it was wrong.

When the accused was arrested, she was transferred to a Mental Health facility where she was diagnosed as suffering from an acute psychosis. As a result of anti-psychotic medicine,

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[65] The 2014 amendments have been the subject of criticism and because of the differing opinions in the provincial courts of appeal, and there is a possibility that there could be *Charter* challenges in the near future.
[66] *Criminal Code*, s 672.54. See *Pinet v St. Thomas Psychiatric Hospital*, [2004] 1 SCR 528, 19 CR (6th) 21 [*Pinet*]; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 25 CR (5th) 1 [*Winko*].
[67] This is an amendment from the *Not Criminally Responsible Reform Act*. However, this has merely codified the common law. Hy Bloom and Richard D Schneider, *Mental Disorder and The Law: A Primer For Legal and Mental Health Professionals*, 2d ed (Toronto: Irwin Law Inc, 2017) [Bloom] at 310.
[68] For example, see *R v CR*, 2017 ABCA 318 (CanLII) at paras 15, 28; *R v Schoenborn*, 2015 BCSC 2254 (CanLII) at para 63.
[69] See, for example: *Ontario (Review Board) v Ranieri* 2015 ONCA 444 (CanLII) at para 20.
[70] (1992), 80 Man R (2d) 72 (QB) [*Trueman*]. See also: *R v Furlong,* [1998] NJ No 332.

Trueman emerged from her psychotic state and realized what she had done. She became very depressed.

Trueman then stood trial on the murder charges. Two psychiatrists testified that she had recovered from the psychosis and no longer presented a danger to herself or others. They also opined that Trueman may never show psychotic symptoms again.

In this case, the court decided to make a disposition. The Court conditionally discharged Ms Trueman. The conditions included: she must reside with her parents; she must remain at her parents' home at all times unless she is accompanied by an adult; she must comply with the directions given her by the Forensic Services Unit; and she must not have any contact or communication with her children.

In his written reasons, Hanssen J stated that the creation of a mental disorder regime within the *Criminal Code* "ha[s] sparked a great deal of controversy".[71] Further, he stated that "some members of the public appear to be under the impression the changes in the *Criminal Code* will result in large numbers of dangerous mentally disordered people being unleashed and allowed to roam the streets".[72] However, the judge held that this was not so because the primary consideration in any disposition hearing is the need to protect the public. Consequently, any person whose release would constitute a significant threat to the safety of the public will not be released.

In *R v Huk* (1993)*,* Huk was found not criminally responsible on account of mental disorder for setting fire to a car.[73] He had been diagnosed as having chronic schizophrenia. The court made a disposition under s 672.54. The court felt that based on the circumstances, the accused should be detained in custody in a psychiatric facility and thereafter released into the community when the authorities are satisfied that he should be released.[74]

In several other cases, after a verdict of not criminally responsible on account of mental disorder or a finding of unfit to stand trial, the courts have remitted the matter to the Review

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[71] *Trueman*, at 8.
[72] *Trueman*, at 8.
[73] *R v Huk,* [1993] OJ No 522.
[74] The *Calgary Herald* also reported about a case where a person (Jack Hing Quon) found not criminally responsible for the baseball bat beating of two city women was ordered to be detained in psychiatric custody until a review panel determined he should be released. See: K. Lunman, "Schizophrenic Acquitted in Attacks on Women" *Calgary Herald* (October 10, 1992).

Board for a disposition.[75] While decisions of the Review Board must be recorded (s 672.52), they are not often reported.[76] However, when a disposition of a Review Board is appealed to the provincial court of appeal it may become more public.

In *Orlowski v British Columbia (Attorney General)* (1992), the British Columbia Court of Appeal (BCCA) examined the Review Board's disposition of three individuals who were subject to periodic review, which is required for every patient under the transitional provisions of the *Criminal Code.*[77] The three appellants had been found not guilty by reason of insanity for various offences and were subject to Lieutenant Governor's warrants. The Review Boards had ordered various dispositions regarding the accused, but had not expressed any views as to whether each accused was not a significant threat to society.[78]

The BCCA held that the language of s 672.54 does not require the Board to reach a conclusion as to whether the accused is not a significant threat. This is because the requirement for an absolute discharge in s 672.54(a) only arises if the Board has the opinion that the accused is not a significant threat. Thus, the Board need not order an absolute discharge when it has *doubts* about whether the accused is a significant threat.

The Court also held that where the Board makes an adverse finding under s 672.54(a), it should express reasons as to whether it is of the opinion that the accused is not a significant threat. In the absence of such reasons, the Court is entitled to remit a disposition back to the Board under s 672.78(3) with instructions that it make findings.

The BCCA remitted the decisions back to each Review Board to determine whether or not the Board had an opinion on whether any of the appellants was a significant threat to the safety of the public, and if so, to indicate that opinion.

In *R v Cluney* (1992), the Nova Scotia Court of Appeal heard an appeal from a Review Board hearing pursuant to the transitional provisions.[79] In 1984, Cluney had been found not guilty of sexual assault by reason of insanity. In a decision dated June 25, 1992, the Board

[75] See, for example: *R v White,* [1992] Alta D 5290-01 (Prov Ct).
[76] This might be because of certain restrictions placed upon the disposition information under s 672.51. See the discussion under Procedure at Disposition Hearing.
[77] (1992), 75 CCC (3d) 138, 94 DLR (4th) 541 (BCCA) [*Orlowski*].
[78] (*Orlowski*]. See also: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39 at para 42, [1999] 2 SCR 817, in which the Supreme Court confirmed that there was a common law obligation on administrative decision-makers to provide reasons for their decisions.
[79] SC 1991, c 43, s 10(2).

reviewed the circumstances of the offence and, after considering medical reports and evidence given by the staff of the Nova Scotia Hospital and the accused, concluded that Cluney should be re-integrated into the community slowly and under supervision. The Review Board held that a conditional discharge would be premature. The Board was prepared to permit Cluney to live in a group home up to three nights a week at the hospital's discretion. He could also continue receiving weekend passes for up to two weekends per month.[80]

On appeal, Cluney argued that the Board failed to properly address s 672.54. In its disposition, the Board had not clearly indicated whether it took the view that the accused was not a significant threat to society. The Nova Scotia Supreme Court approved the judgment of the BCCA in *Orlowski*.[81] The Court held that the board had failed to properly address s 672.54, which requires that the board make the least onerous and restrictive disposition, while taking into consideration the need to protect the public. Further, although the board had concluded that it was unable to decide upon the issue as to whether or not the accused was a significant threat, it was essential that the board, in making its disposition under s 672.54 clearly state whether or not it held the opinion that the accused was not a significant threat to the public. As a result, the Court allowed the appeal and remitted the matter back to the Board for further consideration on the threshold question of whether the accused was not a significant threat to the safety of the public.[82]

In 1999, the SCC held that section 672.54 does not create a presumption of dangerousness or impose a burden on a not criminally responsible ("NCR") accused to prove a lack of dangerousness.[83] If the court or Review Board concludes the NCR accused is not a significant threat to the public's safety, the Review Board or court must order an absolute discharge.[84] If the NCR accused is found to be a threat to the safety of the public, the court or

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[80] (1992), 116 NSR (2d) 302 [*Cluney*]. See also: *R v Murphy,* [1997] NSJ No 102.
[81] [1999] 2 SCR 625.
[82] See also: L. Burt, "The Mental Disorder Disposition Provisions of the Criminal Code" (1993) 14(1) Health Law in Canada 9, where the author argues that a disposition under s 672.54(c) could give the hospital the discretion to permit the offender to reside in the community while under the hospital's supervision.
[83] *Winko*. See also *Orlowski v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 733, 25 CR (5th) 76; *Bese v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 722, 25 CR (5th) 68. As noted, this conclusion is complicated where an accused is designated as a High-Risk Accused. This is discussed later in this Chapter.
[84] *Winko*.

Review Board may order the accused be discharged on conditions or detained in hospital subject to conditions.[85] A significant threat to public safety means "a risk of serious physical or psychological harm to members of the public —including any victim of or witness to the offence, or any person under the age of 18 years — resulting from conduct that is criminal in nature but not necessarily violent."[86]

In *Penetanguishene Mental Health Centre v Ontario (Attorney General)* (2004),[87] the SCC held that the need to protect the public from dangerous persons, the accused's mental condition, and the accused's reintegration into society should be considered at every step of section 672.54. A court or Review Board should not isolate the "least onerous and least restrictive" requirement from other listed factors. Further, the term "appropriate" that appears in ss 672(b) and (c) should be understood and applied within the framework of making a disposition order that is least onerous and restrictive, taking into account the above-listed factors.

In *Pinet v St. Thomas Psychiatric Hospital* (2004),[88] the SCC held that even if a risk to the public safety is established, the conditions for a disposition of an NCR accused must be the "least onerous and restrictive". In *Pinet*, the Court held that detaining an accused who is not a candidate for community access under maximum security conditions, despite the fact that they do not present a risk to public safety, is incompatible with the "least onerous and least restrictive" assessment.[89] Furthermore, the Ontario Court of Appeal affirmed in *Sim v Ontario* (2005) that although s 718.2(e) of the *Code* does not apply to disposition made by a Review Board, the principles enumerated in *R v Gladue*[90] should be considered in determining the appropriate placement of an aboriginal (Indigenous) NCR accused.[91]

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[85] *Winko*. In *R v Lewis* (1999), 170 Nfld & PEIR 278, 132 CCC (3d) 163, the court held that where a Review Board concludes an NCR accused posed a significant threat to the public safety, they must either impose a discharge subject to conditions or detain the accused in hospital.
[86] *Criminal Code* s 672.5401. The codification of a definition for "significant threat to the safety of the public" was passed in 2014 as part of the *NCR Reform Act* s 10.
[87] [2004] 1 SCR 498, 19 CR (6th) 1 [*Penetanguishene*].
[88] 2004 SCC 21 [*Pinet*].
[89] *Pinet* at para 56.
[90] *R v Gladue*, [1999] 1 SCR 688. This Supreme Court of Canada decision advises lower courts to consider an Indigenous offender's background and make sentencing decisions accordingly, based on section 718.2 of the *Criminal Code*.
[91] [2005] 201 CCC (3rd) 482 (Ont CA).

In *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)* (2006),[92] the SCC considered whether a Review Board had authority to impose conditions on the director of a psychiatric facility regarding the supervision of treatment of a not criminally responsible accused. The Review Board had issued a custody disposition to the accused to which it attached conditions on the director of the facility to "undertake comprehensive review of M's diagnostic formulations, medications and programs with view to developing integrated treatment approach, to provide it with independent assessment of M's risk to public before next hearing, and to make assertive effort to enrol M in culturally appropriate treatment program."[93]

The SCC held that Review Boards do not have power to prescribe treatment for an accused, as that authority "lies exclusively within the mandate of the provincial authority in charge of the hospital where the NCR accused is detained, pursuant to various provincial laws governing the provision of medical services to persons in the custody of a hospital facility."[94] However, the Court determined that a Review Board does have authority to make orders and attach conditions relative to the supervision of the medical treatment of an accused.[95] Further, the orders and conditions of a Review Board may be imposed on parties other than the accused.[96] The Court concluded that the Director, and the hospital administration and treatment team by implication, were therefore bound by the Review Board's orders and conditions.[97]

In *R v Conway* (2010),[98] the SCC considered whether, under the *Charter*, a Review Board has authority to grant an absolute discharge or an order for specific treatment to an accused that had been determined a danger to the public. The Court found that the Review Board was a

[92] [2006] 1 SCR 326, 36 CR (6th) 1 [*Mazzei*].
[93] *Mazzei.*
[94] *Mazzei* at para 31.
[95] *Mazzei* at para 18. See also *R v Williams* (2007), 328 NBR (2d) 109, 2007 CarswellNB 614. See also: *Wiebe v Manitoba (Attorney General)* (2006), 211 CCC (3rd) 429 (Man CA) where the Court found that there exists a duty on a Review Board to ensure that medical treatment is provided for mental disorder detainees where necessary and appropriate.
[96] *Mazzei* at para 18. The court stated: "[p]arliament could not have intended to create a statutory body charged with overseeing and implementing the "assessment-treatment" model without ensuring that it would have the power to compel others to abide by its orders and conditions." The Review Board's ability to impose conditions on parties other than the accused stems from "the wording of s 672.54, the legislative scheme, Parliament's intent and the relevant case law" (para 21).
[97] *Mazzei* at para 21.
[98] [2010] 1 SCR 765, 75 CR (6th) 201 [*Conway*].

court of competent jurisdiction capable of granting *Charter* remedies.[99] It determined, however, that in the context of its scope and duties, a Review Board does not have authority to grant an absolute discharge or an order directing alternate treatment to an accused that has been found dangerous to the public.[100]

Alternatively, the court may consign the decision to an appropriate Review Board in the province or territory. Even when the court makes a disposition, other than an absolute discharge, a Review Board must hold its own hearing to review the disposition. This must be done no later than 90 days after the court makes a disposition. Any Review Board disposition other than an absolute discharge must be reviewed annually. Lieutenant Governors in Council no longer have any role in criminal proceedings involving an unfit or mentally disordered accused. Also, a disposition in relation to a mentally disordered accused may not direct psychiatric or other treatment unless the accused has consented and it is in his or her best interests. However, where the court has rendered a verdict of unfit to stand trial and has not yet made a disposition, it may, on application by the prosecutor, order treatment of the accused for a period of not more than 60 days for the purpose of making the accused fit to stand trial.[101]

(b) "Significant Threat to the Public" and the Paramountcy of Public Safety

As noted, the amendments to the *Criminal Code* in 2014 specified that in making dispositions (whether a court or a Review Board), the safety of the public must be the paramount consideration when looking at the factors to be considered (the other factors include: the accused's mental condition, the accused's re-integration into society and the accused's other needs). Parliament in 2014 also added s 672.5401 "Significant threat to safety of public", which reads:

> **672.5401** For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public — including any victim of or witness to the offence, or any person under the

[99] However, the Ontario Court of Appeal has held that it has very restricted remedial powers under the *Charter*, and that the inquisitorial process is not applicable for *Charter* applications: *Re Starz*, 2015 ONCA 318 (CanLII).
[100] *Conway* at para 101. See also: *Demers*, discussed above under 2. Persons found Not Criminally Responsible on Account of Mental Disorder.
[101] *Criminal Code*, s 672.55.

> age of 18 years —resulting from conduct that is criminal in nature but not necessarily violent.

Prior to this codification, the SCC, in *Winko,* provided a common law definition as follows: "significant threat to the safety of the public means a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying. The conduct giving rise to the harm must be criminal in nature."[102] There is the possibility that this change in language (a *real* risk vs a risk) lowers the standard set in *Winko.*[103] In other words, instead of requiring a real risk of harm to the public, since the amendment, it will be sufficient if there is a risk of harm to the public.

Cases to date at the appeal level (there are no SCC decisions on s 672.5401 yet), indicate that the lower courts have not strayed from the common law test provided in *Winko*. The Ontario Court of Appeal (ONCA) in *Re Carrick*[104] relied on *Winko* to assist in the interpretation of s 672.5401 and stated:[105]

> In short, the 'significant threat' standard is an onerous one. An NCR accused is not to be detained on the basis of mere speculation. The Board must be satisfied as to both the existence and gravity of the risk of physical or psychological harm posed by the appellant in order to deny him an absolute discharge.

The BCCA in *Calles v British Columbia (Adult Forensic Psychiatric Services*),[106] upheld the Review Board's finding that Calles posed a significant threat to public safety, and again relied on *Winko* to state:

> The threat posed must be more than speculative and be supported by the evidence. It 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. A minuscule risk of grave harm will not suffice', nor will a high risk of trivial harm: *Winko*, at para. 57[107]

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[102] *Winko*, at para 65.
[103] For more discussion on the distinction between a "risk" vs a "real risk", see Bloom at 3.
[104] *Re Carrick*, 2015 ONCA 866 (CanLII) [*Carrick*].
[105] *Carrick*, at para 17.
[106] *Calles v British Columbia (Adult Forensic Psychiatric Services),* 2016 BCCA 318 (CanLII) [*Calles*].
[107] *Calles*, at para 15. See also: *Nelson v British Columbia (Adult Forensic Psychiatry Services)*, 2017 BCCA 40; *Re Wall,* 2017 ONCA 713 (CanLII); *Re Abikarim*, 2017 ONCA 793 (CanLII); *Re Hammoud*, 2018 ONCA 317 (CanLII); *Re Sokal*, 2018 ONCA 113 (CanLII); *Re Pellett*, 2017 ONCA 753 (CanLII).

Until the SCC rules on the interpretation of this section and addresses the concerns expressed by Bloom, it appears that at least three courts of appeal have continued to follow the *Winko* standard.[108]

3. Procedure at Disposition Hearing

(a) Public Hearings

Section 672.5 of the *Criminal Code* sets out the nature of a disposition hearing, whether conducted by a court or Review Board. The hearing may be conducted in a manner that is as informal as is appropriate in the circumstances.[109] The court or Review Board has an inquisitorial role and must search out and consider evidence that is both favourable and unfavourable to the accused, regardless of whether or not the accused is present at the hearing.[110] Under s 672.5(6), the court or Review Board may order that some or all members of the public be excluded from all or part of the hearing where it considers it to be in the accused's best interest and not contrary to the public interest.

In *Blackman v British Columbia* (*Review Board*), Blackman challenged the constitutional validity of s 672.5(6).[111] Blackman unsuccessfully sought to have the public excluded from his Review Board hearing. In 1983, he had been found not guilty by reason of insanity for six counts of murder and was under the authority of the Forensic Psychiatric Services Commission. He wished to have the media excluded from the review hearing and filed several documents indicating a concern that his treatment and re-integration into society would be adversely affected if details of his current situation were published. The Review Board rejected Blackman's request, finding that although banning the media would be in Blackman's best interests, it would be contrary to the public interest. In this case, the public interest in an open hearing outweighed the petitioner's interest in a closed hearing.

On appeal to the British Columbia Supreme Court, Blackman unsuccessfully argued that his *Charter* rights, s 15 and s 7, were violated. He argued that he should be treated in the same

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[108] See also: *JS c Centre universitaire de santé McGill (CUSM)*, 2016 QCCA 1085 (CanLII).
[109] *Criminal Code,* s 672.5(2).
[110] *R v LePage* (2006), 217 OAC 82 at para 22, 214 CCC (3d) 105 [*LePage*]. See also *R v Wodajio*, 2005 ABCA 45 (CanLII) at para 13 and *Rutledge v British Columbia (Director of Adult Forensic Psychiatric Services),* 2017 BCCA 251 (CanLII) at para 38 for discussion of the inquisitorial role and process.
[111] (1993), 82 CCC (3d) 5 (BCSC), appeal dismissed (1993), 22 BCAC 29 (CA) [*Blackman*].

manner as a young offender and therefore the information regarding his review hearing should not be made public. The court disagreed and held that s 672.5(6) is not discriminatory. It requires Courts or Review Boards to make an assessment on an individual basis and not on the collective basis of assessing all mentally disordered persons. While the legislation did not provide as much protection for mentally disabled offenders as for young offenders, it did provide more protection than for accused in criminal proceedings. The court held that disposition hearings are essentially an extension of the criminal process and it is proper to take into consideration the presumption in favour of public access to criminal proceedings.

Blackman also challenged the legislation as offending *Charter* s 7 because the phrase "not contrary to the public interest" was too vague. The court disagreed and held that the phrase was intended to refer to the principle of openness in judicial proceedings Further, it could not be argued that s 7 was infringed by state intervention. The state was not attempting to restrict the accused's physical liberty or exercise control over his mind and body. The publicity and corresponding impact upon the accused were attributable to the media and not to the government.

Blackman appealed this decision to the BCCA. The BCCA held that it did not have the jurisdiction to hear the appeal because the order of the court denying exclusion of the public was not a "disposition" or "placement decision" within s 672.72(1), which was the section that set out the Court's jurisdiction on appeal.

(b) Parties

During a review hearing, the accused has the right to be present during the hearing,[112] but the court or chairperson of the Review Board has the authority under s 672.5 to permit the accused to be absent or to cause the accused to be removed and barred from re-entry for the whole or any part of the hearing.[113] The accused may be excluded from the disposition hearing if he/she interrupts the hearing so that to continue in the presence of the accused would not be feasible.[114] Second, the accused may be excluded for the safety of others or him/herself, if the

[112] *Criminal Code,* s 672.5(9).
[113] *Criminal Code,* s 672.5(10).
[114] *Criminal Code*, s 672.5(10)(b)(i). See *Re Girard*, 2016 ONCA 985 (CanLII) for judicial interpretation of this provision.

failure to exclude the accused would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused.[115] Finally, the accused may be excluded when the court or Review Board hears evidence on whether grounds exist for removing the accused for safety reasons.[116]

During a disposition hearing, the accused has the right to be represented by counsel.[117] Where the accused is unrepresented, the court or Review Board must assign counsel if the accused has been found unfit or where the interests of justice so require.[118] The Ontario Court of Appeal has established that a Review Board has authority under s 672.5(8) to appoint *amicus curiae*, which act as counsel to the court and may be assigned the role of presenting issues favouring the accused that otherwise might not be raised.[119]

The persons who may be parties to the disposition hearing, besides the accused, are noted in ss 672.5(3) to 672.5(4). On application, the court or Review Board must designate as a party the Attorney General of the province where the disposition is to be made. If the accused has been transferred from another province, then the Attorney General of that province is also named as a party.[120] The court or Review Board may also designate parties who have a substantial interest in protecting the interests of the accused, where the court or Review Board is of the opinion that it is just to do so.[121]

(c) Rights of the Parties

The rights of the parties at the disposition hearing are outlined in subsection 672.5(11). Any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party. Further, on application, any party may cross-examine any party who made a written assessment report that was submitted to the court or Review Board.[122] A party cannot compel the attendance of witnesses, but may request the

[115] *Criminal Code*, s 672.5(10)(b)(ii).
[116] *Criminal Code*, s 672.5(10)(b)(iii).
[117] *Criminal Code,* s 672.5(7). See also *Starz* at para 125 for discussion of representation when *Charter* issues are raised.
[118] *Criminal Code,* s 672.5(8).
[119] *LePage* at para 29. See also *Re Runnalls,* 2011 ONCA 364 (CanLII).
[120] *Criminal Code,* s 672.5(3).
[121] *Criminal Code,* s 672.5(4).
[122] *Criminal Code,* s 672.5(11).

court or the chairperson of the Review Board to do so.[123]

(d) Victims' Rights

While not designated as a party, notice of a disposition hearing must be given to any victim of the NCR accused's offence who requests notification.[124] A victim includes any person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of the NCR accused's offence.[125] Victims may prepare and file a written statement describing the impact of the offence, including any physical or emotional harm, property damage or economic loss suffered as the result of the commission of the offence.[126] The Review Board or court must consider that statement in making its disposition determination, to the extent it is relevant.[127] A copy of this statement will be given to the NCR accused or his/her counsel, as well as the prosecutor, as soon as practicable after a the NCR verdict is rendered.[128] If the victim requests, the court or Review Board shall allow any victim to read or present his/her filed statement during the disposition hearing, in any manner considered appropriate, unless doing so would interfere with the proper administration of justice.[129]

(e) Disposition Information

The court or Review Board is entitled to consider a broad range of "disposition information" that does not have to comply with the strict rules of evidence.[130] "Disposition information" consists of all or part of any assessment reports submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making or reviewing a disposition.[131]

Generally, all disposition information must be made available for inspection by and

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[123] *Criminal Code,* s 672.5(12).
[124] *Criminal Code,* s 672.5(5.1)
[125] *Criminal Code,* s 2.
[126] *Criminal Code,* ss 672.5(14).
[127] *Criminal Code,* s 672.541.
[128] *Criminal Code,* ss 672.5(15).
[129] *Criminal Code,* ss 672.5(15.1).
[130] *Owen* at para 29. See also *R v Wodajio*, 2005 ABCA 45 (CanLII) at paras 18-37 where the Alberta Court of Appeal held that a Review Board was entitled to consider unproven allegations of sexual assault during a disposition hearing.
[131] *Criminal Code,* s 672.51(1).

copies provided to each party and counsel representing the accused.[132] However, some or all disposition information may be withheld from the accused.[133] This is permitted where the court or Review Board is satisfied, on the basis of the disposition information and the evidence or report of the medical practitioner responsible for the assessment or treatment of the accused, that disclosure of the information would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused. However, the court or Review Board may release some or all of the disposition information to an accused notwithstanding subsection 672.51(3) where, in its opinion, the interests of justice make disclosure essential.[134]

The court or Review Board is authorized to withhold disclosure of disposition information from a party other than the accused or the Attorney General when disclosure to the party is not necessary to the proceeding and may be prejudicial to the accused.[135]

In order to ensure that the disposition information withheld under s 672.51(3) or (5) does not come to the attention of the accused or other party, the accused or the party to the hearing must be excluded during disclosure of the information.[136] If the accused has been excluded from the hearing,[137] the hearing record may not be disclosed to the accused.[138]

Subsections 672.51(7) to (11) deal with disclosure and publication of disposition information to persons not parties to the proceedings. Where disclosure to the accused or other party has been withheld during exclusion from the hearing,[139] disclosure to other non-parties is also barred.[140] Further, where the court or Review Board is of the opinion that disclosure of the disposition information would be seriously prejudicial to the accused and that protection of the accused takes precedence over the public interest in disclosure, the Review Board cannot make disposition information available to non-parties.[141] The disposition information may nevertheless be made available for statistical or research purposes under s

[132] *Criminal Code,* s 672.51(2).
[133] *Criminal Code,* s 672.51(3) and (4).
[134] *Criminal Code,* s 672.51(4).
[135] *Criminal Code,* s 672.51(5).
[136] *Criminal Code,* s 672.51(6).
[137] *Criminal Code,* s 672.5(10)(b)(ii) or (iii).
[138] *Criminal Code,* s 672.52(8).
[139] Under *Criminal Code* s 672.51(3) or (5), or s 672.51(8).
[140] *Criminal Code,* s 672.51(7)(a).
[141] *Criminal Code,* s 672.51(7)(b).

672.51(9) or (10).

The media is prohibited from publishing any disposition information that is prohibited from being disclosed under s 672.5(7) or any part of the record of proceedings where the accused was excluded under s 672.5(10).[142]

(f) Delegated Authority

If a Review Board makes a disposition under s 672.54(b) (conditional discharge) or (c) (custodial order), it may delegate authority to the person in charge of the hospital to increase or decrease the liberty of the accused within the limits of the disposition (with the exception of special provisions for High-Risk Accused).[143] Where there is a significant increase in the restrictions on the accused's liberty, the delegated authority is required to record the restrictions on the accused's file and to give notice of the restrictions to the accused as soon as is practicable.[144] If the increased restrictions remain in force for over seven days, the Review Board must also be notified.[145]

4. Procedures of the Review Board

Amendments to the *Criminal Code* have changed the role and power of the Review Board. Unlike under the previous regime, the Review Board now has the power to make binding decisions. Further, the amendments remove the final decision as to dispositions of mentally disordered accused from the Lieutenant Governor and leave the initial decision to the court or Review Board and the ongoing decisions about the accused to the Review Board.

The *Criminal Code* provisions require that each province establish a Review Board to make or review dispositions concerning any accused who has received a verdict of not criminally responsible on account of mental disorder or unfit to stand trial.[146] The Review Board must consist of not fewer than five members appointed by the Lieutenant Governor in Council of each province.

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[142] *Criminal Code,* s 675.51(11).
[143] *Criminal Code,* s 672.56(1). This discretion is, however, heavily restricted in cases where the NCR accused is designated as a High-Risk Accused (672.64(3)). This is discussed in more detail in the following section.
[144] *Criminal Code*, s 672.56(2). Note: In *R v Pinet* (1995), 40 CR (4th) 113, 100 CCC (3d) 343, the Ontario Court of Appeal held that delegation of authority to transfer to a facility with a different security category falls within s 672.56(2).
[145] *Criminal Code,* s 672.56(2).
[146] *Criminal Code,* s 672.38(1).

Under s 672.38(2), the Review Board is treated as having been established under provincial law. Watt and Feurst state that this provision is designed to deny access to the *Federal Courts Act* as a means of reviewing Board decisions.[147] However, it is possible to appeal a disposition order and placement decisions to the Court of Appeal under s 672.72. Additionally, Review Board decisions that are not orders might be reviewable by the courts under provincial administrative review procedures.[148]

Section 672.39 of the *Criminal Code* outlines the qualifications required by Board members. At least one Board member must be entitled to practice psychiatry under provincial law. If only one member is a psychiatrist, at least one other member must have training and experience in the field of mental health and be a duly qualified medical practitioner or psychologist.[149] The chairperson of the Review Board must be a present or former judge of the Federal Court or of a superior, district or county court of a province or a person who is qualified for such an appointment.[150] A quorum of the Review Board is constituted by the chairperson, a psychiatrist and any other member.[151] There are transitional provisions for chairpersons and the quorum where the chairperson existing at the time of the amendments was not a judge or legally trained person.[152]

A decision made by the majority of the members of Review Board is a decision of the Review Board.[153] At a hearing of the Review Board to make or review a disposition, the chairperson has all of the powers that are conferred on commissioners under Part I by sections 4 and 5 of the *Inquiries Act*.[154] These powers include summoning witnesses, requiring witnesses to give evidence and produce documents, enforcing the attendance of witnesses and

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[147] D. Watt and M. Fuerst, eds. *2018 Tremeear's Criminal Code*, (Toronto: Thomson Prof. Pub., 2017) at 1250. The *Federal Courts Act* RSC 1985, c F-7 applies to suits against the federal Crown and appeals from decisions of federal boards, commissions or other tribunals "Federal board, commission or other tribunal" is defined as "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*".

[148] See, for example, *Alberta Rules of Court,* Rules 753.01 to 753.19 and the *Administrative Procedures and Jurisdiction Act,* RSA 2000, c A-3. Most administrative reviews are governed by the common law.

[149] *Criminal Code,* s 672.39.

[150] *Criminal Code,* s 672.4(1).

[151] *Criminal Code,* s 672.41(1).

[152] See *Criminal Code*, ss 672.4(2) and 672.41(2).

[153] *Criminal Code,* s 672.42.

[154] *Criminal Code,* s 672.43. See *Inquiries Act,* RSC 1985, c I-11.

compelling them to give evidence.

The Review Board may make rules providing for its practice and procedure, subject to the approval of the Lieutenant Governor. Further, the Governor in Council may make regulations governing the practice and procedure before the Review Board.[155]

5. Appeals from Dispositions and Placement Decisions

Sections 672.72 to 672.78 deal with appeals from disposition or placement decisions.[156] These sections deal with appeals in cases where the accused was charged with an indictable offence or a summary conviction matter. It is important to differentiate between appeals from the verdicts of unfit to stand trial or not criminally responsible on account of mental disorder and appeals from disposition or placement decisions made after one of those verdicts. Appeals from mental disorder verdicts are dealt with in Parts XXI and XXVII of the *Criminal Code* and are discussed in Chapter Ten.

"Disposition" is defined in s 672.1(1) as an order made by a court or Review Board under section 672.54 (e.g., a custodial disposition, absolute or conditional discharge) or an order made by a court under section 672.58 (treatment order). "Placement decisions" are decisions made by the Review Board as to the place of custody of a dual status offender (see s 672.68(23)). Appeals from dispositions or placement decisions are made directly to the provincial court of appeal.[157] Each party to the proceedings may appeal against a disposition or placement decision made by a court or Review Board based upon any ground that raises a question of law or fact alone or of mixed law and fact.[158] Leave to appeal is not required.[159]

Notice of appeal must be given in accordance with the applicable rules of court within 15 days after the day on which the parties are given a copy of the placement decision or disposition and the reasons for it.[160] The court of appeal may extend the time for giving notice of appeal under s 672.72(2). Appeals under this section are to be heard as soon as is practicable

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[155] *Criminal Code,* s 672.44.
[156] Sections 672.79 and 672.8 of the Act have been repealed under Bill C-10 as of May 2005.
[157] In *Blackman* (discussed earlier), the British Columbia Court of Appeal held that it did not have jurisdiction to hear an appeal from the B.C. Supreme Court's order denying exclusion of the public, because the order was not a "disposition" or "placement decision" within the meaning of s 672.72(1).
[158] *Criminal Code*, s 672.72(1). See *Mazzei*.
[159] *Criminal Code,* s 672.72(1).
[160] *Criminal Code,* s 672.72(2).

after notice of appeal is given, within any time period, in or out of the court's regular sittings, that may be fixed by the court of appeal, a judge of the court of appeal or the rules of that court.[161]

Under s 672.73(1), appeals are to be based on a transcript of the proceedings where the disposition or placement decision was made. The court of appeal has the same powers to receive further evidence "in the interests of justice" as the court has in indictable appeals under s 683(1).[162] When an application is made to admit fresh evidence on appeal from the decision of a Review Board, the "interests of justice" includes justice to both the accused, whose liberty is at stake, and to the public, whose protection is sought to be assured.[163] Fresh evidence may be admitted under s 672.73(1) if it is trustworthy and relevant to the risk to public safety.[164] The court or Review Board must be notified of the appeal and must transmit its record to the court of appeal under s 672.74.

Initiating appeal proceedings may postpone the disposition that the accused received at trial. In some cases, the filing of a notice of appeal may suspend the application of the disposition pending the determination of the appeal. Filing a notice of appeal against a hospital treatment order (s 672.58) suspends the application of the disposition pending the determination of the appeal.[165]

Under s 672.76(2), an appeal court judge has discretion to suspend an absolute discharge (672.54(a)), a conditional discharge (s 672.54(b)), or a custodial disposition (s 672.54(c)). An appeal judge may make any other placement or disposition decision pending appeal, other than an ordering an absolute discharge (s 672.54(a)) or a hospital treatment order

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[161] *Criminal Code,* s 672.72(3).

[162] For cases in which the court discusses whether to admit new evidence upon appeal, see: *Providence Continuing Care Centre, Mental Health Services v Edgar* (2006), 218 OAC 55, 216 CCC (3d) 563 [*Edgar*]; *R v Owen*, 2003 SCC 33, [2003] 1 SCR 779 [*Owen*]; *Stolar v R* (1988), 62 CR (3d) 313 (SCC); *R v Price* [1993], 3 SCR 633; *Palmer v R* (1980), 14 CR (3d) 22 (SCC); *R v O'Brien* (1977), 38 CRNS 325 (SCC); *McMartin v R* (1964), 43 CR 403 (SCC); *R v Cheung* (1990), 56 CCC (3d) 381 (BCCA); *R v Bonin* (1989), 47 CCC (3d) 320 (BCCA) leave to appeal refused (1989), 102 NR 400n (SCC); *R v Young* (1970), 11 CRNS 104 (NSCA); *R v Cobham* (1993), 80 CCC (3d) 449 (Alta CA), reversed [1994] 3 SCR 360; *Re Furlan*, 2014 ONCA 740 (CanLII); *Re Isbister*, 2013 ONCA 132 (CanLII); *Re Latouche*, 2015 ONCA 675 (CanLII).

[163] *Owen* at para 54. See also: *Tyrell, Re*, 2013 ONCA 170, [2013] OJ No 1227.

[164] *Edgar* at para 54. See also: *Owen* at para 71.

[165] *Criminal Code,* s 672.75. The previous version of this text included notice of appeals filed against an absolute discharge (s 672.54(a)). However, this was held to unjustifiably breach an absolutely discharged person's ss 7 and 9 *Charter* rights (see: *Re Kobzar*, 2012 ONCA 326 (CanLII)).

(s 672.58).[166] A judge may also direct that a temporary treatment disposition pursuant to 672.58 be carried out pending appeal. Further, a judge may give any directions that she considers necessary for expediting the appeal.

If a disposition or placement decision is suspended pending an appeal, the suspension will revive a disposition (or in its absence, any order for the interim release or detention of the accused) that was in effect immediately before the disposition or placement decision took effect.[167] This is subject to any disposition made by a judge of the court of appeal under s 672.76(2)(c).

The powers of the court of appeal when hearing an appeal of a disposition or placement decision are outlined in s 672.78. It states:

> 672.78(1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that
>
> (a) it is unreasonable or cannot be supported by the evidence;
>
> (b) it is based on a wrong decision on a question of law; or
>
> (c) there was a miscarriage of justice.
>
> (2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion
>
> (a) that paragraphs (1)(a), (b) and (c) do not apply; or
>
> (b) that paragraph (1)(b) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.
>
> (3) Where the court of appeal allows an appeal against a disposition or placement decision, it may
>
> (a) make any disposition under section 672.54 or any

[166] *Criminal Code*, ss 672.76(1) and (2). In *British Columbia (Director of Adult Forensic Psychiatric Services) v British Columbia (Attorney General)*, 2002 BCCA 404 at para 19, 166 CCC (3d) 40, the British Columbia Court of Appeal held that a Review Board disposition should not be suspended where the focus of application for suspension is in the interests of the Director of the psychiatric service and is concerned only incidentally with the mental condition of the accused.

[167] *Criminal Code,* s 672.77.

> placement decision that the court or Review Board could have made;
>
> (b) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any direction that the court of appeal considers appropriate; or
>
> (c) make any other order that justice requires.[168]

Thus, the courts of appeal possess similar powers on disposition appeals as in appeals from verdicts of guilty, not guilty, unfit to stand trial or not criminally responsible on account of mental disorder.[169]

The appropriate standard of review when a court of appeal considers a Review Board's jurisdiction to impose conditions under s 672.54(b) is correctness.[170] If the Review Board acted within its jurisdiction and it correctly interpreted s 672.54, it must still determine whether the conditions imposed were reasonable.[171] The standard of review for this determination is reasonableness.[172] In the case of a defendant who is determined by a Review Board to be fit to stand trial, the no right of appeal exists. In *R v Paré,* the Ontario Court of Appeal found that when a Review Board finds that a defendant is fit to stand trial, the courts must attempt to try the case and reach a verdict.[173]

6. Review of Dispositions

A Review Board must hold a review hearing not later than twelve months after making a disposition (other than an absolute discharge) and every twelve months thereafter for as long as the disposition remains in force.[174] The Review Board must also hold a review hearing to review any disposition made under paragraphs 672.54(b) or (c) as soon as is practicable after receiving notice that the person in charge of the place where the accused is detained or

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[168] *Criminal Code* s 672.78.
[169] See, for example, *Criminal Code* s 686. There are numerous legal decisions which amplify the powers of the court of appeal under this section. See also the discussion of appeals from the verdict of not criminally responsible on account of mental disorder in Chapter Ten.
[170] *Mazzei* at para 16. See also *Penetanguishene*; and *Pinet,* at paras 24-29.
[171] *Mazzei* at para 17. See also *Owen*.
[172] *Mazzei* at para 16. See also *Owen*.
[173] (2001), 159 CCC (3d) 222 (Ont CA).
[174] *Criminal Code,* s 672.81(1); A failure to adhere to this timeline is not, however, necessarily a breach of the principles of fundamental justice, nor is it necessarily cause for remedy, see *Starz* at paras 75-87.

directed to attend requests the review.[175] However, the Review Board may extend the time for holding a hearing to a maximum of 24 months after the making or reviewing of a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.[176] The Review Board may also extend the time for holding a subsequent hearing under this section to a maximum of 24 months without consent if the accused has been found not criminally responsible for a serious personal injury offence, the accused is subject to a disposition made under paragraph 672.54 (c), and the Review Board is satisfied based on all the evidence that the condition of the accused is not likely to improve and that detention remains necessary for the period of the extension.[177]

Where an accused is detained in custody under paragraph 672.54(c) and a sentence of imprisonment is subsequently imposed on the accused for committing another offence, the Review Board must hold a review hearing as soon as is practicable after receiving notice of that sentence.[178]

(a) Discretionary Reviews

The Review Board may hold a hearing to review any of its dispositions at any time, of its own motion or at the request of the accused or any other party.[179] This review is in addition to any of the mandatory review hearings under s 672.81. When a party requests a review hearing under s 672.82, that party is deemed to abandon any appeal taken under s 672.72.[180] Where a review Board holds a discretionary review on its own motion, it must provide notice to the prosecutor, the accused, and any other party.[181]

When a hearing is held under s 672.82, the Review Board should apply the s 672.54 tests to determine the appropriate disposition to be made.[182] If the Review Board determines the accused is not a significant threat to the safety of the public, they must order that the accused

[175] *Criminal Code,* s 672.81(2).
[176] *Criminal Code*, ss 672.81 (1.1)
[177] *Criminal Code,* ss 672.81 (1.1) and (1.2)
[178] *Criminal Code,* s 672.81(3).
[179] *Criminal Code,* s 672.82(1).
[180] *Criminal Code*, s 672.82(2).
[181] *Criminal Code*, s 672.82(1.1).
[182] *R v Peckham* (1994), 34 CR (4th) 227 at para 19, 19 OR (3d) 766 [*Peckham*].

be discharged absolutely.[183] Otherwise, the Review Board may order the accused be discharged subject to conditions or detained in custody.

(b) Procedure at Review Hearings

The Review Board must hold a review hearing in accordance with the procedures outlined in s 672.5.[184] The accused who is in custody must be brought to the review hearing. If the accused is not in custody, he/she may be summoned or a warrant may be issued to compel his/her appearance.[185]

Whenever a Review Board holds a hearing to review a disposition in respect of an accused who has been found unfit to stand trial, it must first determine whether the accused is fit to stand trial at the time of the review hearing.[186] If the Review Board determines that the accused is now fit to stand trial, it must order that the accused be sent back to court, and the court must then try the fitness issue.[187]

If the Review Board determines that the accused is not fit to stand trial or if the accused has been found not criminally responsible on account of mental disorder, the Review Board must review the disposition and make any other disposition it considers appropriate.[188]

Appeals of review dispositions are governed by s 672.72. Finally, the Review Board decisions *must* be reviewed every twelve months, or 24 months under the appropriate circumstances, and *may* be reviewed at any time at the request of any party (ss 672.81 and 672.82).[189]

7. Transfers

(a) Where Detainee in Custody

In ss 672.86 and 672.87, the *Criminal Code* provides for inter-provincial transfers of persons who are in or out of custody. The persons must be subject to mental disorder verdicts

[183] *Peckham; Winko* at para 47; *Schoenborn* at para 15.
[184] These procedures are discussed in Section 3: Procedure at Disposition Hearing.
[185] *Criminal Code,* s 672.85.
[186] *Criminal Code,* s 672.48(1).
[187] Note: In *R v Pare* (2001), 151 OAC 103 at para 5, 159 CCC (3d) 222, the Ontario Court of Appeal held there is no right of appeal from a Review Board decision that finds the accused is fit to stand trial.
[188] *Criminal Code,* s 672.83(1).
[189] *Criminal Code,* s 672.83(2). See also: *Demers*.

and certain types of dispositions (i.e., custody or conditional discharge). Certain conditions must exist before persons subject to these dispositions may be transferred to another province. First, the Review Board of the province where the accused is detained (or directed to attend hospital for treatment) must recommend a transfer for the purpose of the accused person's re-integration into society, recovery, treatment or custody. Second, the Attorneys General of both the sending province and the recipient province must consent to the transfer.[190] This transfer is accomplished by warrant, signed by an officer authorized by the Attorney General of the transferring province, which specifies the place in Canada to which the accused is to be transferred.[191]

The accused person's consent to a transfer is not required.[192] Further, because s 672.86(1) does not require the Review Board to make a *disposition* in order to transfer an accused person who is detained in custody or directed to attend at a hospital for treatment, the recommendation that the accused be transferred out of province does not seem to be appealable under s 672.72. Similarly, an *order* that a non-custodial accused be transferred out of province does not meet the definition of "disposition" for the purposes of an appeal to the court under s 672.72.[193] Consequently, decisions of the Review Board to transfer accused out of province do not appear to be reviewable by the courts through the appeal procedures provided in the *Criminal Code* provisions.[194] These decisions are also not reviewable under the *Federal Court Act* (see previous discussion). However, Review Board decisions may be reviewable under provincial administrative law.[195]

A decision that occurred prior to the *Criminal Code* amendments illustrated that the accused had the right to procedural fairness when a transfer decision was made that impacted the detainee's liberty interest. Under the former s 617(2), a person who was detained under a Lieutenant Governor's (L.G.) warrant could be transferred for rehabilitation purposes to any

[190] *Criminal Code,* s 672.86(1).
[191] *Criminal Code,* s 672.86(1) and (2)
[192] Possibly in the future we will see legal challenges to this provision based on its infringement of *Charter* s 6—the right to move and to take up residence in any province; or s 7—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.
[193] See definition of "disposition" in section 672.1.
[194] However, these decisions may be reviewable under administrative law principles.
[195] See, for example, *Alberta Rules of Court,* Rules 753.01 to 753.19 and the *Administrative Procedures Act,* RSA 2000, c A-3. Generally, administrative reviews are governed by the common law.

other place in Canada provided the person in charge of the receiving facility consented.

In *Ontario (AG) v Grady,* a detainee was held on a Lieutenant Governor's warrant after being found not guilty by reason of insanity for the murder of his wife.[196] In 1984, the detainee had been transferred from a restrictive mental health facility to a less restrictive facility. Just prior to a Review Board hearing, the detainee had been involved in an incident with a girlfriend involving circumstances that were somewhat similar to those of his wife's death. The Review Board recommended that the detainee be transferred back to the more restrictive facility and the Lieutenant Governor followed this recommendation, issuing a warrant. The effect of the warrant was a substantial reduction in the detainee's liberty.

At the Review Board hearing, the detainee's lawyer had requested an adjournment to explore further treatment programs and to provide a period of stabilization in light of the detainee's pre-hearing behaviour. The detainee also objected to the presence and participation of the Crown Attorney at the hearing. The detainee applied for *habeas corpus* and sought to quash the L.G. warrant based on the ground that the applicant was denied procedural fairness.[197]

The Ontario High Court quashed the L.G. warrant. There were several factors that influenced the court. First, there was no material properly before the board to support its conclusion that the detainee could not be adequately treated in the less restrictive facility, or that the best interests of the public necessitated a transfer, or that the best interests of the detainee required a transfer. Second, no notice was given before the hearing that the applicant might be transferred back to the more restrictive facility. There was no opportunity to make submissions regarding this option. Third, it was not appropriate for the Attorney General to submit victim impact statements where the detainee's lawyer could not cross-examine their authors Further, the statements were not relevant to the detainee's treatment requirements or the public interest. Fourth, because the detainee received no notice of the Board's main concern, he was not able to know the case that was to be met. Fifth, the Board should have asked for submissions on the impending transfer, providing the detainee with an opportunity to be heard.

[196] (1988), 34 CRR 289 (Ont HC).
[197] An application to test the legality of a person's detention.

Finally, the Lieutenant Governor was under a duty to remedy any breach in the rules of fairness before issuing the warrant. The duty arose from the common law and from s 7 of the *Charter.* In relying upon recommendations that were arrived at through a process in which procedural fairness was denied, the L.G. breached the duty to exercise administrative authority fairly. Because the recommendation had the effect of diminishing liberty interests, the L.G. had a duty to satisfy himself that the board had proceeded fairly.

Thus, it would appear that an accused held in custody has a right to procedural fairness when a transfer decision is made that affects her liberty interests.[198]

(b) Where Person Not in Custody

In some cases, a person found not criminally responsible on account of mental disorder may be ordered to attend a hospital for outpatient treatment. While this person is not in custody, he/she remains under the jurisdiction of the Review Board for the duration of his/her disposition. Where an accused who is not detained in custody is to be transferred to another province, the Review Board of the province that has jurisdiction over the accused must first recommend a transfer in order to reintegrate the accused into society or to aid in his/her recovery or treatment.[199] Both the Attorney General of the province to which the accused is being transferred and the Attorney General of the province from which the accused is being transferred, or officers authorized by the Attorney Generals, must give their consent to the transfer.[200] Next, the Review Board of the province where the accused is directed to attend for treatment must issue an order that directs the accused to be taken into custody and transferred under a warrant from the Attorney General of the transferring province.[201] Alternatively, the Review Board may order the accused who is out of custody to attend a specified place in Canada, subject to any conditions it considers appropriate.[202]

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[198] See also: *Conway v Ontario (AG)* (1991), 86 DLR (4th) 655 (Ont Gen Div). The provisions on transfers have not been judicially considered on this point to date.
[199] *Criminal Code*, s 672.86(2.1)(a).
[200] *Criminal Code*, s 672.86(2.1)(b).
[201] *Criminal Code,* s 672.86(3).
[202] *Criminal Code,* s 672.86(3). See *Criminal Code* s 672.87 for the extent of authority conferred by a s 672.86(2) warrant.

(c) Transfer of Jurisdiction

Once the accused is transferred to another province under s 672.86, the Review Board in the receiving province will gain exclusive jurisdiction over the accused.[203] The receiving Review Board may exercise the powers and must perform the duties outlined in ss 672.5 and 672.81 to 672.83.[204] Alternatively, the Attorney General of the receiving province may enter into an agreement with the Attorney General of the sending province, enabling the Review Board of the sending province to exercise the powers and perform the duties outlined in ss 672.5 and 672.81 to 672.83.[205]

If the accused is transferred to another province other than under s 672.86, the Review Board of the province from which the accused is transferred has exclusive jurisdiction over the accused.[206] Alternatively, the Attorneys General of the sending and receiving provinces may enter into an agreement enabling the Review Board of the receiving province to exercise jurisdiction over the accused.[207]

8. Disposition at End of Sentence

Where the offender has been found not criminally responsible on account of mental disorder or unfit to stand trial and the person's disposition under the *Criminal Code* is about to expire, Alberta's *Mental Health Act* authorizes a physician to examine the person, assess his/her mental condition and issue an admission certificate if the person meets the prerequisites for the issuance of an admission certificate.[208] This means that if a person continues to suffer from a mental disorder at the end of his/her sentence, he/she may be involuntarily admitted to a mental health facility for treatment.

B. High-Risk Accused

On July 11 2014, sections 672.64 – 672.66 of the *Criminal Code* came into force, via the *Not Criminally Responsible Reform Act*.[209] These sections create a classification and treatment regime for NCR accused who are determined to be High-Risk Accuseds (HRA). This somewhat

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[203] *Criminal Code,* s 672.88(1).
[204] *Criminal Code,* s 672.88(1).
[205] *Criminal Code,* s 672.88(2).
[206] *Criminal Code,* s 672.89(1).
[207] *Criminal Code,* s 672.89(2).
[208] *Mental Health* Act, RSA 2000, c M-13, s 3.
[209] SC 2014, c 6 [*NCR Reform Act*].

controversial designation restricts a Review Board's powers of disposition, the frequency of reviews, and the privileges that an HRA may enjoy.

1. Designation

Section 672.64(1) sets out how an NCR Accused can be designated as an HRA:

> 672.64(1) On application made by the prosecutor before any disposition to discharge an accused absolutely, the court may, at the conclusion of a hearing, find the accused to be a high-risk accused if the accused has been found not criminally responsible on account of mental disorder for a serious personal injury offence, as defined in subsection 672.81(1.3), the accused was 18 years of age or more at the time of the commission of the offence and
>
> > (a) the court is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person; or
> >
> > (b) the court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person.
>
> Factors to consider
>
> (2) In deciding whether to find that the accused is a high-risk accused, the court shall consider all relevant evidence, 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 current 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.

The HRA application occurs after an accused has been found NCR, but before a disposition granting an absolute discharge. The application must be made to a court (not a Review Board) and the decision must be made by a judge.[210] The accused and the Crown are party to this proceeding, but the prospective receiving "hospital" is not.[211] It may only be used where an accused is over 18, and has been found guilty of a "serious personal injury offence", which means an indictable offence involving either "the use or attempted use of violence against

[210] *Schoenborn* at para 23.
[211] Bloom at 312. Hospital is defined in the *Criminal Code* at s 672.1.

another person, conduct endangering the life or safety of another person or likely to inflict psychological damage upon another person," or one of a series of listed offences, which are primarily offences of a sexual nature.[212]

An accused need only satisfy one of sub-sections 672(1)(a) and (b) to receive the HRA designation. Thus, based on 672.64(1)(b), an HRA designation may be imposed based solely on the details of the accused's index offence.[213]

At the time of writing,[214] these new provisions have not received significant judicial attention and have not been considered by any appeal Court.[215] However, the standards that must be met to satisfy s 672.64(a) and (b) were considered in detail by the British Columbia Supreme Court in *R v Schoenborn*.[216] *Schoenborn* involved a Crown application to designate an NCR accused as an HRA stemming from the murder of his three children. The NCR accused suffered from a major delusional disorder with some symptoms of schizophrenia. He murdered his children to prevent them from experiencing a life of sexual and drug abuse that he imagined their mother and her new partner were inflicting upon them.[217] The Crown argued that the NCR accused satisfied both 672.64(1)(a) and (b).

In the Court's view, to be designated as an HRA, an accused must pose a threat greater than that necessary to make other NCR dispositions for accused who present a "significant threat to the safety of the public" pursuant to s. 672.54(b) and (c).[218]

To satisfy 672.64(1)(a)[219] the Crown must demonstrate that there is a high degree of probability that the accused will cause, attempt to cause, or threaten to cause bodily harm to another person, and in so doing, expose that person to serious physical or psychological harm.[220]

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[212] *Criminal Code* s 672.81(1.3). Listed offences include: ss 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 271, 272 or 273 or an attempt to commit such an offence.
[213] Lacroix at 47.
[214] February 2018.
[215] Most judicial consideration comes out of Quebec. For example, in *R. c. Fournier*, 2016 QCCS 4803 (CanLII) the Court designated the accused as HRA in a relatively brief fashion.
[216] 2017 BCSC 1556 (CanLII) [*Schoenborn*].
[217] *Schoenborn* at para 151.
[218] *Schoenborn* at para 26.
[219] "[D]emonstrate a substantial likelihood that the accused will use violence that could endanger the life or safety of another person."
[220] *Schoenborn* at paras 48, 61, 71, 72, and 82.

To satisfy s 672.64(1)(b),[221] the Crown must demonstrate the conduct in question included actions that could be described as cruel, savage or inhuman.[222] A risk of grave physical or psychological harm requires finding that there is a high degree of probability that the accused will use intentional violence to interfere in a substantial way with the physical or psychological integrity, health or well-being of another person.[223]

The relevant factors to consider in making the HRA determination are listed under 672.64(2). The Court in *Schoenborn* offered the following guidance on these factors:

- Nature and circumstances of the offence: Notwithstanding the horrendous details of the offence, the Court focused its analysis on the NCR accused's mental state, and whether or not anger played a role in his actions.

- Repetitive nature of the offence: If relying on an alleged pattern of behaviour, the Crown may only rely on conduct that is criminal in nature. There must be significant similarities regarding the essential characteristics of each alleged example, and the fewer the number of incidents in the alleged pattern, the more similarity is required between their essential characteristics. In comparing different incidents in an alleged pattern of repetitive behaviour, the court must consider the context and surrounding circumstances of the incidents, including particularly the mental state of the accused.

The judge in *Schoenborn* did not grant the HRA application. The NCR accused's psychosis and delusions had been in remission for a lengthy period of time. While he suffered from continued aggressive conduct, it did not rise to the requisite level of serious physical or psychological harm required by s 672.64(1)(a). In terms of 672.64(1)(b), the index offence was brutal, but it was committed under fundamentally different circumstances than the NCR accused now found himself. The judge could not find a risk of grave physical or psychological harm as required by s. 672.64(1)(b).

The Crown opted not to appeal the ruling.[224]

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[221] "The court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person."
[222] *Schoenborn* at para 89.
[223] *Schoenborn* at paras 96, 100.
[224] Charmaine de Silva "No appeal after child killer Allan Schoenborn wasn't designated 'high-risk accused'" *Global News* (September 14, 2017) online: https://globalnews.ca/news/3744829/no-appeal-after-child-killer-allan-schoenborn-wasnt-designated-high-risk-accused/.

2. Effect of Designation

The HRA designation significantly curtails the Review Panel's disposition powers. It impacts the NCR accuseds in three ways:

- Persons designated as an HRA may only receive custodial dispositions in a hospital setting (a disposition under 672.54(c).[225] HRA persons are not eligible for conditional (s 672.54(b)) or absolute (s 672.54(a)) discharges.
- The custodial detention is strictly confined to the hospital. Other NCR accuseds who receive dispositions under 672.54(c) are eligible for on-and off-grounds passes. An HRA person may not leave the hospital unless the person in charge of the hospital decides that an absence is needed for medical reasons or for reasons necessary for treatment.[226] In that case, the HRA person must be escorted by someone authorized by the person in charge of the hospital, and a structured plan must be prepared such that the accused's absence will not present an "undue risk" to the public.[227] This restriction continues to apply where the Review Board has delegated authority to decrease the restrictions on the accused's liberty to the person in charge of the hospital where the accused is detained.[228]
- Review Boards may extend the time for holding a disposition hearing from 12 months to up to 36 months for HRA persons.[229] This can occur if the HRA accused is represented by counsel and both the accused and the Attorney General consent to the extension, or if the Review Board is satisfied on the basis of any relevant information that the accused's condition is not likely to improve and that detention remains necessary for the period of the extension.[230] The Review Board's unilateral decision can be appealed.[231]

[225] *Criminal Code* s 672.64(3).
[226] *Criminal Code* s 672.64(3)(a).
[227] *Criminal Code* s 672.64(3)(b).
[228] *Criminal Code* s 672.56(1.1); *Schoenborn* at para 25.
[229] Pursuant to *Criminal Code* s 672.81(1), further reviews must generally occur every 12 months as long as the disposition remains in force.
[230] *Criminal Code* ss 672.81(1.31) and (1.32).
[231] *Criminal Code* s 672.81(1.5).

3. Review and Revocation of the HRA Designation

Once the HRA designation is made, it can only be removed by a superior level court. The designation may be reviewed at any and all disposition hearings before the Review Board. As outlined above, while disposition hearings are scheduled to occur annually, this timing may be extended to up to 36 months for HRA persons, if the accused has counsel and consents to the extension, or if the Review Board is of the opinion that the accused's condition is not likely to improve.[232]

If the Review Board is satisfied based on the evidence that there is "not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person" is shall refer the case to a superior criminal court.[233] If the Court reaches the same conclusion, it can revoke the designation. If the Court does not revoke the HRA designation, it must send a transcript of the hearing to the Review Board, and the Review Board must, within 45 days, hold a hearing and review the conditions of detention imposed under paragraph 672.54(c), subject to the restrictions set out in subsection 672.64(3).[234]

The review process includes two opportunities for an assessment to be ordered. The Review Board and may order an assessment as part of its disposition hearing to determine if the HRA designation is still needed. If the Review Board refers its findings to a Court, the Court may also order an assessment.[235]

Sections 672.64(4) and (5) provide that an HRA designation may be appealed to the appropriate Court of Appeal pursuant to the provisions in ss 672.72 and 672.78. In addition, each decision of the Review Board or a Court in relation to maintain, review, or revoke the high-risk designation gives rise to a right of appeal to the Court of Appeal.[236]

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[232] *Criminal Code* s 672.81
[233] *Criminal Code,* s 672.84(1).
[234] *Criminal Code,* s 672.84(5).
[235] Bloom at 314.
[236] Bloom at 314.

4. Retroactivity

Section 672.64(1) is triggered by a Crown application that is made "before any disposition to discharge an accused absolutely".[237] It applies to NCR accuseds who have not yet received absolute discharges.

Conflicting case law has developed as to the retroactivity of ss 672.64-672.66. The Quebec and British Columbia courts disagree on whether these provisions apply to persons who have been found NCR prior to the passage of the *NCR Reform Act*. As a result, ambiguity exists as to whether these provisions apply to accused persons who were found to be NCR prior to the 2014 amendments, but who had not received absolute discharges at the time the amendments came into force.

In British Columbia, a 2015 case related to the *Schoenborn* decision outlined above held that the HRA provisions applied retroactively. In *R v Schoenborn*[238] (2015) the accused had been found NCR in 2010, and had received custodial dispositions since that time. The Crown sought to have the accused designated as an HRA. In the Court's view, a plain reading of 672.64 demonstrated that the laws were intended to apply to all NCR accused who remained under the jurisdiction of the Review Board. As such, the section applied to all NCR accused who had not yet been absolutely discharged, irrespective of the 2014 introduction of the HRA regime. While there is typically a presumption against the retroactive application of laws, this presumption does not apply to the NCR regime given its unique status and preventative nature that is focused on public safety rather than punishment.

Quebec courts reached the opposite conclusion. [239] In *R c CR*, the Quebec Superior Court of Justice held that, without express language demonstrating the intent to apply retroactively, the presumption against such an interpretation prevailed. In Quebec, then, the HRA regime only applies to persons who were found NCR from June 2014 onward.

5. Compare and Contrast HRA with Dangerous Offender Provisions

Because the new sections dealing with HRA persons are relatively new, there have not been many cases in which they are interpreted and applied. There are, however several

[237] *Criminal Code,* s 672.64(1).
[238] *R v Schoenborn*, 2015 BCSC 2254 (CanLII).
[239] *R c CR*, 2015 QCCQ 2299 (CanLII).

decisions in which similar sections dealing with dangerous offenders have been judicially considered. The prosecutor has a duty to inform the court that he/she believes that the offender has committed a serious personal injury offence that is a designated offence, and the offender has been convicted at least twice before for designated offences and sentenced to a minimum of two years' imprisonment. Also, the Prosecutor must inform the court whether he/she intends to apply to have the offender remanded for assessment under *Criminal Code* s 752.1(1) (dangerous or long-term offender designation). After the assessment, the Prosecutor can apply for an application that the offender is a dangerous offender under *Criminal Code* s 753.2. In *R v Lyons,* the SCC held that the provisions of the *Criminal Code,* which provide that the court, without a jury, determines the question of whether a person is a dangerous and thereby sentences the offender to an indeterminate sentence, do not offend the fundamental justice provisions in *Charter* s 7.[240] Further, the provisions do not create a situation of arbitrary detention or imprisonment contrary to s 9. Finally, the imposition of an indeterminate sentence for dangerous offenders does not constitute "cruel and unusual punishment" within *Charter* s 12 because of the provision for periodic review by the National Parole Board.

The dangerous offender provisions also utilize the "pattern of repetitive behaviour" language that is utilized by HRA regime. In terms of the dangerous offender provisions, a pattern is determined not only by the number of offences, but also by the elements of similarity in the offender's behaviour.[241] The pattern should be determined from the behaviour of

[240] (1987), 61 CR (3d) 1 (SCC). See also: *R v Johnson,* [2003] SCJ No 45 [*Johnson*] in which the Court held that even where the statutory criteria for a dangerous offender finding were met, a sentencing judge retained the discretion not to make the declaration where the goal of protecting the public could not be met by imposing a less restrictive sanction. Where the sentencing judge would be satisfied that a long-term offender finding would be sufficient to reduce the threat posed by an offender to others, the judge could not properly make a dangerous offender declaration and sentence the offender to an indeterminate sentence. The general rule was that offenders were to be punished having regard to the sentencing provisions in force at the time they committed the offence. However, based on section 11(i) of the *Charter*, Johnson was entitled to the benefit of the lesser punishment available under the new regime even though he committed the offence before the long-term offender provisions came into effect. A new hearing was required pursuant to section 759(3) of the Code, as it could not be said that there was no reasonable possibility that the sentencing judge would not have imposed a different sentence but for his failure to consider the long-term offender provisions; and *R v Rollins* (1993), 15 CRR (2d) 120 (BCSC), where the court held that the provision for sending an offender for psychiatric observation in furtherance of a dangerous offender application [s 756] did not offend the accused's right to be protected from self- incrimination. Further, the fact that the provision was broadly worded did not violate *Charter* s 7 and was not void for vagueness because an accused is not entitled to the same level of protection after conviction as he is at the pre-trial stage.

[241] *R v Langevin* (1984), 39 CR (3d) 333 (Ont CA) [*Langevin*].

accused, with the focus on actions rather than thoughts.[242] In *R v Dow*, the British Columbia Court of Appeal held that a pattern of repetitive behaviour under s 753(1)(a)(i) consists of three elements: a pattern revealed by repetitive behaviour, an element in the pattern is that the dangerous behaviour has not been restrained in the past, and a likelihood that the same behaviour in the future will not be restrained and will cause death or injury. Behaviour that is of a "brutal nature" does not demand a situation of stark horror. Conduct that is coarse, savage and cruel and that is capable inflicting severe psychological damage on the victim is sufficiently brutal to meet the test.[243]

6. Controversy

The *NCR Reform Act*, and specifically the HRA regime, received a significant amount of criticism. Criminal and mental health experts have expressed concern that the HRA regime creates a disincentive for persons with mental illness to pursue the NCR defence. As Bloom explains, the decision to pursue an NCR verdict is tactical and driven, at least in part, by the likely outcome. In practice, severely mentally ill accused persons will not pursue an NCR verdict where they feel it imposes a harsher sentence than the regular prosecutorial system. This increases the probability that mentally ill offenders will avoid the NCR regime and its rehabilitative aims, and instead end up in prison. Within the prison systems, mentally ill persons often do particularly poorly and their conditions often deteriorate. This has the potential to make communities less safe.[244]

For this and other reasons, Canadian mental health professionals and organizations have been critical of the *NCR Reform Act*, and of the HRA regime generally.[245] This criticism was amplified by the fact that government ministers declined to meet with any mental health organizations in the drafting process. Eleven National health organizations publicly opposed the *NCR Reform Act*. Many mental health professionals have expressed the opinion that the means employed by the *NCR Reform Act* will not enhance public safety, and in fact its methods stand in conflict with available evidence on risk and recidivism rates among the mentally ill.[246]

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[242] *R v Crane*, 2010 ABCA 130 at para 22, 254 CCC (3d) 542.
[243] *Langevin.* See also *R v Melanson* (2001), 152 CCC (3d) 375, 142 OAC 184. Compare *Schoenborn.*
[244] Bloom at 315.
[245] Bloom at 315.
[246] Lacroix at 47.

C. Dual Status Offenders

A mentally disordered accused might be a dual status offender. *Criminal Code* sections 672.67 to 672.71 deal with dual status offenders. A "dual status offender" is defined in s 672.1 as "an offender who is subject to a sentence of imprisonment in respect of one offence and a custodial disposition under paragraph 672.54(c) in respect of another offence."[247] Section 672.67(1) provides that, where a court imposes a sentence of imprisonment on an offender who is, or thereby becomes, a dual status offender, that sentence takes precedence over any prior custodial disposition, pending any placement decision by the Review Board.[248] Under s 672.67(2), if the court imposes a custodial disposition on an accused, who is, or thereby becomes, a dual status offender, the disposition will take precedence over any prior sentence of imprisonment pending any placement decision by the Review Board.[249]

When the Review Board believes a dual status offender's place of custody is inappropriate to meet the mental health needs of the offender or to safeguard the well-being of other persons, the Review Board must decide whether to place the offender in custody in a hospital or in a prison.[250] The Review Board may make a placement decision either on application by the Minister or on its own motion.[251] The Review Board must give both the offender and the Minister reasonable notice before making its placement decision.[252]

Section 672.68(3) states that, in making a placement decision, the Review Board should take into account the following considerations: the need to protect the public from dangerous persons; the treatment needs of the offender and the availability of the treatment; whether the offender would consent to treatment or is a suitable candidate for treatment; any submissions made to the Review Board by the offender or other party; any assessment report submitted in writing to the Review Board; any other factors that the Review Board considers relevant.[253] The

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[247] *Criminal Code*, s 672.1.
[248] *Criminal Code*, s 672.67(1). For a discussion of the limitations this provision places on a Review Board's powers, see *Saskatchewan (Attorney General) v Karlssen*, 2013 SKQB 338 (CanLII) at paras 16, 17.
[249] *Criminal Code*, s 672.67(2).
[250] *Criminal Code*, s 672.68(2).
[251] *Criminal Code*, s 672.68(2). For the purposes of s 672.68, "minister" means the Minister of Public Safety and Emergency Preparedness or the Minister responsible for correctional services of the province to which a dual status offender may be sent pursuant to a sentence of imprisonment.
[252] *Criminal Code*, s 672.68(2).
[253] *Criminal Code*, s 672.68(3).

Review Board must make their placement decision as soon as practicable, but no later than 30 days after receiving the application from or giving notice to the Minister under s 672.68(2), unless the Minister and Review Board agree to a longer period that does not exceed 60 days.[254]

On application by the Minister or dual status offender who is the subject of the decision, the Review Board must hold a hearing to review a placement decision if it is satisfied that a significant change in circumstance requires it.[255] The Review Board may also review a placement decision on its own motion, provided they give reasonable notice to the Minister and dual status offender.[256]

The *Criminal Code* provisions discussed above confer upon the courts some flexibility in selecting the most appropriate disposition for a person found not criminally responsible on account of mental disorder. Further, the new regime provides much more autonomy to the Review Board. There seem to be more safeguards in place to protect the best interests of the accused. As a result, society may benefit if the mentally disordered accused receive the treatment that they require.

III. Mentally Disabled Persons and Sentencing

A. General Sentencing Principles and Procedures

Although the *Criminal Code* provides for a plea of not criminally responsible, an accused may elect not to raise the issue of mental disorder, plead guilty to the charges or be found guilty. This decision has been further complicated by the potential designation as a high-risk accused.[257]

Once an accused has been found guilty of an offence, he/she will be sentenced. The sentencing process is complex. The fundamental principle of sentencing is proportionality, which intrinsically tied to its fundamental purpose - the maintenance of a just, peaceful and safe society through the imposition of just sanctions.[258]This is achieved through the more

[254] *Criminal Code*, s 672.68(4).
[255] *Criminal Code*, s 672.69(2).
[256] *Criminal Code*, s 672.69(3).
[257] Lacroix at 48.
[258] *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 (CanLII) at para 37.

specific goals of punishment and incapacitation,[259] deterrence (both of the general public and the individual offender) and rehabilitation.[260] It is not easy to balance these objectives.[261] One difficulty for sentencing judges is that these goals often conflict and therefore they provide little assistance with the sentencing process. For example, rehabilitation may require that the offender be given a community sentence, while deterrence may dictate that he be given a sentence of imprisonment.[262]

Generally, the sentencing process involves two stages. First, the court looks at the type of sentence that should be imposed (e.g., fine, probation, imprisonment). This determination will be based on whether the court chooses a tariff disposition (imprisonment or fine) or an individualized sentence (e.g., probation).[263] A tariff disposition is a specified fine or length of imprisonment based on the nature of the offence. Thus, everyone who is found guilty of a particular offence will receive a sentence within a particular range. An individualized sentence involves looking at the needs of a particular offender and fashioning probation conditions that meet those needs and address the other sentencing factors. Next, the court determines the length or the prison term or probation order or the exact amount of the fine.[264] If the court chooses a tariff sentence, it will look at the evolution of the relevant legal decisions to provide guidance as to the range of sentence that would be appropriate. The precise length of sentence will be affected by aggravating or mitigating factors recognized by the case law.[265] Mental illness, for example, has been considered a mitigating factor.

Although there are general sentencing procedures, when a person has a mental disorder, the courts may look outside the general range of sentences and will impose an individualized sentence that will recognize the particular situation of the offender.[266] However,

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[259] The theory is that offenders who are incarcerated are removed from the community and are therefore unable to commit crimes.
[260] Specific deterrence applies to deter a convicted offender from committing further offences because of the punishment he/she received. General deterrence applies to prevent the commission of crimes by people other than convicted offenders.
[261] Curt Griffiths and Simon Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 324 [Griffiths and Verdun-Jones].
[262] Griffiths and Verdun-Jones at 324.
[263] R.P. Nadin-Davis, *Sentencing in Canada,* (Toronto: Carswell, 1982) at 3 – 6 [Nadin-Davis].
[264] Nadin-Davis at 4.
[265] Griffiths and Verdun-Jones, at 339.
[266] *R v Hiltermann*, [1993] AJ No 609 at 3 [*Hiltermann*].

the sentence must be forged from the available sentencing options. The options currently available to the sentencing judge include: an absolute or conditional discharge;[267] a suspended sentence;[268] probation;[269] a fine;[270] or imprisonment.[271] The court's disposition may involve a combination of these.

A sentence of imprisonment for two years or more or a sentence of life imprisonment must be served in a federal correctional institution (except in Newfoundland)[272] and a sentence of less than two years must be served in a provincial correctional facility.[273] The court may order that the terms of imprisonment be served consecutively[274] or that they be served concurrently.[275] Where the sentence imposed is for less than ninety days, an intermittent sentence may be permitted.[276]

The purpose and principles of sentencing are codified in s 718 of the *Criminal Code,* which states:

> 718. The fundamental purpose of sentencing is to protect society and to

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[267] *Criminal Code,* s 730 provides that an absolute or conditional discharge is available where the accused has pleaded guilty or is found guilty of an offence where there is no minimum penalty. The offence must not be one punishable by life imprisonment or 14 years imprisonment. The absolute or conditional discharge must be in the accused's best interest and not contrary to the public interest. The discharge may be absolute or in accordance with conditions prescribed in a probation order.

[268] *Criminal Code*, s 731(1)(a). A suspended sentence means that the passing of sentence is postponed and the accused is released upon conditions prescribed in a probation order. It is possible only where there is no minimum sentence prescribed for the offence. In deciding whether to suspend sentence, the court will consider the age and character of the accused, the nature of the offence and the circumstances surrounding its commission.

[269] The court may make a probation order in addition to fining the accused or in addition to sentencing the accused to prison for two years or less Section 732.1(2) of the *Criminal Code* outlines the conditions that must be met and those that may be placed in a probation order. All probation orders require the accused to keep the peace, to be of good behaviour and to appear in court when required to do so. Additional conditions include reporting to a probation officer, abstaining from consumption of alcohol and seeking employment. Courts may also add other conditions that they consider desirable for securing good conduct and preventing repetition of the offence or the commission of other offences.

[270] Section 734 of *the Criminal Code* provides that a fine may be imposed for an indictable offence in addition to or in lieu of imposing a term of imprisonment if the offence is punishable by imprisonment for five years or less and there is no minimum term of imprisonment. Under s 736(1), a fine may be discharged by participation in a fine option program.

[271] For a summary conviction offence, the maximum term is six months. There are five categories of maximum terms of imprisonment for indictable offences These maximums are: life, fourteen years, ten years, five years and two years. In most cases, these sentences may be reduced by the award of remission and the granting of parole. There are a few crimes for which mandatory minimum sentences must be served. These include high treason, first and second-degree murder and driving while impaired.

[272] Griffiths and Verdun-Jones at 295.

[273] *Criminal Code*, s 732.

[274] *Criminal Code*, s 718.3(4).

[275] *Criminal Code*, s 753.

[276] *Criminal Code*, s 732. For example, the offender may be permitted to serve his sentence on weekends.

> contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.[277]

Thus, the goals of sentencing are similar to those existing at common law. The judge will continue to weigh the sentencing factors.[278] However, the provisions also state that a sentence must be proportionate to the gravity of the offence and the responsibility of the offender.[279] In addition, 2015 amendments to s 718 and 718(a) emphasized that the purposes of sentencing include protection of society and reparation for harm to victims and community.[280]

Section 718.2 of the *Criminal Code* requires a court that imposes a sentence to take into consideration a number of principles. It states:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the

[277] *Criminal Code,* s 718.
[278] See *R v Bunn*, [2000] 1 SCR 183, 30 CR 95th) 86, 140 CCC (3d) 505. See also: *R v Kain* (2004), 185 CCC (3d) 501.
[279] See *R v Nasogaluak*, [2010] 1 SCR 206, 72 CR 96th) 1, 251 CCC (3d) 293 and *R v Nur*, [2015] 1 SCR 773, 2015 SCC 15 (CanLII).
[280] *Victims Bill of Rights Act*, 2015 SC c 13, s 23.

> foregoing …;[281]
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive alternatives may be appropriate in the circumstances; and
>
> (e) all available alternatives, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Section 762.1 requires judges to state the terms of the sentence imposed, and the reasons for it.[282] This enhances the appellate courts' ability to review sentences.[283]

The inclusion of rehabilitation as a sentencing principle and the emphasis on alternatives to imprisonment may be of great benefit to mentally disabled offenders This will depend, however, on the availability of suitable community programs.

B. Sentencing Principles and Mentally Disabled Clients

Aside from the disposition choices available to the judge after finding a person unfit to stand trial or not criminally responsible on account of mental disorder under *Criminal Code* s 16, there are no specific sentencing alternatives designed for a mentally disabled offender. The

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[281] Relevant aggravating circumstances to be considered under s 718.2(a) include: evidence the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor; evidence the offender, in committing the offence, abused the offender's spouse, common-law partner, or a person under the age of 18; evidence the offender abused a position of authority or trust in relation to the victim; evidence the offence had a significant impact on the victim, considering their age and other personal circumstances such as their health and financial situation; evidence the offence was committed for the benefit of organized crime; evidence the offence was a terrorism offence; evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*, RSC 1992, c 20. The list of aggravating factors contained in s 718.2(a) is not exhaustive. See *R v Cook* (2009), 71 CR (6th) 369, 250 CCC (3d) 248 (Que CA).

[282] *Criminal Code*, s 726.2.

[283] Canada, Department of Justice, *Directions for Reform: Sentencing*, Ottawa: Supply and Services, 1990 [Green Paper] at 19.

sentencing judge must choose from the same options available to any offender: absolute or conditional discharge; suspended sentence and probation; a fine; imprisonment or a combination; however, the judge may take into consideration the fact that the offence may have been motivated by the presence of a mental disability.[284]

Where the accused has a mental disability, the court may consider psychiatric reports and pre-sentence reports to assist in sentencing. The information that is received after a verdict, and how it is used, is within the judge's discretion. However, counsel has a role in protecting and advancing their client's interests in the sentence proceedings. It is customary for Crown counsel and defence counsel to make representations at the sentencing stage. Defence counsel must present to the judge alternatives that can best meet the needs of the offender, but which also fall within the range of sentencing prescribed by law.[285]

In dealing with a mentally disabled offender, the sentencing judge may experience some difficulty in applying the traditional general and specific sentencing goals. These may be of little relevance to a mentally disabled offender.[286] For example, the sentencing goal of deterring a mentally disabled offender may not be possible. The offender may not have the ability to apply the lesson or to perceive it as relevant to him.[287] Further, unless the offender is dangerous, a more appropriate goal may be to rehabilitate or habilitate the offender. Thus, in many cases, it may be desirable to impose an individualized sentence based on the circumstances of the particular accused.

Defence counsel will have the obligation to investigate possible alternatives to assist the court and her client. Mental health and other professionals may be of great assistance in outlining the possible community resources that could be used to assist the offender.[288]

C. Effect of Mental Disability on Sentence

Mental disability may be a factor in sentencing because it existed at the time of the

[284] Section 718 of the *Criminal Code* does not contain any specific sentencing options for mentally disabled offenders.
[285] The Calgary John Howard Society, *The Mentally Handicapped Offender: A Guide to Understanding*, 1983 at 53 [Calgary John Howard Society].
[286] Calgary John Howard Society at 51.
[287] Calgary John Howard Society at 51.
[288] A list of agencies which may be of assistance for mentally disabled clients may be found in Chapter 15.

offence and contributed to the offence[289] or because it has developed subsequent to the offence and exists at the time of sentencing.[290] In most cases, the mental disability existed at the time of the offence and continues to exist at sentencing.

While the *Criminal Code* specifies a range of sentence options and lengths, several factors, including the mental condition of the accused, may alter the sentence usually imposed on persons charged with similar offences.[291] Schiffer postulates that the fate of a mentally disabled person depends upon a combination of three factors: (1) the type of offence involved; (2) the nature of the offender's mental disability; and (3) the philosophy of the sentencing judge.[292] Nadin-Davis further postulates that the presence of a mental health factor will be accorded varying weight by the courts, depending on the court's emphasis upon rehabilitation of the offender, protection of the public by confinement or general deterrence (a rare choice).[293] Thus, it may only be possible to understand a particular sentence through knowing which particular factor was emphasized. For example, if a judge is most concerned about protecting the public, he/she might be inclined to impose a longer sentence of prison confinement. Further, he/she might attempt to mould the sentence so as to assist in obtaining a "cure" for the offender and thereby protect the public once the offender has served his/her sentence.[294]

A person's sentence may be mitigated because he/she was mentally disabled at the time of the offence. Mitigation of sentence takes several forms. First, the disability may result in a lesser sentence. Second, the person's mental condition may mean that imprisonment will be harsher for him than for an offender without a mental disability. Thus, the court may be inclined to impose a shorter sentence. Third, the availability of treatment and the willingness of the offender to participate in treatment programs may influence the length and nature of the sentence.

A perception that the accused is dangerous may also affect the nature and length of sentence. In these cases, the court will tend to impose the longest possible sentence in order

[289] *R v Ellis*, 2013 ONCA 739 (CanLII) at para 116.
[290] Nadin-Davis at 83.
[291] *Criminal Code*, s 718.2(a)(i)
[292] M.E. Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978) at 227 [Schiffer].
[293] Nadin-Davis at 83.
[294] Nadin-Davis at 83.

that the accused is not released until he is "cured".

1. Mental Disability as a Mitigating Factor

A person's mental disability may impact the severity of his/her sentence.[295] If evidence establishes that a mental illness or disability was compromised during an offence, it must be considered during sentencing. Failing to do so is a reviewable error on appeal.[296] In *R v Ramsay*, the Alberta Court of Appeal held that when sentencing mentally disabled offenders, the sentencing judge should have regard to the cognitive deficit of the particular offender.[297] The Court further recognized that "where an offender is found to be criminally responsible, but suffering from a serious mental illness, a more lenient disposition reflective of the offender's diminished responsibility is called for."[298]

In *Ramsay*, the Court considered the appropriate sentence for an offender with cognitive deficits associated with fetal alcohol syndrome. In crafting a sentence for such an offender, the Court noted that there were two identifiable challenges: "accurately assessing the moral blameworthiness of the offender in light of the adverse cognitive effects of FASD; and balancing protection of the public against the feasibility of reintegrating the offender into the community through a structured program under adequate supervision."[299]

In *R v Peters*, the Newfoundland Court of Appeal stated that "the mental illness of an offender will often be considered a mitigating factor in sentencing even though it is not of the sort that would establish a verdict of not criminally responsible on account of mental disorder at the time of commission of the offence."[300] In such cases, the focus in sentencing may instead be placed on mechanisms that promote rehabilitation and treatment rather than punishment.[301] The Court noted that this is especially true where lengthy prison terms are

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[295] For an overview of principles and case law governing mental disability and sentencing in Alberta, see *R v Verwindt*, 2016 ABPC 70 (CanLII).
[296] *R v Tremblay*, 2006 ABCA 252 (CanLII) at para 7, see discussion in *R v Shevchenko*, 2018 ABCA 31 (CanLII) [*Shevchenko*] at para 25.
[297] *R v Ramsay*, 2012 ABCA 257 at para 21, 292 CCC (3d) 400 [*Ramsay*].
[298] *Ramsay.* See also: *R v Tremblay*, 2006 ABCA 252 at para 7, 401 AR; *R v Resler*, 2011 ABCA 167 at para 14, 505 AR 330; *R v Virani*, 2012 ABCA 155 at para 16, 524 AR 328 [*Virani*].
[299] *Ramsay,* at para 16.
[300] *R v Peters*, 2000 NFCA 55 at para 19 [*Peters*]. See also: *R v Branton*, 2013 NLCA 61, 2013 CarswellNfld 378; *R v Tkach*, 2008 ONCJ 803, [2008] O.J. No. 5973; *R v MacKenzie*, 2004 BCPC 100, 2004 CarswellBC 858.
[301] *Peters*.

regarded as counterproductive, even in cases that do not involve offenders who are mentally ill.[302] It is a well-established principle that, in order for mental illness to be considered as a mitigating factor in sentencing, the offender must show a causal link between his/her illness and criminal conduct.[303] However, this connection does not have to be a direct overlap. In *R v Ayorech*, the Alberta Court of Appeal stated that "mental disorders, particularly schizophrenia, can significantly mitigate a sentence, even if the evidence does not disclose that the mental illness was the direct cause of the offence or that it was carried out during a period of delusions, hallucinations, or such. It is sufficient that the mental illness contributed to the commission of the offence."[304] The Court of Appeal added to this reasoning in *Shevchenko*, where an accused suffered from bipolar disorder, among other things, when committing several serious offences in a short time span. The Court explained that, even where a direct causal link is not established, "an offender who has a significant mental illness is generally considered to have less moral blameworthiness than someone operating with an unimpaired view of the world. It is therefore imperative that a sentencing judge appreciate the extent and manifestation of the illness and link it to the degree of moral blameworthiness…Rarely do the offence and the mental illness stand entirely apart. The offence must be viewed in the context of the mental illness."[305] In *Resler*, the Alberta Court of Appeal noted that although deterrence and denunciation are important principles in sentencing, they may be considered to carry less weight in the context of a mentally ill offender.[306] The Court stated that "[l]ittle would be achieved by making an example of an offender whose acts are committed at the time of mental illness, and specific deterrence has little impact on the mentally ill."[307]

Older cases also demonstrate that mental disability may be a mitigating factor during sentencing. For example, in *R v Brown,* the accused was convicted of kidnapping a girl. He had

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[302] *Peters*.
[303] *R v Robinson*, [1975] OJ No 585. See also: *R v Prioriello*, 2012 ONCA 63, 99 W.C.B. (2d) 54; *R v Ellis*, 2013 ONCA 739 (CanLII)
[304] *R v Ayorech*, 2012 ABCA 82, 100WCB (2d) 234. For other cases where mental illness was a mitigating factor in sentencing, see: *R v Resler*, 2011 ABCA 167, [2011] AJ No 618 [*Resler*]; *R v Belcourt*, 2010 ABCA 319, [2010] AJ No 1221; *R v Muldoon,* 2006 ABCA 321; *R v Heaven*, 2005 ABCA 367, [2005] AJ No 1420; *R v Trins*, 2001 ABCA 129, [2001] AJ No 705.
[305] *Shevchenko,* at para 28.
[306] *Resler,* at para 14.
[307] *Resler*. See also: *R v Tremblay*, 2006 ABCA 252, [2006] AJ No 1124.

attempted to choke her, placed her in the trunk of his car, driven her to the dump, and believing her to be dead, covered her with garbage.[308] She survived, and the accused was convicted of kidnapping. At trial, psychiatrists testified that Brown had a history of depression and inadequacy and that his state of mind at the time of the offence was "fluctuating, waxing and waning." At the time of the choking, he had a "crisis of the mind, a depression" and the discharge of an aggressive impulse brought temporary relief to his mental condition. The trial court imposed a sentence of 15 years' imprisonment. The Ontario Court of Appeal reduced the sentence to seven years because of the accused's mental condition at the time of the offence.

In *R v Curtis,* the Alberta Court of Appeal reduced an 18-month sentence for arson to one-year imprisonment because of the accused's mental health. He was described as having a psychopathic disorder.[309] In *R v Sabean,* the Nova Scotia Court of Appeal upheld the trial sentence of two months' imprisonment followed by 18 months' probation for indecent assault.[310] The accused person's mental age of twelve was a mitigating factor in the relatively light sentence. In *R v Butt,* the Newfoundland Court of Appeal reduced a sentence for robbery from four years to two years less one day.[311] The Court looked at the accused's circumstances—including his alcohol problem and psychiatric illness—and determined that consideration must be given to helping the accused. This could be accomplished by a shorter jail term and psychiatric counselling.[312]

In *R v Medwid,* a high school principal was convicted of stealing from a canteen fund while suffering the effects of a nervous breakdown.[313] This offence was totally out of character. These factors influenced the court to impose a lighter than usual sentence. Similarly, in *R v Taylor,* the Ontario Court of Appeal overturned a conviction and fine in favour of a conditional

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[308] (1970), 8 CCC (2d) 13 (Ont CA) [*Brown*].
[309] (1984), 57 AR 80 (CA). Similarly, in *R v Macarthur*, [1979] NSJ No 559, an accused with a low mentality had a sentence for arson reduced from 4 years' imprisonment to 2 1/2 years, partly because of his mental disability.
[310] (1979), 35 NSR (2d) 35 (CA) [*Sabean*].
[311] (1986), 59 Nfld. & PEIR 89 (Nfld CA) [*Butt*].
[312] See also: *R v Selamio* (1979), 23 AR 403 (WTSC). On the other hand, see *R v Brown,* (June 25, 1993) No 71 (Quicklaw) (Nfld CA) where the accused was convicted of assaulting his child and of failing to provide the necessaries of life for his child. The Court of Appeal increased the lower court's sentence from four months' imprisonment to 18 months' imprisonment. Although the accused was mildly mentally handicapped, the Court of Appeal held that he was able to function as the father of the family and had the responsibility of ensuring that his children were protected and cared for.
[313] (1990), 89 Sask R 158 (CA) [*Medwid*].

discharge where the accused was under psychiatric care and having a "mental quasi breakdown because of certain conditions in his life".[314]

In *R v Chan*, the accused, who was suffering from a transient mental illness when he attempted to murder his wife, was given a three-year suspended sentence with very strict conditions.[315] The sentence was upheld on a Crown appeal. In *R v C (J),* a person with paranoid schizophrenia accused was convicted of two counts of sexual assault, two counts of assault with a weapon and two counts of kidnapping.[316] He was sentenced to a total of 10 years' imprisonment. The trial judge stated that the accused's mental illness was a mitigating factor in reducing the severity of the sentence. The court of appeal later affirmed this decision.[317]

In *R v Schira*, the accused pleaded guilty to kidnapping using a firearm and sexual assault using a firearm.[318] Schira was diagnosed with having a psychotic mental disorder. The psychiatric assessments determined that he was fit to stand trial and that he did not qualify for the defence of not criminally responsible by reason of mental disorder. Schira admitted that the motivation of the offence was sexual arousal; however, he had no adult criminal record. The accused had been in pre-trial custody for 11 months at the psychiatric facility and was further sentenced by the trial judge to 14 years imprisonment.

The trial court held that even though Schira's mental illness did not lead him to commit the offences, it was a mitigating factor because it did play a role in the offence. The court further held that the pre-trial custody spent in hospital did not attract the same credit as if Schira had been in a remand facility and that since the kidnapping was distinct from the sexual assaults, it attracted its own sentence. The court sentenced Schira to 8 years imprisonment for use of a firearm in kidnapping and 6 years imprisonment for use of a firearm while committing a sexual assault. These sentences were to be served concurrently in a psychiatric institution. As

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[314] (1975), 24 CCC (2d) 551 (Ont CA) [*Taylor*]. See also: *R v Hergert* (1977), 3 AR 522 (Dist Ct) where a person accused of shoplifting was granted an absolute discharge for taking a jar of Ovaltine from a grocery store because she formed the intention to steal it on impulse, in a state of some emotional upset. See also: *R v McInnis* (1973), 13 CCC (2d) 471 (Ont CA), where, on two shoplifting convictions, the Court of Appeal reduced a suspended sentence with three years' probation to a conditional discharge because the accused suffered from emotional stress at the time of the offences

[315] (1993), 18 CR (4th) 255 (Que CA).

[316] (1992), 134 AR 141 (QB).

[317] [1993], AJ No 249.

[318] [2004], AJ No 563.

well, the accused was ordered to serve half of the sentence before he could be released based on parole. This was pursuant to s 743.6 of the Criminal Code. He was also ordered to submit a DNA sample and had a lifelong firearms prohibition.

On appeal, the Alberta Court of Appeal allowed an appeal by Schira, who appealed on the grounds that the sentence was unduly harsh, failed to take into account sentencing parity, failed to give proper credit for pre-trial custody and erred in the application of the *Criminal Code*'s sentencing principles.[319] Particularly, Schira submitted that the sentencing judge made an error in principle when he stated that less credit was to be given for pre-trial custody spent in a psychiatric unit of a hospital. In its reasons, the Court of Appeal stated that there was no principle that supported less credit for pre-trial custody spent in the psychiatric unit of a hospital and the sentencing judge erred in this respect. The Court reduced the sentence by one year but agreed that the sentence imposed was fit and proper under the circumstances because the facts related to the offence required a denunciatory and deterrent sentence.

In *R v Jenkins,* the accused, married for 25 years, killed his wife. He had no history of violence and pleaded guilty to manslaughter.[320] A psychiatrist testified that the accused was in a state of dissociation when committing the offence. The accused stated that he remembered all of the events and was remorseful. The trial court granted the accused a suspended sentence and three years' probation. This sentence was upheld by the Quebec Court of Appeal because of the exceptional circumstances (the accused's possible dissociation at the time of the murder).

Where there is a history of mental disability, some effort has been made in Alberta to tailor sentences to the needs of individual accused.[321] For example, in *R v Young,* the accused

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[319] [2004] AJ No 1302.
[320] [1993] AQ/QJ No 804.
[321] In *Resler*, the Alberta Court of Appeal agreed with the sentencing judge that a suspended sentence of 18 months' imprisonment plus three years of probation was an appropriate sentence for a conviction of break and enter, forcible confinement, assault and assault with a weapon, given the offender's history of serious mental health problems. The sentencing judge noted that if not for the offender's mental health illness, a penitentiary sentence would have been appropriate in this case. In *Belcourt*, the Alberta Court of Appeal held that the sentencing judge had erred by failing to give adequate weight to the appellant's mental illness, which was the source of the attack. The Court held that the sentencing judge's recommendation that the appellant's sentence be served in a psychiatric facility was not sufficient to balance this factor. Further, the sentencing judge failed to measure the sentencing principles of denunciation and deterrence in light of the appellant's mental condition. The Court ordered that the appellant's nine-month sentence for aggravated assault be reduced to time already served (4.5 months), plus 2 years' probation.

had a fairly long record for property offences.[322] He was charged with theft and four counts of breaking and entering. Most of the thefts were items of small value. Young had a history of drug abuse and exhibited some signs of psychiatric difficulty. The type of counselling Young required was not available in an institution. Although the accused did not appear to have great hope for rehabilitation, the court decided to impose an individualized sentence with emphasis placed on rehabilitation. The court imposed a sentence of probation that emphasized 24-hour supervision and guidance. The terms of the probation included attending schooling, acquiring part time employment, and attending counselling at outpatient services, among other conditions.

In *R v O'Flaherty,* the Alberta Provincial Court imposed a suspended sentence upon a man who pleaded guilty of breaking into medical centres and stealing drugs.[323] Expert testimony indicated that the accused suffered from multiple personality disorder. The court was concerned that if he was placed in jail, the accused would not receive the treatment that he needed and would eventually re-offend. The accused was placed on probation for three years, with the strong recommendation that his psychologist be consulted about obtaining treatment for the accused.

In *R v Hiltermann,* the accused received a suspended sentence with three years' probation for assaulting his seven-week-old child (including fracturing the femur). The probation order included terms that the accused take counselling or treatment and that he perform 500 hours of community service. The Court of Appeal stated that this was a serious case of physical abuse that would normally have attracted a substantial term of incarceration. However, the accused was mentally disordered and therefore normal sentencing principles did not apply. The accused had organic brain damage that caused him to be unable to cope with stress in a normal fashion. Thus, the majority of the Court of Appeal held that in cases of "diminished responsibility through mental disorder, treatment of the offender is generally given priority over deterrence as a sentencing factor, with an individualized sentence being tailored

[322] (1991), 123 AR 129 (Prov Ct) [*Young*].
[323] (1992), 124 AR 127 (Prov Ct). See also: H. Dolik, "Split Identity Spares Thief" *Calgary Herald* (January 12, 1992).

to the particular circumstances of the offender."[324]

2. Effect of Incarceration

In some cases, a term of imprisonment may have more serious consequences for a mentally disabled accused than for a person without a mental disability. As a result, the court may be inclined to reduce the usual sentence to reflect the adverse effect that incarceration might have on the accused. In rarer cases, the court may determine that incarceration may benefit the mentally disabled accused and choose to impose a stiffer sentence.

In *R v Wallace*, the accused pleaded guilty to robbery and assault and was sentenced to a total of ten years' imprisonment.[325] The accused's psychiatric records were examined by the Court of Appeal. These indicated that the accused had paranoid schizophrenia and that prolonged detention posed a danger of suicide and prevented the necessary treatment. The Court of Appeal reduced the sentences to a total of six years' imprisonment because the original sentence constituted much more severe punishment for the accused than for a "normal" person. The ultimate protection of society required a sentence that would make rehabilitation possible.

Similarly, in *R v Boudreau,* the accused was convicted on four charges relating to payments of money and gifts to government employees.[326] The accused, aged 59, was under psychiatric care for severe depression. The accused was sentenced to a total of 12 months' imprisonment. At the Court of Appeal hearing, evidence was introduced that the accused's psychiatric condition had deteriorated and that the accused was now psychotic. His physical condition had also deteriorated and he had arteriosclerosis. It was possible that if he was sent to prison, he would give up, not cooperate with treatment and die. Both the Crown and the accused appealed the 12-month sentence. In refusing to change the sentence imposed at trial, the Court of Appeal held that the accused's health was a serious concern and therefore his sentence should not be varied so as to require its service in a penitentiary.

In *R v Carvery,* a 20-year-old accused with psychological problems was charged with

[324] *Hiltermann* at 3.
[325] (1973), 11 CCC (2d) 95 (Ont CA) [*Wallace*].
[326] (1978), 39 CCC (2d) 75 (NSCA) [*Boudreau*].

false pretenses.[327] The Nova Scotia Court of Appeal reduced the offender's sentence to 60 days in prison with three years' probation. The balance remaining on the accused's prison sentence was to be served intermittently. The Court was persuaded by the argument that continued incarceration would be hard on this accused.

In *R v Menkes,* the accused pleaded guilty to two counts of arson, one count of possession of a weapon for a purpose dangerous to the public peace and one count of theft not exceeding $200.[328] He was sentenced to a total of seven years' imprisonment. Menkes' record had begun almost 25 years earlier and consisted of 16 convictions for non-violent offences Following his arrest for the arson and weapon offence, Menkes was sent for a psychiatric assessment. This assessment indicated that the accused had paranoid schizophrenia. The Ontario Court of Appeal reduced the sentence to two years less a day on each count and two years less a day indeterminate to run concurrently. The court indicated that because Menkes was ill and vulnerable in the prison community, serious consideration must be given to the institution in which he would be imprisoned. A maximum reformatory sentence would be appropriate for the offences and would provide for his treatment as well as give him less exposure to others who may abuse him.

In *R v Marceau,* the 79-year-old accused pleaded guilty on a charge of manslaughter in the death of his wife.[329] The accused had suffered from acute depression and was suicidal. Before her death, his wife was also mentally and physically ill. Marceau was psychiatrically assessed and it was determined that he could have met the definition of "insane" at the time of the offence. The issue of insanity was not raised at trial. Under the circumstances of the case, the Provincial Court determined that personal and general deterrence were not relevant. Further, prison would be gravely harmful to the accused and he required continued treatment in a supportive environment. Consequently, the court imposed a suspended sentence and three years' probation. One of the conditions of the probation was that Marceau reside at the Royal Ottawa Hospital until suitable accommodations could be found in a senior citizens' facility.

In *R v Lienau,* the harshness of incarceration for this accused was a factor in

[327] (1976), 14 NSR (2d) 643 (CA). The representation of a matter of fact known to be false, with the fraudulent intend of inducing the person to whom the statement is made to act on it.
[328] (1977), 19 Crim. LQ 278 (Ont CA) [*Menkes*].
[329] [1978] OJ No 1688 [*Marceau*].

sentencing.[330] The accused, diagnosed with schizophrenia and considered a suicide risk, had removed a safe from his parents' home and had attempted to sell some bonds from the safe to undercover officers. He pleaded guilty to theft. The Alberta Court of Appeal upheld a sentence of one day in prison with three years' probation. The Court was influenced by the fact that the accused was cooperating and was following treatment.

In *R v Mulgrew,* a woman with a psychologically fragile personality was convicted and sentenced to three years' probation for stabbing her husband.[331] She had been assessed at a psychiatric facility as being seriously mentally ill at the time of the offence. Her psychiatrist testified that incarceration would make meaningful therapy difficult and that the progress that she had made under treatment might be destroyed by incarceration. The Ontario Court of Appeal agreed and dismissed the Crown's sentence appeal.[332]

In *R* v *TBH* the accused was a homeless man who committed aggravated assault when an elderly couple tried to escort him out of their residence.[333] T.B.H. grabbed the man by the throat and due to a prior medical condition, the man suffered a stroke and was left severely disabled. T.B.H. had a drug problem but at the time of sentencing, he was receiving treatment for his addiction. He had a long record of similar offences and was on probation at the time of the assault. T.B.H. pleaded guilty and expressed remorse for his actions The Court sentenced T.B.H. to five and one-half years imprisonment and was subject to a lifetime firearms prohibition and DNA order. The court felt that probation was inappropriate because it had failed to help T.B.H. in the past. Looking to similar cases, the court held that T.B.H. should receive a custodial sentence of between five years, three months to 11 ½ years Applying a 30 percent discount for an early guilty plea, the maximum sentence was eight years, one month. T.B.H. received a sentence in the middle of this range in order to balance the need to protect the public with T.B.H.'s low level of moral blameworthiness and his capacity to be rehabilitated.

In *R v Newby,* a lawyer pleaded guilty to defrauding the provincial government of over $870,000 and was given a suspended sentence.[334] Several factors had influenced the trial court

[330] (1986), 68 AR 205 (CA).
[331] (February 18, 1993) 183/85 (Ont CA).
[332] See also: *R v Munn* (1978), 29 NSR (2d) 476 (NSCA); *R v Reddick* (June 14, 1988) 8803-0146-A6 (Alta CA).
[333] [2005] AJ No 259 [*TBH*].
[334] (1991), 120 AR 68 (CA) [*Newby*].

to impose an unusual sentence. The accused had turned himself in, returned all the money and pleaded guilty. He suffered from chronic fatigue syndrome, which gave him the judgmental working mind of a seven-year-old. He had serious damage to the pre-frontal lobes, which diminished his ability to make intelligent judgments. His condition was only treatable in California.[335] Further, the accused would likely commit suicide if incarcerated. The Crown appealed the sentence. The Court of Appeal upheld the sentence based on the unusual circumstances of the case.

In *R v McMullen,* a person with chronic schizophrenia was convicted of theft of a sweater and sentenced to six months in prison.[336] The accused had prior convictions for theft. On previous occasions, it appeared that the accused's condition improved during imprisonment because he was inclined to take his medication. In dismissing the accused's sentence appeal, the Manitoba Court of Appeal confirmed his sentence. The Court was influenced to uphold the sentence based on the accused's inability to cope on the street and because his condition usually improved during incarceration.

It may also be argued that the effect of imprisonment on the mentally disabled offender is so onerous that failure to moderate the sentence would be subjecting the offender to cruel and unusual punishment under the *Charter* or under international human rights legislation.[337] If it can be shown that the offender would suffer unduly because of a particular sentence, he/she may be able to utilize these laws to argue for a more appropriate sentence. Section 12 of the *Charter* provides that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." A person who has a mental disability might argue that because he/she lacks the ability to protect him/herself in a general prison population, he/she is exposed to cruel and unusual treatment or punishment. Further, the general prison atmosphere could cause him/her to suffer exacerbated symptoms of his/her mental illness.[338] In *R v Nur*, the

[335] It is not clear from the judgment whether the accused was travelling to California for treatment.
[336] (1984), 26 Man R (2d) 80 (CA) (hereinafter *McMullen*). See also: *R v Town* (Ont CA), [1992] OJ No 475.
[337] The Court in *R v Verwindt*, 2016 ABPC 70 (CanLII) at para 66 noted this possibility, and the invocation of similar constitutional protections in the United States to halt the lawful execution of mentally ill prisoners. See: *Atkins v Virginia*, (2002), 536 U.S. 304 (U.S.S.C.)).
[338] See: *Larabie v R* (1988), 42 CCC (3d) 385 (Ont HC) where the court held that the fact that a fugitive was facing extradition and experiencing adverse effects on his mental or physical well-being did not constitute cruel and unusual punishment. The court opined, however, there may come a point where the consequences of extradition

Supreme Court of Canada affirmed that, for a law to be "cruel and unusual" it must be "grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender."[339]Gross disproportionality is more than punishments that are more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable."[340]

In *R v Smith,* Lamer J., who delivered the principal majority judgment, elaborated on the test of gross disproportionality and stated:

> In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.[341]

The accused in *R v Adamo* successfully argued that a mandatory minimum sentence breached s 12, due in large part to his mental disability.[342] The accused suffered severe brain trauma with significant permanent intellectual impairment and psychosis after being beaten by gang members. Years later, he was charged with breaching a *Criminal Code* provision regarding the storage of a firearm, which (at that time) imposed a mandatory minimum sentence of three years imprisonment.[343] The judge found that the accused's mental problems and paranoia were connected to the offence. The judge also found a prison sentence would be extremely harsh and detrimental for the accused, given his impulse control problems, obsession with gangs, the presence of gang members in jail, and the limited appropriate programming at the relevant federal penitentiary. The accused's mental condition made him an inappropriate candidate for imprisonment to achieve general deterrence. The Court found three years' imprisonment was

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would be so extreme so as to outrage the standards of decency. One example of such a consequence would be where the accused would become unfit to stand trial if extradited.

[339] *R v Nur*, 2015 SCC 15 [*Nur*] at para 39, quoting *R v Smith*, 1987 CanLII 64 (SCC), [1987] 1 SCR 1045, at p 1073. See also *R v Lloyd*, [2016] 1 SCR 130, 2016 SCC 13 (CanLII).

[340] *R v Ferguson*, 2008 SCC 6 (CanLII) at para 14.

[341] [1987] 1 SCR 1045 [*Smith*].

[342] *R v Adamo,* 2013 MBQB 225 (CanLii) [*Adamo*].

[343] *Criminal Code* s 95(2)(a)(i). The mandatory minimum sentence contained in this law has since been held to breach s 12 more broadly (see *Nur*). Pursuant to s 52 of the *Constitution,* it is of no force and effect.

grossly disproportionate to what was appropriate for the accused. The sentence unjustifiably contravened ss 7, 12 and 15 of the *Charter.*

Further, it may be argued that there are valid alternatives to the punishment suggested that would adequately respond to a mentally disabled offender.[344] However, it should be noted that the SCC has held that it will only be on rare occasions that the court will find a sentence so grossly disproportionate that it violates the provisions of s 12.[345] There are several examples of unsuccessful s 12 claims made by accused persons with various mental degrees of mental incapacity.[346]

In *Steele,* the SCC intervened when a person who was declared a "criminal sexual psychopath" in 1953 after pleading guilty to attempted rape was still in custody after 37 years. The court held that although Steele's initial indeterminate sentence as a dangerous sexual offender did not violate *Charter* s 12, his continued indeterminate detention did. The length of confinement was grossly disproportionate to the circumstances of the offence. Further, the National Parole Board had erred in denying Steele parole based on minor and explicable breaches of discipline rather than focusing on the issue of risk.[347]

It is also possible to argue that a lack of adequate treatment facilities in prisons may constitute cruel and unusual punishment. This is especially so where the accused is being reviewed on a regular basis to determine if he qualifies for release. If there are no treatment facilities available, he/she cannot get better and therefore under certain circumstances could be subjected to a life sentence without the chance of parole.[348]

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[344] See, for example, *R v Swaby*, 2017 BCSC 2020 (CanLII) where a community service order was an appropriate sentence given the accused's significant cognitive impairments. The mandatory minimum sentence in that case was held to violate s 12 of the *Charter*.

[345] *Steele v Mountain Institution,* [1990] 2 SCR 1385, 80 CR (3d) 257 [*Steele*].

[346] For example, see *R v Newborn*, 2018 ABQB 47 (CanLII) and *R v ERDR*, 2016 BCSC 684 (CanLII).

[347] However, the court advised that future challenges should be made by way of judicial review of the National Parole Board's decision rather than by an application for *habeas corpus* This aspect of the decision has been criticized. See, for example, D. Stuart, *Charter Justice in Canadian Criminal Law* 4th ed (Toronto: Thomson Canada Ltd., 2005) at 446-47 and A. Manson, "The Effect of Steele on Habeas Corpus and Indeterminate Confinement" (1991), 80 CR (3d) 282. Allan Manson has suggested that this jurisdictional restriction undercuts developing protections for prisoners under the law relating to *habeus corpus* and that judicial review is unlikely to provide adequate protection for cases such as *Steele.* This view was shared by the Ontario Court of Appeal in *Gallichon v Canada (Commissioner of Corrections)* (1995), 43 CR (4th) 187 (Ont CA).

[348] This argument was raised unsuccessfully in *R v Bishop,* [1993] AJ No 725 (Alta CA), where the Court held that an application with respect to cruel and unusual punishment at the time of sentencing was premature. Application for leave to appeal to the Supreme Court was dismissed without reasons, March 3, 1994. At some later time, if

In addition to the *Charter* arguments, individuals may be able to rely upon international laws that deal with cruel, inhuman and degrading treatment. Some of the international human rights laws legally bind the government of Canada and individuals can complain to the United Nations Human Rights Committee about cruel, inhuman and degrading treatment under certain circumstances For example, Article 5 of the *Universal Declaration of Human Rights* provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[349] There is a similar provision in the *International Covenant on Civil and Political Rights* ("*ICCPR*").[350] Canada has ratified both the Covenant and the *Optional Protocol to the International Covenant on Civil and Political Rights,* which provides a mechanism for consideration of complaints that a nation has violated the Covenant.[351] This means that after exhausting all available legal remedies in Canada, an individual could complain to the United Nations Human Rights Commission about cruel or inhuman treatment in the prison setting.

To a large extent, Canada has not explicitly adopted the language of the Convention into its domestic law. However, these international rules are frequently used to support an argument that an individual's *Charter* rights have been violated. To support an argument that a mentally disabled person has been subjected to cruel and unusual punishment, she/he might rely upon the provisions of the *Standard Minimum Rules for the Treatment of Prisoners.* These rules were adopted in 1955 by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, approved by the Economic and Social Council of the United Nations, and revised in 2015.[352] A small number of Canadian legal decisions have relied upon articles from this international document in support of arguments about prisoner treatment.[353]

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treatment has not been made reasonably available to the prisoner, it could be argued that the sentence has become disproportionate and therefore could amount to cruel and unusual punishment.

[349] Signed December 10, 1948, GA Res 217 A (III), UN Doc A/819, at 71 (1948).

[350] (1976) 993 UNTS 3, acceded to by Canada in May, 1976, article 7.

[351] (1976) 999 UNTS 171, acceded to by Canada in May, 1976.

[352] Approved by ECOSOC Res 663C (XXIV) and 2076 (LXII). Canada was a member of the Economic and Social Council at the time the resolution was adopted and voted in favour of its adoption. However, Canada did not incorporate this legislation into domestic law. There may be a possible argument that because these provisions have been followed by many countries over a long period of time, they have become part of customary law and are therefore morally binding if not legally binding. The revised rules can be found at: UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175, available at: http://www.refworld.org/docid/5698a3a44.html [accessed 25 April 2018].

[353] See: *Collin v Kaplan* (1982), [1983] 1 FC 496 (TD); *Stanley v RCMP* (1987), 8 CHRR D/3799 (CHRT); *BRL v Canada,* [2001] CCS No 18257.

Two articles from the revised *Standard Minimum Rules for the Treatment of Prisoners* deal directly with the issue of mentally disabled prisoners.[354] They state:

> Rule 109
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> 1. Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.
>
> 2. If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals.
>
> 3. The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
>
> Rule 110
>
> It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social psychiatric aftercare.

Therefore, the international community has recognized that mentally disabled persons should be considered for special treatment in the penal system. The lack of such special treatment may amount to cruel and unusual punishment in some cases.

The effects of incarceration upon mentally disabled prisoners are discussed at length in Chapter Thirteen, Mentally Disabled Persons in Prisons and Jails.

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[354] Under the original Standard Minimum Rules for the Treatment of Prisoners, mentally disabled prisoners were addressed at Rules 82 and 83. They stated: Rule 82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible. (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management. (3) During their stay in prison, such prisoners shall be placed under the special supervision of a medical officer. (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment. Rule 83. It is desirable that steps should be taken, by arrangement with appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provisions of social-psychiatric after-care.

3. Need for Treatment as a Mitigating Factor

At times, the courts may examine the availability of treatment for mental disability in various prison settings or the treatment needs of the accused and these may influence the type of sentence rendered. For example, a shorter sentence may be imposed so that the accused may obtain treatment once he/she is back in the community.

The modification in length of incarceration may take the form of a reduction in a penitentiary sentence, or it may amount to substituting a term of imprisonment in a provincial jail instead of a federal institution. The reduction of the accused's sentence in *Wallace* is an example of the reduction of a penitentiary sentence.

However, in order to avail oneself of the mitigating impact of mental illness on sentencing, the accused may have to show a willingness to treat his/her illness. *R v Maier*,[355] a mentally ill accused was convicted with common assault for spitting on a shelter volunteer. He had a history of such behavior, and was accordingly given a particularly harsh sentence of 20 months of imprisonment, despite the fact that he suffered from untreated schizophrenia. The Majority based its decision largely on the fact that the accused had "the opportunity to comply with treatment and has consistently refused to do so."[356] As a result, the Court rejected the accused's mental illness as a mitigating factor in sentencing.

There are a number of cases where a shorter sentence (in a provincial jail) is substituted for a longer term in a federal institution in order to facilitate treatment. Often, these cases are based on the unavailability of psychiatric facilities in federal penitentiaries.[357] However, the *Corrections and Conditional Release Act*[358] mandates the provision of mental health care services in federal institutions. As such, this argument may no longer be practical.

On occasion, the Crown may seek a longer sentence than the tariff rate in order to ensure that the mentally disabled accused receives treatment.[359] However, some courts

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[355] *R v Maier*, 2015 ABCA 59 [*Maier*].
[356] *Maier,* at para 40.
[357] Nadin-Davis at 86. See, for example: *Menkes; R v Gionet* (1977), 1 CR (3d) S-16 (NSCA); *R v Marcello,* (1973), 11 CCC (2d) 302 (Ont CA).
[358] SC 1992, c 20.
[359] In *R v Patey* (1999), 177 Nfld & PEIR 289 at para 31, [1999] NJ No 191, the Supreme Court of Newfoundland Trial Division considered an appropriate sentence for a man with a long history of mental illness and convictions who was charged with assaulting an intoxicated person during lockup. The court stated that "the only way the [accused] will obtain whatever treatment may be available for his condition is if he receives a sufficiently lengthy

question this practice. For example, in *R v Kearley,* the Nova Scotia Court of Appeal held that it is not the function of the courts to order confinement solely for the purpose of treatment of physical or mental disorders.[360] The Court of Appeal did, however, uphold the one-year sentence imposed by the trial court upon an offender with a personality disorder for unlawfully pointing a firearm. On the other hand, in *R v Sager,* the British Columbia Court of Appeal reduced a sentence of nine months' incarceration to six months on the charge of threatening a police officer.[361] The trial judge had been advised that the nine-month sentence was imperative to ensure that the accused could participate in a rehabilitative program. The Court of Appeal held that an inappropriate sentence could not be saved on the basis that the accused should be incarcerated long enough to receive treatment.[362]

In *R v Hynes,* the accused, a person with paranoid schizophrenia, was convicted of mischief and received the maximum sentence of two years' imprisonment with three years' probation.[363] The Court of Appeal reduced the sentence to one-year imprisonment followed by three years' probation including terms requiring the accused to abide by all directions given with respect to psychiatric treatment and medication. Although a severe custodial term was warranted, a term of two years' imprisonment was beyond the acceptable range. The Court quoted Nadin-Davis with approval when he stated that "[i]n sentencing psychotic offenders, the Court must satisfy two objectives. First, the needs of the offender must be accommodated. Again the purpose of sentencing a mentally disturbed person is not to punish him for his actions and general deterrence is not an important consideration. Instead a sentence must be imposed that is tailored towards the accused's rehabilitation and cure".[364]

This reasoning has also been used in determining whether an accused should be

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sentence to ensure he serves his time within a federal correctional institution with treatment facilities." The Court stated that rehabilitation, if at all possible, was the best way to ensure protection of society, which was its primary objective in sentencing. The accused was sentenced to 30 months' imprisonment, and the sentencing judge stated: "[b]ecause of [the accused's] need for treatment, I urge that his transfer to a federal institution take place as soon as possible" (para 35).

[360] (1989), 93 NSR (2d) 290 (CA) [*Kearley*]. See also: *R v Luther* (1971), [1972] 1 OR 634 (CA).

[361] 1991 CarswellBC 1647, [1991] BCWLD 825 (CA).

[362] See also: *Chaisson v R* (1975), 3 CR (3d) S-17 (NSCA); *R v Goodwin,* [1991] BCWLD 092 (CA); *R v McDow* (1974), 10 NSR (2d) 92 (CA); *R v Harvey*, 2006 BCCA 355 (CanLII) where the Court of Appeal reduced a two-year sentence that was imposed so the accused would have access to federal psychiatric services.

[363] (1991), 64 CCC (3d) 421 (Nfld CA) [*Hynes*].

[364] Nadin-Davis at 93.

released on bail pending his/her trial. In *R v Skyers*, the Ontario Superior Court highlighted the importance of prompt and appropriate psychiatric treatment in reducing the likelihood that the accused would commit future offenses Where there was no reasonable risk that the accused would commit offenses pending trial, a conditional release from detention in order to receive treatment was found to be appropriate.[365]

The need for treatment is often considered when the court imposes a term of probation. Whether the court can currently impose treatment as a term of probation is discussed below under Probation Orders.

4. Need to Protect Society as a Factor in Sentencing

On several occasions, the courts have focused on the need to protect society while imposing a sentence on a mentally disabled offender.[366] Where the court considers that a mental disorder has rendered the accused beyond control and that the accused represents a continuing danger if at large, the need to protect society may weigh heavily against the accused. In *R v Ramsay*, the Alberta Court of Appeal recognized that in some cases mental disorder may be a factor that escalates the objective of protecting the public.[367]

In *R v Leech,* the accused kidnapped, raped, indecently assaulted and sodomized a young woman.[368] Expert evidence established that he had a psychopathic personality disorder. The court imposed the longest possible sentence—a life sentence with the recommendation that no clemency or reduction be considered until the person ceased to be a dangerous person at large.

In *R v Hill,* the 26-year-old accused raped a 14-year-old babysitter. Hill suffered from a personality disorder that consisted of impulsiveness, low stress tolerance, uncontrollable anger

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[365] *R v Skyers* (2011), OJ No 6272, 99 WCB (2d) 621.

[366] In *R v Walsh*, 2010 CarswellNfld 317 at para 26, the provincial court of Newfoundland and Labrador stated that [i]n imposing sentence upon an offender who suffers from a mental illness a court attempts to balance the need to protect the public, particularly when the offence committed involves violence with the need for treatment and rehabilitation. See *R v Power*, 2008 NLTD 8 (CanLII), (2007), 273 Nfld. & P.E.I.R. 88 (NLSC); *R v Palfrey*, [2010] N.J. No. 81 (P.C.); *R v Patey*, 1999 CanLII 13899 (NL SCTD), (1999), 177 Nfld. & P.E.I.R. 289 (NLSC). In *R v C.G.M.*, 2000 SKCA 13 at para 22, 189 Sask R 103 the Saskatchewan Court of Appeal stated that when public protection and rehabilitation cannot be reconciled, public safety is paramount. See also: *R v H. (A.)*, 2006 SKQB 413 at para 43, 286 Sask R 23.

[367] *Ramsay,* at para 21. In such cases, strict proof and clear fact finding are required.

[368] (1972), 21 CRNS 1 Alta (SCTD), aff'd [1973] 1 WWR 744 (Alta CA). See also: *Kjeldsen v R,* [1980] 3 WWR 411 (Alta CA), aff'd 28 CR (3d) 81 (SCC), where a psychopath considered dangerous was given a life sentence for first degree murder.

and difficulty in knowing his own sexual identity.[369] Expert evidence indicated that the accused's disorder might not abate until he was as old as 60. On the accused's appeal from a twelve-year sentence, the Ontario Court of Appeal imposed a life sentence. The court held that a life sentence was appropriate where the person suffered from a mental or a personality disorder that would not qualify him for confinement in a mental institution but would render him a danger to the community. In a similar case in 2014, a diagnosed pedophile was designated a dangerous offender after briefly kidnapping a young girl. Although he did not sexually assault her, the Superior Court of Ontario affirmed the "Hall principle" that an indeterminate sentence is appropriate in the case of an offender who "suffers from some mental or personality disorder rendering him a danger to the community but not subjecting him to confinement in a mental institution."[370]

In *R v Pontello,* the accused raped two women at knife point and stabbed and attempted to rape a third. At the time of the offences, he had no prior criminal record, a good work record and was regarded as a responsible member of his local community.[371] After conviction, Pontello was assessed at a mental health facility. One psychiatrist found him to have a high degree of "over controlled" hostility that could be ventilated occasionally by an intense explosive reaction. Since the accused maintained his innocence, it would be very difficult to treat him. A second psychiatrist opined that there remained a very significant potential for further violent behaviour. Both psychiatrists agreed that the accused had the potential of presenting a continuing danger to the physical safety of women. Consequently, the Court of Appeal upheld a sentence of life imprisonment.

In *R v Gillen (Hanoum),* the accused was convicted of kidnapping a two-week-old baby and received a sentence of life imprisonment.[372] The accused had suffered a tragic life and was mentally unbalanced due to the misuse of drugs. The British Columbia Court of Appeal upheld the sentence and held that psychiatric evidence of mental disorder was of little relevance to a proper sentence. The welfare of the accused was secondary to the need to protect society.

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[369] (1974), 15 CCC (2d) 145 (Ont CA), aff'd [1977] 1 SCR 827. Followed in *R v Fisher,* 23 CCC (2d) 449, 1975 CarswellOnt 1027. Not followed in *R v Robinson*, 121 CCC (3d) 240, 101 BCAC 81.
[370] *R v Vanhatter*, 2014 ONSC 6373 at para 157.
[371] (1977), 38 CCC (2d) 262 (Ont CA).
[372] [1979] BCJ No 575.

However, the court considered that the information of mental disorder and the tragic life might be relevant to the National Parole Board in the future.

In *R v Woods,* the accused and three other persons were jointly tried for the first degree murder of a 12-year-old shoeshine boy.[373] After he admitted all of the essential elements of the offence, Woods was convicted of second degree murder with parole eligibility after 18 years. The Crown appealed Wood's acquittal on the charge of first degree murder, and Woods asked the court to reduce his parole ineligibility to ten years. In dismissing the appeals, the Ontario Court of Appeal upheld Wood's parole ineligibility even though psychiatric evidence indicated that he was suffering from schizophrenia with psychopathic and paranoid elements. The court stated that the murder was a cold and callous act that profoundly shocked the community. Consequently, the 18 years imposed for parole ineligibility was appropriate.[374]

Where the accused does not represent a continuing, severe danger, the courts might not impose a life sentence. For example, in *R v Keefe,* the accused had a long history of mental illnesses, mental handicap and admittance to psychiatric facilities.[375] Keefe was hitchhiking and asked for a ride at the house of the victim. He later returned, wounded the victim with a knife, hit her across the face and chest, and following her escape, attempted to cut his wrists with an electric saw. Although the trial court had imposed a life sentence, the Ontario Court of Appeal reduced the sentence to twelve years' imprisonment. The court held that this was not a crime of stark horror, nor did it result from a pattern of violent behaviour.

Sometimes, courts will impose a longer than normal or unusual sentence for an offence where the maximum penalty is less than a life sentence. In *R v Fisher,* the accused was convicted of wounding a reformatory guard. Fisher had been institutionalized since the age of

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[373] [1980] OJ No 1604.

[374] See also: *R v McGrath* (1980), 25 Nfld & PEIR 138 (Nfld TD), where the accused was highly aggressive and had anti-social personality disorder which had caused admission to a mental hospital on 16 occasions. The accused was convicted of second degree murder, sentenced to life imprisonment, with parole eligibility increased to 20 years because of the need to protect the public. For the same reason, in *R v Rollin* (1989), 91 NSR (2d) 115 (CA), the accused, a 22-year-old with limited education and a troubled childhood, had a seven-year sentence for armed robbery increased to twelve years by the Court of Appeal. See also: *R v Sacrey* (1985), 54 Nfld & PEIR 249 (Nfld CA), where the accused 45-year-old minister received a suspended sentence and three years' probation at trial. One condition was that the accused attend treatment. The Court of Appeal increased the sentence to 12 months' imprisonment with three years' probation. The Court held that rehabilitation was not of overriding importance even though the accused was suffering from psychiatric problems curable by treatment.

[375] (1978), 6 CR (3d) S-35 (Ont CA). See also: *R v N (RO)*, 6 BCLR (2d) 306, [1986] BCWLD 4012; *R v Nichol* (1981), 60 CCC (2d) 573, 13 Man R (2d) 381.

eight, and had spent 20 years in a reformatory in connection with three attempted murders.[376] Evidence of psychiatrists indicated that he had a personality disorder and was dangerous. Chances of a cure were uncertain. The Ontario Court of Appeal increased the original sentence of two years' imprisonment to 14 years to be served consecutively to the time served because the accused was dangerous.[377]

In another case, *R v Robinson,* the need to protect society seemed to take precedence over the accused's mental illness.[378] Robinson was convicted of several rapes and sexual assaults. At the time of the offences, he was in a state of psychosis and had lost touch with reality. Psychiatrists testified that he was certifiably mentally ill and required intensive psychiatric treatment, group therapy and family therapy for a significant length of time. The Ontario Court of Appeal increased the offender's sentence for the rapes to eight years' imprisonment to run concurrently. The court stated that the emphasis in this case needed to be on protection of the public. However, the court also noted that the accused could obtain treatment while incarcerated.[379]

In *R v Himmelspeck,* a 34-year-old male with an I.Q. of 63 was convicted of attacking a woman at night in a laundromat with the intention of taking $10 from her.[380] When the woman's screams attracted the attention of two men, the accused ceased his assault and started to walk away. However, the accused remained at the scene until the police arrived. The trial court imposed a sentence of three months' imprisonment plus a five-year prohibition against possession of firearms. The Alberta Court of Appeal increased the sentence to three years' imprisonment. Although the accused was mentally handicapped, the dissenting justice would have increased the accused's sentence to five years' imprisonment because the primary

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[376] (1978), 23 CCC (2d) 449 (Ont CA).

[377] See also: *R v Draper* (1978), 4 CR (3d) S-20 (Ont CA); *R v Bradbury* 14 CCC (2d) 139 (Ont CA); *R v Mitchell* (1978), 20 Crim L Q 420 (Ont CA).

[378] (1974), 19 CCC (2d) 193 (Ont CA); followed in *R v Wellington* (1985), 12 OAC 333 (Ont CA); *R v Detlor* (1981), 23 CR (3d) 59 (Ont CA); *R v Canney,* [1995] NBJ No 248.

[379] See also: *R v Boyd* (1979), 47 CCC (2d) 369 (Ont CA), where the 73-year-old accused, whose mental health was deteriorating and who was convicted of manslaughter in the death of his sister-in-law, was sentenced to four years' imprisonment to run from the date of the appeal because the Court opined that the predominant aim of sentencing in this case was protecting the public; *R v Blackhall*, [1998] BCJ No 2593 (BCCA), where the Court turned down the option of probation with treatment as a condition because the accused, a person with schizophrenia, refused treatment while in prison. Further, the accused posed a serious threat in the community.

[380] (1980), 22 AR 406 (CA). See also: *R v Hackett,* [1981] NSJ No 577; *R v Jones,* [1994] 2 SCR 229.

consideration ought to be the protection of the community and there was little hope for treatment.[381]

In *R v Lefort,* the accused was convicted of robbing a bank. He had a severe mental illness and was insane within the meaning of s 16 (as it then was) shortly before and shortly after the offence.[382] The Nova Scotia Court of Appeal increased a sentence of six months' imprisonment to two years' imprisonment. The trial court had overemphasized the accused's mental condition in contrast to the need for deterrence. Further, the accused could continue his medication and treatment while serving the sentence.[383]

In *R v Markwart,* the accused, a 56-year-old male paraplegic with psychological problems, was fined for forgery (at trial).[384] The Saskatchewan Court of Appeal allowed the Crown's sentence appeal and varied the sentence to one year in prison. The accused had a lengthy record and the protection of the public outweighed any concern for rehabilitation or the accused's psychological problems.

In *R v Holmes,* a 57-year-old accused diagnosed as having paranoid schizophrenia was convicted in the attempted stabbing of his building caretaker.[385] He also severely cut the caretaker's ear. The accused had a related record including assault, forcible entry, and uttering threats The Manitoba Court of Appeal upheld the eight-year sentence because the accused's mental illness (a mitigating factor) was counterbalanced by the need for public protection. Further, treatment would be available during imprisonment.

In *R v Cepcicka,* the accused abducted his former girlfriend and attacked her with a knife, cutting her finger.[386] He was arrested and then released on bail with strict conditions. He again sought her out, abducted her and attacked her with a knife. A psychologist's report indicated that the accused had a personality disorder and required intensive treatment in a residential treatment centre. The trial judge sentenced the accused to two years less one day plus three years probation, urging that the accused receive psychiatric counselling.

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[381] See also: *Covey v R* (1981), 22 CR (3d) 334 (NSCA). The accused suffered from manic depressive illness and personality disorders. The court held that in cases of arson (the accused pleaded guilty to four counts of arson), the protection of the public must be the prime consideration.
[382] (1981), 50 NSR (2d) 152 (NSCA).
[383] See also: *R v McLaren* (1984), 62 NSR (2d) 152 (NSCA).
[384] (1983), 25 Sask R 78 (CA).
[385] (1990), 71 Man R (2d) 152 (CA).
[386] (1992), 131 AR 136 (Alta CA).

On appeal, the accused's sentence was increased to three years' imprisonment. The Court of Appeal considered that the best protection for the victim was to blend a firm sentence with rehabilitation in a treatment facility. The court strongly recommended that the accused be assessed with a view to going to the Regional Psychiatric Centre for intensive treatment as soon as possible.

There are several factors that a sentencing judge may take into account if the accused has a mental disability. These include whether the disability influenced the commission of the offence, the accused's need for treatment, the effect of incarceration on the accused and the need to protect society. It is difficult to gauge which factor will take precedence in any given case. In some cases, the nature of the offence (e.g., if violence was involved) may persuade the court to vary the sentence.

D. Judicial Recommendations or Requirements for Treatment

When a mentally disabled offender has been convicted, the judge or counsel may be inclined to recommend or require that the accused receive treatment. In some cases, the judge recommends that the accused receive treatment while incarcerated or on probation. In other cases, the judges have imposed probation terms that mandate that the accused receive treatment. This second option is discussed separately below.

Where judges are of the opinion that the accused should receive treatment in prison, they may direct that all psychiatric reports accompany the offender to the penal institution.[387] Alternatively, they may direct that the penal institution make psychiatric treatment available to the offender.[388] However, while a judge may recommend that a sentence be served at a mental health centre, she/he may not sentence the accused to such a facility.[389] If a judge makes such a sentence, she/he must have the concurrence of the Penitentiary Service.[390]

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[387] See, for example: *R v Draper* (1978), 4 CR (3d) S-20 (Ont CA); *R v Charles,* [1999] OJ No 4322; *R v MBH* [2002] OJ No 2290.

[388] *R v Johnstone* (1980), 38 NSR (2d) 313 (NS Prov Ct) [*Johnstone*]; *R v Fiander* (1988), 69 Nfld & PEIR 195 (Nfld SCTD); *R v Parent* (1982), 38 NBR (2d) 1 (CA).

[389] See: *R v Soonias* (1981), 12 Sask R 296 (QB); *R v Laycock,* [1995] SJ No 396 [*Laycock*]. The provisions of s 747 of the *Criminal Code* (as proposed by SC 1995), which sought to establish a hospital orders regime would have permitted a judge to require that the accused serve a portion of his sentence in a hospital. This section was, however, repealed before it came into force by SC 2005, c 22 s 29, effective January 2, 2006. See below under "Hospital Orders".

[390] *R v Deans* (1977), 39 CRNS 338 (Ont CA).

E. Probation Orders

One goal in sentencing mentally disabled accused may be described as developing an individual program beneficial to the accused while at the same time restricting her activities so as to protect the public.[391] In *Young,* Judge Pepler outlined the four areas that are necessary in developing a program that assists the accused and benefits society. They are:

- supervision on a nearly 24-hour basis;
- counselling and medical aid;
- accommodation and training to develop living skills; and
- programs of work, school and leisure by day and by night.[392]

Unfortunately, not many facilities provide this type of long term care. As a result, probation is often used as a method of re-integrating the offender into society while exercising a measure of control over her/his behaviour.

A term of probation may be imposed on an offender to follow a term of imprisonment,[393] or after a conditional discharge[394] or suspended sentence.[395] In order for probation to be imposed after a sentence, the sentence (or total of sentences) must not exceed two years.[396]

In the past where there was a good chance of rehabilitation, mentally disabled offenders often received a reduced prison sentence followed by a term of probation that contained conditions requiring the offender to take medication or obtain treatment for his/her condition. Numerous cases provided for probation with mandated treatment.[397] Indeed, some judges were inclined to shorten prison sentences or suspend sentences altogether because treatment could not be mandated in prison. However, once the offender was on probation, treatment could be ordered without the consent of the offender. The possibility of

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[391] See: *Young* (Alta Prov Ct).
[392] *R v Rousselle* (1992), 124 AR 132 (Prov Ct).
[393] *Criminal Code,* s 731(1)(b).
[394] *Criminal Code*, s 731(1).
[395] *Criminal Code*, s 731(1)(a).
[396] *Criminal Code*, s 731(1)(b).
[397] See, for example: *R v Duncan* (February 14, 1989), 8903-0026A5 (Alta CA); *R v Osachie* (1973), 24 CRNS 285 (NSCA); *R v D* (1971), [1972] 1 OR 405 (CA); *Johnstone; R v DeCoste* (1974), 10 NSR (2d) 94 (C.A.); *R v Robertson* (1979), 10 CR (3d) S-46 (Ont CA); *R v Sleep* (1978), 23 NSR (2d) 639 (CA); *Leger v R* (1979), 10 CR (3d) S-25 (Que CA); *R v Thompson* (1983), 58 NSR (2d) 21 (CA); *Hynes; R v Wilkinson* (April 27, 1989) CA 670/87 (Ont CA).

rehabilitation was a promising alternative to serving time in prison without treatment and served the additional purpose of protecting society in the future.

However, a 1990 decision of the British Columbia Court of Appeal has called into question the constitutionality of mandatory treatment as a condition of probation without the offender's consent. In *R v Rogers,* the accused was arrested and charged with possession of a knife for a purpose dangerous to the public peace.[398] He had poked what appeared to be a kitchen knife towards a woman standing at a street corner. Psychiatric assessment concluded that the accused was suffering from chronic schizophrenia. Following treatment, the accused was able to stand trial and pleaded guilty. He was placed on probation. One of the probation conditions was that the accused "seek and take whatever psychiatric assessment or treatment that can be arranged".

On appeal, the accused argued that this condition violated s 7 of the *Charter of Rights and Freedoms.* This section provides:

> 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.

The Court of Appeal agreed and held that a probation order that compels an accused person to take psychiatric treatment or medication was contrary to s 7 and could not be saved by *Charter* s 1. Other less drastic measures were available to ensure public protection. The Court noted with approval the Law Reform Commission's recommendation that probation orders with conditions of psychiatric treatment should only be made where the offender consents to the

[398] (1990), 2 CR (4th) 192 (BCCA) [*Rogers*]. Followed in *R v Palamarek* (May 1991) per *Lawyer's Weekly* May 24, 1991 (BC Prov Ct); *R.* v. *Wisdom* (March 14, 1991) CA013442 (BCCA); *R v Sookochoff*, [1999] SJ No 155; and *Laycock*. See also: *R v Whittaker* (1989), 103 NBR (2d) 146 (CA), where the trial court imposed a term of probation requiring the offender to submit to treatment and take drugs as prescribed for his mental health problems. The Court of Appeal struck the term regarding the taking of prescription drugs. But see *Hynes*, which was decided after *Rogers*, and which contained a probation term requiring the accused to continue to take treatment and medication. In *Deacon v Canada (Attorney General)*, 2005 FC 1489, [2005] FCJ No 1827 [*Deacon*], the Federal Court upheld a parole board decision to impose a probation condition requiring the offender, who had a long history of sexual abuses against children, to take medication. The Federal Court held that legislation gave the parole board discretionary power to impose conditions, and since evidence showed the medication reduced the offender's risk of re-offence, it would have been unreasonable to conclude the board did not have jurisdiction to impose treatment. The condition did not violate the offender's *Charter* s 7 right to security of the person because it was clear from the statutory scheme and Parliamentary intent that the parole board has discretionary power to impose such a condition. The condition violated the offender's s 7 fundamental right to be fee from unwanted medical treatment, but the Court held this infringement was a reasonable limit under *Charter* s 1 because the protection of the public was a pressing and substantial objective to which the condition to take medication was rationally connected.

psychiatric treatment.[399]

While the probation order was invalid, the court had to consider the risks involved in permitting the offender to be at liberty on probation. In some cases the risk to society might be too great and only incarceration would afford the necessary protection. Although conditions imposed on probation will depend upon the circumstances of each case, they should not compel an offender to undergo medical treatment including the compulsory taking of medication.

In this case, the court deleted the condition in the probation order requiring compulsory treatment and substituted a new condition whereby the accused was required to take reasonable steps to maintain himself in such condition that his chronic schizophrenia would not likely cause the accused to conduct himself in a manner dangerous to himself or anyone else. If the accused did not consent to the form of medical treatment or medication that was prescribed or recommended by the Inter-Ministerial project, he was required to report to his probation officer for the purpose of being monitored.

Although probation remains a possible sentencing option for the mentally disabled offender, if treatment and medication are necessary for rehabilitation, the *Rogers* decision holds that it is not possible to force the offender to submit to treatment or to take medication.[400] The *Rogers* case has gained traction in other jurisdictions across Canada. For example, in *R v TW*[401], the Ontario Superior Court of Justice imposed terms of probation on the accused that included participation in "counseling and treatment programs as may be recommended, including psychiatric treatment and drug treatment programs". However, the Court added, with reference to *Rogers*, that the accused "shall not be required to submit to any treatment program or medication to which he does not consent."[402]

The *Rogers* ruling has not, however, eliminated the inclusion of mandated treatment as part of probation orders. In *R v Robinson,* the Alberta Provincial Court imposed a sentence that contained a probation condition that directed the accused to take antipsychotic medication,

[399] See: *The Criminal Process and Mental Disorder* (Working Paper No. 14), 1975 [Law Reform Commission, 1975]; *Medical Treatment and Criminal Law,* 1980 [Law Reform Commission, 1980].
[400] See *Deacon*, above, for example of where Federal Court held the parole board did not err by imposing a condition on the offender to take medication.
[401] 2015 ONSC 2167 (CanLII) [*TW*].
[402] *TW* at para 57. See also, *R v Savova*, 2012 ABPC 121 (CanLII) at para 19.

counselling and other treatment as recommended by the outpatient services of the Calgary General Hospital.[403]

In light of *Rogers,* it is likely that judges are more cautious about imposing treatment as a condition in a sentence of probation.[404]

IV. Conclusion

Courts have become more willing to use the *Criminal Code* provisions that deal with the disposition of a mentally disordered offender's case. As courts and Review Boards attempt to utilize these provisions, some of the practical benefits and difficulties will become apparent. These provisions attempt to introduce some flexibility into the standard sentencing options that were previously available. It will be interesting to see if the offenders and society benefit.

Although many mentally disabled accused may elect to plead not criminally responsible on account of mental disorder and will therefore fall under the disposition scheme, there will no doubt remain a significant number of mentally disabled offenders who are found guilty. With the advent of new sentencing legislation, perhaps courts will be more flexible when considering the most appropriate sentence for a person who has a mental disability.

Once a mentally disabled offender has been sentenced to jail or prison, he/she will experience the results of the court's determination. The special difficulties experienced by mentally disabled prisoners are discussed in Chapter Thirteen, Mentally Disabled Persons in Prisons or Jails.

[403] (Alta Prov Ct) [1993] AJ No 610. For examples of where the Courts have directed the accused to submit to counselling and treatment as part of their probation order, see also: *R v Resler*, 2011 ABCA 167, [2011] AJ No 618; *R v Cross*, 2012 PCNL 1310A00972.

[404] Compare the scheme in place for ordering that an accused found unfit to stand trial undergo treatment. This is discussed under Persons Found Unfit to Stand Trial or Not Criminally Responsible on Account of Mental Disorder.

Appendix

Forms

The following forms pertaining to sentencing are contained in the *Criminal Code*.

FORM 48

Assessment order of the Court

(Section 672.13)

Canada,

Province of

(territorial division)

Whereas I have reasonable grounds to believe that evidence of the mental condition of *(name of accused),* who has been charged with....., may be necessary to determine*

[] whether the accused is unfit to stand trial

[] whether the accused suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code* at the time of the act or omission charged against the accused

[] whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, if the accused is a female person charged with an offence arising out of the death of her newly-born child

[] if a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, the appropriate disposition to be made in respect of the accused pursuant to section 672.54, 672.58, or 672.64 of the *Criminal Code* or whether the court should, under subsection 672.84(3) of that Act, revoke a finding that the accused is a high-risk accused

[] if a verdict of unfit to stand trial has been rendered in respect of the accused, whether the court should order a stay of proceedings under section 672.851 of the *Criminal Code*

I hereby order an assessment of the mental condition of (*name of accused*) to be conducted by/at (*name of person or service by whom or place where assessment is to be made*) for a period of……days.

This order is to be in force for a total of days, including travelling time, during which time the accused is to remain*

[] in custody at (*place where accused is to be detained*)

[] out of custody, on the following conditions:

* Check the applicable option

Dated this ..... day of .....A.D....., at .....

(Signature of justice or judge or clerk of the court, as the case may be)

FORM 48.1

Assessment Order of the Review Board

(Section 672.13)

Canada,

Province Of

(Territorial division)

Whereas, I have reasonable grounds to believe that evidence of the mental condition of (*name of accused)*, who has been charged with .....may be necessary to*

[] If a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, make a disposition under section 672.54 of the *Criminal Code* or determine whether the Review Board should, under subsection 672.84(1) of that Act, refer to the superior court of criminal jurisdiction for review a finding that the accused is a high-risk accused

[] If a verdict of unfit to stand trial has been rendered in respect of the accused, determine whether the Review Board should make a recommendation to the court that has jurisdiction in respect of the offence charged against the accused to hold an inquiry to determine whether a stay of proceedings should be ordered in accordance with section 672.851 of the *Criminal Code*

I hereby order an assessment of the mental condition of *(name of accused)* to be conducted by/at *(name of person or service by whom or place where assessment is to be made)* for a period of _____days

This order is to be in force for a total of _____ days, including travelling time, during which time the accused is to remain*

[] in custody at *(place where accused is to be detained)*

[] out of custody, on the following conditions:

(set out conditions, if applicable)

* Check applicable option.

Dated this ..... day of .....A.D.

....., at .....

.....

(Signature of Chairperson of the Review Board)

FORM 49

WARRANT OF COMMITTAL
DISPOSITION OF DETENTION
(Section 672.57)

Canada,
Province Of
(Territorial division)

To the peace officers, in the said *(territorial division)* and to the keeper *(administrator, warden)* of the *(prison, hospital or other appropriate place where the accused is detained)*.

This warrant is issued for the committal of A.B., of .....(*occupation),* hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused was charged);*

And whereas the accused was found*
[] unfit to stand trial
[] not criminally responsible on account of mental disorder

This is, therefore, to command you, in Her Majesty's name, to take the accused in custody and convey the accused safely to the (*prison, hospital or other appropriate place)* at ..... and there deliver the accused to the keeper (*administrator, warden)* with the following precept:

I do therefore command you the said keeper (*administrator, warden)* to receive the accused in your custody in the said (*prison, hospital or other appropriate place)* and to keep the accused safely there until the accused is delivered by due course of law.

The following are the conditions to which the accused shall be subject while in your (*prison, hospital or other appropriate place):*

The following are the powers regarding the restrictions *(and the limits and conditions on these restrictions)* on the liberty of the accused that are hereby delegated to you the said keeper *(administrator, warden)* of the said (*prison, hospital or other appropriate place):*

* Check applicable option.
Dated this ..... day of .....A.D....., at .....

.....
(Signature of judge, clerk of the
court, provincial court judge or chairperson of the
Review Board)

FORM 50

WARRANT OF COMMITTAL

PLACEMENT DECISION

(Section 672.7(2))

Canada,

Province Of

(Territorial division)

To the peace officers, in the said *(territorial division)* and to the keeper *(administrator, warden)* of the *(prison, hospital or other appropriate place where the accused is detained)*.

This warrant is issued for the committal of A.B., of .....(*occupation),* hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused was charged);*

And whereas the accused was found*

[] unfit to stand trial

[] not criminally responsible on account of mental disorder

And whereas the Review Board has held a hearing and decided that the accused shall be detained in custody;

And whereas the accused is required to be detained in custody pursuant to a warrant of committal issued by *(set out name of the Judge, Clerk of the Court, Provincial Court Judge or Justice as well as the name of the court and territorial division)*, dated the ..... day of .....in respect of the offence that (*set out briefly the offence in respect of which the accused was charged or convicted);*

This is, therefore to command you, in Her Majesty's name, to*

[] execute the warrant of committal issued by the court, according to its terms

[] execute the warrant of committal issued herewith by the Review Board

*Check the applicable option.

Dated this ..... day of .....A.D.

....., at .....

.....

(Signature of chairperson of the Review Board)

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