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LEGISLATIVE SUMMARY

Bill C-54:
An Act to amend the Criminal Code and the National Defence Act (mental disorder)

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-54
(Legislative Summary)

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Ce document est également publié en français.

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LEGISLATIVE SUMMARY OF BILL C-54: AN ACT TO AMEND THE CRIMINAL CODE AND THE NATIONAL DEFENCE ACT (MENTAL DISORDER)

1 BACKGROUND

Bill C-54, An Act to amend the Criminal Code and the National Defence Act (mental disorder) (short title: Not Criminally Responsible Reform Act) was introduced and given first reading in the House of Commons on 8 February 2013.

The bill amends the legislative framework that deals with mental disorders in the *Criminal Code*[1] (Part XX.1) and the *National Defence Act*.[2] According to its summary, the bill's objectives are:

- to specify that the "paramount consideration" in the decision-making process is the safety of the public (clause 9 of the bill);
- to create a scheme for finding that certain persons who have been found not criminally responsible on account of mental disorder are also high-risk accused (clause 12 of the bill); and
- to enhance the involvement of victims in the processes concerning mental disorder (clauses 7 and 10 of the bill).

On 28 May 2013, after passing second reading in the House of Commons, Bill C-54 was sent to the Standing Committee on Justice and Human Rights, which considered it clause by clause. On 12 June 2013, the committee agreed to report the bill with amendments. The report was tabled in the House of Commons on 13 June 2013.[3] On 18 June 2013, having passed third reading, the bill was sent for first reading in the Senate. It died on the *Order Paper* when Parliament was prorogued on 13 September 2013.

Among the amendments was one that extended the scope of clause 7(2). The notice of discharge (with or without conditions) of the accused that must be given to the victim at the victim's request must now include the accused's intended place of residence.

The bill was also amended to provide for a comprehensive review of the operation of sections 672.1 to 672.89 of the Code within five years after sections 2 to 20 of Bill C-54 come into force. The committee of the Senate, of the House of Commons or of both Houses of Parliament undertaking the review must submit a report on that review to the Senate, the House of Commons or both Houses of Parliament, as the case may be.

Similar amendments were made to the *National Defence Act*.

1.1 THE OBJECTIVE OF PART XX.1 OF THE *CRIMINAL CODE*

Part XX.1 of the Code establishes the statutory framework that governs the treatment of accused who are declared unfit to stand trial or not criminally responsible on account of mental disorder. This exhaustive and independent system was codified in 1992 with the passage of Bill C-30.[4]

Cases dealt with under Part XX.1 are few in number in comparison with those in the traditional adversarial system. Nevertheless, they give rise to vigorous debate and, according to some experts, often reveal a poor understanding of the legal framework and its objectives. The cases are not only complex but also fraught with many constitutional problems, including principles of equality, justice and fairness:

> Reconciling the goals of public safety and fair treatment of individuals who commit offences while suffering from a mental disorder is one of the most important and difficult challenges for our criminal justice system. The issues are complex. Courts must grapple with questions of statutory interpretation and constitutional rights. They must take account of medical as well as legal considerations.[5]

Part XX.1 of the Code put an end to the indeterminate detention of persons found not guilty by reason of insanity. The statutory framework created by Bill C-30 demonstrates Parliament's intention to favour individual, therapeutic treatment of mentally disordered offenders.[6] In *Winko v. British Columbia (Forensic Psychiatric Institute)*, the Supreme Court of Canada held as follows:

> By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR [not criminally responsible] accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge or detention: s. 672.54.
>
> In summary, the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. Under Part XX.1, the NCR accused is neither convicted nor acquitted. Instead, he or she is found not criminally responsible by reason of illness at the time of the offence. This is not a finding of dangerousness. It is rather a finding that triggers a balanced assessment of the offender's possible dangerousness and of what treatment-associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused.[7]

The case law has led to the development of certain legal principles that underpin Part XX.1 of the Code. The legislative framework was amended most recently in 2005 by Bill C-10.[8] The chronology in Appendix A of this legislative summary outlines the evolution of the law on mentally disordered offenders from 1843 to 2005.

1.2 Main Decision Points Currently Provided for in Part XX.1 of the *Criminal Code*

The discussion that follows describes the main bases for decision-making currently set out in Part XX.1 of the Code. As the chart in Appendix B of this legislative summary shows, the description presented here has been simplified to describe in general terms the procedure to be followed when the accused has been deemed fit to stand trial but not criminally responsible on account of mental disorder. The overview of this part is not intended to be exhaustive as it would be impossible to describe all possible scenarios.

It is a fundamental principle of the Canadian system of justice that no person is criminally responsible for an act if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."[9]

Section 16 of the Code sets out the presumption that everyone is presumed to be free from mental disorder. Accordingly, the party to a proceeding who claims otherwise has the burden of proving, on a balance of probabilities, that at the time of the offence the accused was suffering from a mental disorder so as to be exempt from criminal responsibility. In criminal proceedings, the issue of criminal responsibility is subject to certain rules:[10]

- The accused (or his or her lawyer) may raise the issue of criminal responsibility at any time during the proceedings, without notice.
- The accused (or his or her lawyer) may also raise the issue following a guilty verdict and before sentencing.
- The prosecutor may raise the issue of criminal responsibility only in one of the following circumstances:
  - the accused has raised the issue of his or her ability to form criminal intent; or
  - the accused has been found guilty, but before sentencing.

1.2.1 The Power of the Court to Order an Assessment Under Section 672.12 of the *Criminal Code*

The court may, of its own motion, "make an assessment order at any stage of proceedings against the accused."[11] The court may also do so on application of the accused or the prosecutor. The limits to the prosecution's right to ask for an assessment of whether the accused is exempt from criminal responsibility is described in section 672.12(3) of the Code.

1.2.2 Verdict of Not Criminally Responsible in Section 672.34 of the *Criminal Code*

Where the jury or the judge finds, after the evidence has been heard, that an accused committed the act or made the omission in question but was at the time suffering from mental disorder so as to be exempt from criminal responsibility (by virtue of section 16 of the Code), the jury or the judge "shall render a verdict that the accused … is not criminally responsible on account of mental disorder."[12]

It must be pointed out that a verdict of not criminally responsible does not result in an acquittal or a conviction. A verdict under Part XX.1 was described in *Winko* as follows:

> The verdict of NCR [not criminally responsible] under Part XX.1 of the *Criminal Code*, as noted, is not a verdict of guilt. Rather, it is an acknowledgement that people who commit criminal acts under the influence of mental illnesses should not be held criminally responsible for their acts or omissions in the same way that sane responsible people are. No person should be convicted of a crime if he or she was legally insane at the time of the offence: *Swain*, *supra*, at p. 976. Criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong: *Chaulk*, *supra*, at p. 1397; G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989), 14 *Queen's L.J.* 135, at p. 140. For this reason, s. 16(1) of the *Criminal Code* exempts from criminal responsibility those suffering from mental disorders that render them incapable either of appreciating the nature and quality of their criminal acts or omissions, or of knowing that those acts or omissions were wrong.[13]

1.2.3 Disposition Hearings Under Section 672.45 of the *Criminal Code*

Where a verdict of not criminally responsible on account of mental disorder is rendered in respect of an accused, the court may of its own motion, and must on application by the accused or the prosecutor, hold a disposition hearing to determine what is to be done with the accused. The court makes a disposition in respect of the accused only "if it is satisfied that it can readily do so and that a disposition should be made without delay."[14]

Otherwise, the court

> shall send without delay, following the verdict, in original or copied form, any transcript of the court proceedings in respect of the accused, any other document or information related to the proceedings, and all exhibits filed with it, to the Review Board that has jurisdiction in respect of the matter, if the transcript, document, information or exhibits are in its possession.[15]

In practice, the matter is usually sent to the review board.

The scheme provides that a hearing held by the court or the review board under section 672.45 "may be conducted in as informal a manner as is appropriate in the circumstances."[16] In general, the hearings are held in the hospital where the accused is detained under Part XX.1 of the Code. The accused has the right to be present at the hearing[17] unless circumstances dictate that he or she should be barred.[18] The accused also has the right to be represented by counsel.[19]

If the court makes no disposition and sends the matter to the review board, the board, under section 672.47, shall make a disposition as soon as is practicable after the verdict, but not later than 45 days after the verdict was rendered. Under exceptional circumstances, the prescribed time may be extended to a maximum of 90 days after the verdict was rendered.

If the court chooses to make a disposition in respect of an accused, the review board must, under section 672.54, hold a hearing and make a disposition not later than 90 days after the court's disposition was made, unless that disposition was an absolute discharge.[20]

Under section 672.52(3), the court or review board shall state its reasons for making a disposition in the record of the proceedings and shall provide every party with a copy of the disposition and those reasons.

1.2.4 Terms of Dispositions that Can Be Made by a Court or Review Board Under Section 672.54 of the *Criminal Code*

Under the existing wording of section 672.54:

> Where a court or Review Board makes a disposition … it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused.[21]

Currently, a court that chooses to make a disposition in respect of an accused, or a review board to which the matter has been referred, can make one of the three following dispositions:

- discharge the accused absolutely if, in the opinion of the court or the review board, the accused is not a significant threat to the safety of the public;
- discharge the accused subject to such conditions as the court or review board considers appropriate; or
- direct that the accused be detained in custody in a hospital, subject to such conditions as the court or review board considers appropriate.[22]

1.2.5 Mandatory Annual Review by the Review Board Under Section 672.81 of the *Criminal Code*

At present, every disposition made by the review board must be reviewed annually by it until the accused is granted an absolute discharge. However, that time may be extended to a maximum of 24 months with the consent of all of the parties.

After making a disposition following the review hearing, the review board may extend the time for holding a subsequent hearing to a maximum of 24 months if the following requirements are met: the accused "has been found not criminally responsible for a serious personal injury offence,"[23] the accused had been detained in a hospital, and if the review board is satisfied that the condition of the accused is not likely to improve and that detention remains necessary for the period of the extension.[24]

1.2.6 Discretionary Review (Section 672.82 of the *Criminal Code*)

A review board may, of its own motion or at the request of the accused or any other party, hold a hearing to review any of its dispositions.

1.3 Review Boards (Sections 672.38 to 672.45 of the *Criminal Code*) and Rules Applicable to Hearings Held by a Court or a Review Board (Sections 672.5 to 672.54 of the *Criminal Code*)

Sections 672.38 to 672.45 of the Code govern the establishment and composition of review boards. Under section 672.38 of the Code, "[a] Review Board shall be established or designated for each province" and "shall be treated as having been established under the laws of the province."

A review board is a specialized and independent administrative tribunal. It consists of not fewer than five members appointed by the Lieutenant Governor in Council of the province. Members cannot be held personally liable for any act, neglect or default committed in good faith in the exercise of their powers or the performance of their duties and functions. A review board must have at least one member who is entitled under the laws of a province

> to practise psychiatry and, where only one member is so entitled, at least one other member must have training and experience in the field of mental health, and be entitled under the laws of a province to practise medicine or psychology.[25]

The chairperson of a review board must be

> a judge of the Federal Court or of a superior, district or county court of a province, or a person who is qualified for appointment to, or has retired from, such a judicial office.[26]

A decision of a review board is a decision of a majority of the members present and voting.[27] The chairperson has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on persons appointed as commissioners under that Act.[28]

A review board shall make or review dispositions concerning any accused declared not criminally responsible by reason of mental disorder or unfit to stand trial. A review board acts not as an adversarial body, but as an inquisitorial one.[29] This distinction between the traditional justice system and the regime provided for in Part XX.1 of the Code was pointed out in *Winko*:

> The regime's departure from the traditional adversarial model underscores the distinctive role that the provisions of Part XX.1 play within the criminal justice system. The Crown may often not be present at the hearing. The NCR [not criminally responsible] accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present. This is fair, given that the NCR accused may not be in a position to advance his or her own case. The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board. If the court or Review Board is uncertain, Part XX.1 provides for resolution by way of default in favour of the liberty of the individual.[30]

The case law concerning Part XX.1 of the Code highlights the importance and the complexity of a Review Board's mandate, including the need to reconcile the dual objectives of this Part, namely the need to protect public safety and the need to make sure that accused persons are treated fairly.

1.4 USE OF THE REGIME PROVIDED FOR IN PART XX.1 OF THE *CRIMINAL CODE*

Since the regime began, few statistics have been gathered on the use of the provisions of Part XX.1 of the Code. In June 2002, in its report entitled *Review of the Mental Disorder Provisions of the* Criminal Code, the House of Commons Standing Committee on Justice and Human Rights pointed out the lack of in-depth studies and statistics on the numbers of accused declared unfit to stand trial or not criminally responsible on account of mental disorder (NCRMD). The committee's report stressed the need to improve research and data gathering.[31]

In its response to the committee, the Department of Justice highlighted the difficulties involved in gathering reliable data. Those difficulties have continued over the years: a number of the statistics that have been published come with disclaimers describing the limitations to which information gathering is subject.

In 2006, the department published a document entitled *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study*.[32] While it was possible to draw conclusions from the analysis, the document contained a recommendation stating that "additional data collection is still needed, however, to provide a more comprehensive understanding of the forensic mental health system in Canada."[33] The department noted:

> Some of the more pertinent findings include:
>
> - Review Board caseloads have been increasing over the last decade and are expected to continue to grow substantially over the next decade;
> - Although Aboriginal people do not appear to experience the same level of overrepresentation as they do within the traditional criminal justice system, it does appear as though they spend substantially more time under the control of Review Boards;
> - Nearly half of not criminally responsible by reason of mental disorder/ unfit to stand trial (NCRMD/UST) accused appearing before Review Boards at their initial hearing have never been convicted of a prior criminal offence;
> - NCRMD/UST accused have generally committed very serious violent offences such as murder, attempted murder, assault, sexual assault, criminal harassment, threats and arson;
> - Approximately three-quarters of those within the Review Board systems have been diagnosed with schizophrenia or an affective disorder, such as bi-polar disorder, schizoaffective disorder or major depression;
> - One in five cases that are processed by the Review Boards are released (e.g., found fit, given an absolute discharge) after the first hearing; and
> - Almost one-quarter of NCRMD/UST cases are spending at least ten years in the Review Board systems and some have been in for significantly longer.[34]

The most recent data come from March 2013 and were gathered at the request of the Research and Statistics Division of the Department for the National Trajectory Project team (NTP).[35] The conclusions of the study of those declared NCRMD after a serious offence involving violence are as follows:

> Severe violent offences defined as homicide, attempted murder and sexual offences represent less than one in ten offences perpetrated by the entire NCRMD population in the three most populated provinces in Canada. Individuals accused of homicide were comprised of a higher proportion of females than other groups, were more likely to have a single diagnosis rather than comorbid disorders and displayed the lowest rate of recidivism among the three categories of severe violent offences. Victims of individuals found NCRMD accused of homicide or attempted murder were more likely to be individuals in close proximity to individuals living with mental illness. Individuals accused of a sexual offence were almost exclusively male, tended to have a higher rate of previous offences and a higher rate of recidivism. They were also more likely to recidivate violently and have a violent criminal past. Their victims were more likely to be strangers than the two other groups. The rates of absolute discharge were also higher earlier than the two other groups.
>
> Slightly less than half of NCRMD individuals accused of a SVO [serious violent offence] had been previously convicted or had a previous finding of NCRMD, most of whom for non-violent offences. There is significant variability in the rates of absolute discharge by type of SVO. Finally, rates of re-offending were quite low over a three year follow-up period (14%).[36]

2 DESCRIPTION AND ANALYSIS

The bill has 33 clauses. Some clauses contain minor amendments, including linguistic amendments or reformulations intended to clarify the legislator's meaning or intent. Other provisions have been amended to include the new definition of "high-risk accused" provided in the legislative framework laid out in Part XX.1 of the Code.

2.1 PROPOSED AMENDMENTS TO SECTION 672.54 OF THE *CRIMINAL CODE* (TERMS OF DISPOSITIONS MADE BY A COURT OR REVIEW BOARD)

2.1.1 PUBLIC SAFETY AS THE PARAMOUNT CONSIDERATION (CLAUSE 9)

Clause 9 of the bill reformulates section 672.54 of the Code to require the court or Review Board to take into account public safety as the paramount consideration before making a disposition (under sections 672.45(2), 672.47, 672.83 or new section 672.64(3) [high-risk accused] and new section 672.84 [review of conditions in respect of a high-risk accused]). More specifically, the bill replaces the following text [author's emphasis]:

> Where a court or Review board makes a disposition … it shall, *taking into consideration the need to protect the public from dangerous persons*, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused

with

> Where a court or Review board makes a disposition … 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.

2.1.2 Significant Threat to the Safety of the Public (Clause 10)

The bill creates new section 672.5401, which, for the purposes of section 672.54, defines "a significant threat to the safety of the public" as:

> 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.

2.2 Proposed Amendments to Section 672.5 of the *Criminal Code* (Rules for Hearings Held by a Court or Review Board)

2.2.1 Consideration of Victim Impact Statement (Clauses 7 and 10)

The bill amends the rules for hearings held by a court or review board to determine the disposition that should be made in respect of an accused in order to take into account some of the recommendations made by the Standing Committee on Justice and Human Rights in its June 2002 report.

Clause 7(2) of the bill amends the current wording of section 672.5 of the Code (the rules governing hearings held by a court or review board) to provide that

> if the accused is discharged absolutely under paragraph 672.54(*a*) or conditionally under paragraph 672.54(*b*), a notice of the discharge shall, at the victim's request, be given to the victim.

Clause 7(3) of the bill amends the existing section 672.5 of the Code to provide that, if the Review Board refers to the court for review under section 672.84(1) a finding that an accused is a "high-risk accused," it shall notify every victim of the offence that they are entitled to file a statement with the court in accordance with section 672.5(14).

Clause 7(5) amends the current wording of section 672.5 of the Code by adding a requirement for the court or review board to

> inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim has been advised of the opportunity to prepare a statement referred to in subsection (14).

Section 672.541 of the Code currently states that a court or review board shall take into consideration any victim impact statement in determining the appropriate disposition or conditions under section 672.54. Clause 10 of the bill reformulates section 672.541 of the Code to incorporate the requirement that the court or review board take into consideration any statement filed by the victim:

- in deciding whether to find that the accused is a high-risk accused, or to revoke such a finding; and
- in determining whether to refer to the court for review the finding that the accused is a high-risk accused.

2.2.1.1 Duty of the Court or Review Board to Consider Whether It Is Desirable to Impose Additional Conditions on the Accused as Part of the Disposition (Clause 10)

The bill also adds new section 672.542 to the Code, which requires the court or review board, when holding a hearing under section 672.5, to consider "whether it is desirable, in the interests of the safety and security of any person, particularly of a victim of or witness to the offence or justice system participant" to impose on the accused the conditions that he or she:

> (*a*) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the disposition, or to refrain from going to any place specified in the disposition; or
>
> (*b*) comply with any other condition specified in the disposition that the court or Review Board considers necessary to ensure the safety and security of those persons.

2.3 Proposed Amendment to Section 672.56 of the *Criminal Code* (Authority of the Review Board to Delegate to the Person in Charge of the Hospital the Power to Increase or Decrease the Restrictions on the Liberty of the Accused)

2.3.1 Delegation of the Authority to Increase or Decrease the Restrictions on the Liberty of the Accused (Clause 11)

Section 672.56 currently states that a review board that has made a disposition that the accused be discharged subject to certain conditions (section 672.54(*b*)) or that the accused be detained in custody in a hospital subject to certain conditions (section 672.54(*c*)) may delegate to the person in charge of the hospital the authority to increase or decrease the restrictions on the liberty of the accused. Under these provisions, if the decision to increase the restrictions on the liberty of the accused is made, the accused must be given notice of the increase and, if the increased restrictions remain in force for a period exceeding seven days, the review board must also be informed.

Clause 11 of the bill amends section 672.56 by adding new subsection (1.1). This new subsection states that the authority to decrease the restrictions on the liberty of a high-risk accused is subject to the restrictions set out in section 672.64(3), which provide that the accused's detention in hospital must not be subject to any condition that would permit the accused to be absent from the hospital unless it is appropriate, in the opinion of the person in charge of the hospital, for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused's treatment and the accused is escorted by an authorized person, and "a structured

plan has been prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public."

2.3.2 Proposed Amendment to the Current Legislative Framework: The Establishment of a New Designation of High-Risk Accused (Clause 12)

Clause 12 of the bill introduces new section 672.64 into the legislation, allowing a court to designate an accused who was 18 years of age or more at the time of the commission of the offence as a "high-risk accused." To be so designated, the accused must have been found not criminally responsible on account of mental disorder for a serious personal injury offence.

It should be noted that this application must be made by the prosecutor before any disposition is made to discharge an accused absolutely. The court must be satisfied of one of two things:

- that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person, or
- 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.

Under the current scheme, section 672.81(1.3) defines a "serious personal injury offence" as:

> (*a*) an indictable offence involving:
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person; or
>
> (*b*) an indictable offence referred to in section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 271, 272 or 273 or an attempt to commit such an offence.

New section 672.64(2) of the Code states that the court must consider all relevant evidence in deciding whether to find that the accused is a "high-risk accused," 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.

Under new section 672.64(3), if the court finds the accused to be a high-risk accused, the court shall make a disposition under section 672.54(*c*) that the accused be detained in custody in a hospital. At that point, the accused's detention must not be subject to any condition that would permit the accused to be absent from the hospital unless the following conditions are fulfilled:

> (*a*) it is appropriate, in the opinion of the person in charge of the hospital, for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused's treatment, if the accused is escorted by a person who is authorized by the person in charge of the hospital; and
>
> (*b*) a structured plan has been prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public.

It is possible to appeal a decision to declare or not declare an accused "a high-risk accused" (new sections 672.64(4) and 672.64(5) of the Code).

2.3.3 Proposed Amendments to Review Board Reviews

2.3.3.1 Review of a Finding of High-Risk Accused (Clause 15)

Clause 15 of the bill states that, with a high-risk accused, a review board may

> extend the time for holding a hearing in respect of a high-risk accused to a maximum of 36 months after making or reviewing a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.

Clause 15 also states that, a review board may

> extend the time for holding a subsequent hearing under this section to a maximum of 36 months if the Review Board is satisfied on the basis of any relevant information, including disposition information as defined in subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(*c*), that the accused's condition is not likely to improve and that detention remains necessary for the period of the extension.

2.3.3.2 Review of a Finding of High-Risk Accused (Clause 16)

Clause 16 of the bill adds new section 672.84, which states that, if a Review Board holds a review under section 672.81 (annual review) or 672.82 (discretionary review) in respect of a high-risk accused,

> it shall, on the basis of any relevant information, including disposition information as defined in subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(*c*), if it is satisfied that there is not a substantial likelihood that the accused – whether found to be a high-risk accused under paragraph 672.64(1)(*a*) or (*b*) – will use violence that could endanger the life or safety of another person,

refer the finding for review to the superior court.

Under new section 672.84(2),

> [i]f the Review Board is not so satisfied, it shall review the conditions of detention imposed under paragraph 672.54(*c*), subject to the restrictions set out in subsection 672.64(3).

When a finding is sent to the court for a review of a declaration under new section 672.84(3), the court shall revoke the finding if it

> is satisfied that there is not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person.

In that case, the court or review board shall make a disposition under any of sections 672.54(*a*) to 672.54(*c*).

Under new section 672.84(5), if the court decides not to revoke the finding, the review board must, not later than 45 days after that decision, hold a hearing and review the conditions of detention imposed under section 672.54(*c*), subject to the restrictions set out in section 672.64(3).

Under section 672.84(6), any party may appeal a "decision under subsection (1) about referring the finding to the court for review and a decision under subsection (3) about revoking the finding."

3 COMMENTARY

Positions taken in response to Bill C-54 differ, and in some cases conflict. The differing views go beyond the nature of the current scheme to encompass the probable impact of the bill on the mental health system in general and, in particular, on offenders suffering from mental disorders. This commentary attempts to set out some of the points of view that have been expressed in the media.

It was reported that, for some:

> Bill C-54 seems like a tailor-made response to the feeling of horror that the public has felt towards a number of recent crimes. We are reminded of crimes like the Guy Turcotte case, certainly, but also of other sordid tragedies that have occurred elsewhere in Canada.[37]

For others, Bill C-54 is a step in the right direction because it gives victims of crime more consideration and increases their participation in the process described in Part XX.1 of the Code. Those who hold this view see the bill as restoring balance in the system in order to ensure public safety and improve victims' rights.[38]

Some commentators are concerned that the bill could have effects other than the stated one of increasing public safety. Others are also concerned by the removal of absences from hospital, which play a role in the accused's treatment and rehabilitation. For example:

> And some wonder if the amendments announced last week won't actually have the opposite of the desired effect, by discouraging plea bargains that see mentally ill offenders opt for treatment.
>
> "You're going to have a lot more mentally disordered people who have gone to jail for a period of time, have been left untreated and are back on the street untreated. So in that sense, it doesn't really make people much safer," said Bernd Walter, Chairman of the B.C. Review Board. …

> "Nobody was at risk with the previous system from the review board process. Recidivism is much lower than for the convicted population, and they're already spending three to five times longer indoors, so the question becomes what is it we're trying to fix here?" Walter said.[39]

The designation of "high-risk accused" alone has prompted considerable debate. One commentator has said:

> "The announcement … was fear-based. It wasn't evidence-based," Somerville said. "High risk must not be defined or determined by the severity or atrociousness of the crime, but by how well the person responds or does not respond to treatment."[40]

Others feel that the bill addresses concerns that the surveillance and responsibility mechanisms in the current scheme are inadequate:

> The Harper government's plan for reforming the law for people deemed to be not criminally responsible is a reasonable response to concerns in the community that there is not enough oversight and accountability in the present system.[41]

Still others are concerned about possible prejudice towards and stigmatization of individuals with mental disorders. The following are excerpts from a letter sent to the Minister of Justice in February 2013 by the Canadian Alliance on Mental Illness and Mental Health:

> CAMIMH [Canadian Alliance on Mental Illness and Mental Health] is concerned that the introduction of Bill C-54: Not Criminally Responsible Reform Act has created additional stigma for people with mental illness and perpetuates the myth that people with mental illnesses are violent.
>
> Lack of understanding and misinformation is often the basis of the public's fear of those Canadians living with a mental disorder. As a group, people with mental health issues are not more violent than any other group in our society. The majority of crimes are not committed by people with psychiatric illness, and multiple studies have proven that there is very little relationship between most of these diseases and violence. The real issue is the fact that people with mental illness are two and a half to four times more likely to be the victims of violence than any other group in our society.[42]

NOTES

1. *Criminal Code*, R.S.C. 1985, c. C-46.
2. *National Defence Act*, R.S.C. 1985, c. N-5.
3. House of Commons, Standing Committee on Justice and Human Rights, *Twenty-Fifth Report*, 1st Session, 41st Parliament, 13 June 2013.
4. *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, S.C. 1991, c. 43.
5. Joan Barrett and Riun Shandler, *Mental Disorder in Canadian Criminal Law,* Carswell, Toronto, 2006, p. iii (Foreword by Justice J. L. Laskin).

6. Ibid., p. 1-9.
7. *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 (paras. 42 to 43).
8. *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, S.C. 2005, c. 22.
9. *Criminal Code*, s. 16.
10. *R. v. Swain*, [1991] 1 S.C.R. 933.
11. *Criminal Code*, s. 672.12(1).
12. *Criminal Code*, s. 672.34.
13. *Winko v. British Columbia (Forensic Psychiatric Institute)*, para. 31.
14. *Criminal Code*, s. 672.45.
15. Ibid.
16. *Criminal Code*, s. 672.5(2).
17. *Criminal Code*, s. 672.5(9).
18. *Criminal Code*, s. 672.5(10).
19. *Criminal Code*, s. 672.5(7).
20. *Criminal Code*, s. 672.47(3).
21. *Criminal Code*, s. 672.54.
22. Ibid.
23. A "serious personal injury offence" is defined in subsection 672.81(1.3) of the *Criminal Code* as:

    > (*a*) an indictable offence involving:
    >
    > (i) the use or attempted use of violence against another person, or
    >
    > (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person; or
    >
    > (*b*) an indictable offence referred to in section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 271, 272 or 273 or an attempt to commit such an offence.

24. *Criminal Code*, subsection 672.81(1.2).
25. *Criminal Code*, s. 672.39.
26. *Criminal Code*, s. 672.4(1).
27. *Criminal Code*, s. 672.42.
28. *Criminal Code*, s. 672.43.
29. Barrett and Shandler (2006), p. 7-3.
30. *Winko v. British Columbia (Forensic Psychiatric Institute)*.
31. House of Commons, Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the* Criminal Code, 14th Report, June 2002. Two of the committee's recommendations were as follows:

> The Committee recommends that the Department of Justice and other relevant departments and agencies, in collaboration with their provincial and territorial counterparts, collect, process, and analyze the data necessary to facilitate a further parliamentary review of Part XX.1 of the *Criminal Code* in 2007. [Recommendation 18]
>
> The Committee recommends that the legislation implementing the recommendations contained in this report include a requirement for a further review of the provisions and operation of Part XX.1 of the *Criminal Code* within five years of the legislation coming into effect. If no such legislation is adopted by Parliament, it should designate a committee to review the provisions and operation of Part XX.1 of the *Criminal Code* in 2007. [Recommendation 19]

32. Department of Justice, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study*, 2006.
33. Ibid., p. v.
34. Ibid.
35. According to its website, the National Trajectory Project, is "funded through the Mental Health Commission of Canada and based on an ongoing study in Québec funded by the Fonds de recherche en santé du Québec."
36. *Order/address of the House of Commons no. Q-1169 by Mr. Cotler (Mount Royal), February 12, 2013* (Parliamentary document no. 8555-411-1169).
37. Mario Roy, "Crimes insensés," *La Presse*, 11 February 2013 [Translation]; see also Jean-C. Hébert, "Non-responsabilité criminelle – Trouble mental : prisonnier ou patient?," *Le Journal – Barreau du Québec*, Vol. 45, February 2013, p. 8.
38. See, for example, Mia Rabson, "Harper targets mentally ill offenders: New high-risk category seeks to protect public and victims," *Winnipeg Free Press*, 9 February 2013.
39. Dene Moore, "Changes to mentally ill law could mean fewer opt for treatment: review board," *The Canadian Press*, 14 February 2013.
40. Tobi Cohen, "New bill cracks down on not criminally responsible, raises questions of fairness and necessity," *Edmonton Journal*, 8 February 2013.
41. "Overseeing mentally ill patients," Editorial, *Winnipeg Free Press*, 13 February 2013.
42. Canadian Alliance on Mental Illness and Mental Health, *CAMIMH Bill C-54 – Letter to Robert Nicholson*, 25 February 2013.

APPENDIX A – CHRONOLOGY

This chronology outlines the evolution of the law on mentally disordered offenders from 1843 to 2005.[1]

1843 – The common law defence of insanity is formulated by the British House of Lords in *M'Naghten's Case*.[2] The defence rests on the principle that, in order to convict, the state must prove not only a wrongful act, but also a guilty mind.

1892 – Canada's first *Criminal Code*[3] makes the insanity defence available to an accused person who, because of a "natural imbecility" or "disease of the mind," was incapable of appreciating the nature and quality of the act or omission, and of knowing it was wrong.

1991 – The Supreme Court of Canada renders its decision in *R. v. Swain*,[4] concluding that the automatic indeterminate detention of persons found not guilty by reason of insanity, as set out in the *Criminal Code*,[5] infringes their right to liberty under the *Canadian Charter of Rights and Freedoms*.[6]

1992 – A new Part XX.1 of the *Criminal Code* comes into force to govern mentally disordered accused persons, following the passage of Bill C-30 by Parliament.[7] Among other things, it allows for the possibility of an immediate absolute discharge and requires, in all other cases, annual Review Board hearings so that the least restrictive disposition is always imposed on a mentally disordered accused. Bill C-30 also replaces references to "insanity" with the term "mental disorder" and extends the defence to summary conviction in addition to indictable offences.

1999 – The Supreme Court of Canada renders its decision in *Winko v. British Columbia (Forensic Psychiatric Institute)*,[8] upholding the regime in Part XX.1 of the *Criminal Code* as constitutional and concluding that it properly balances public safety and the rights of mentally disordered accused.

2002 – Further to a parliamentary review required by Bill C-30, the House of Commons Standing Committee on Justice and Human Rights tables 19 recommendations intended to improve Part XX.1 of the *Criminal Code*.[9] The Government of Canada responds, indicating that it will introduce legislation to implement most of the recommendations as well as other improvements.[10]

2004 – The Supreme Court of Canada renders its decision in *R. v. Demers*,[11] concluding that the ongoing subjection of a permanently unfit accused to Part XX.1 of the *Criminal Code* constitutes a violation of liberty under the *Canadian Charter of Rights and Freedoms* where the accused poses no significant threat to public safety.

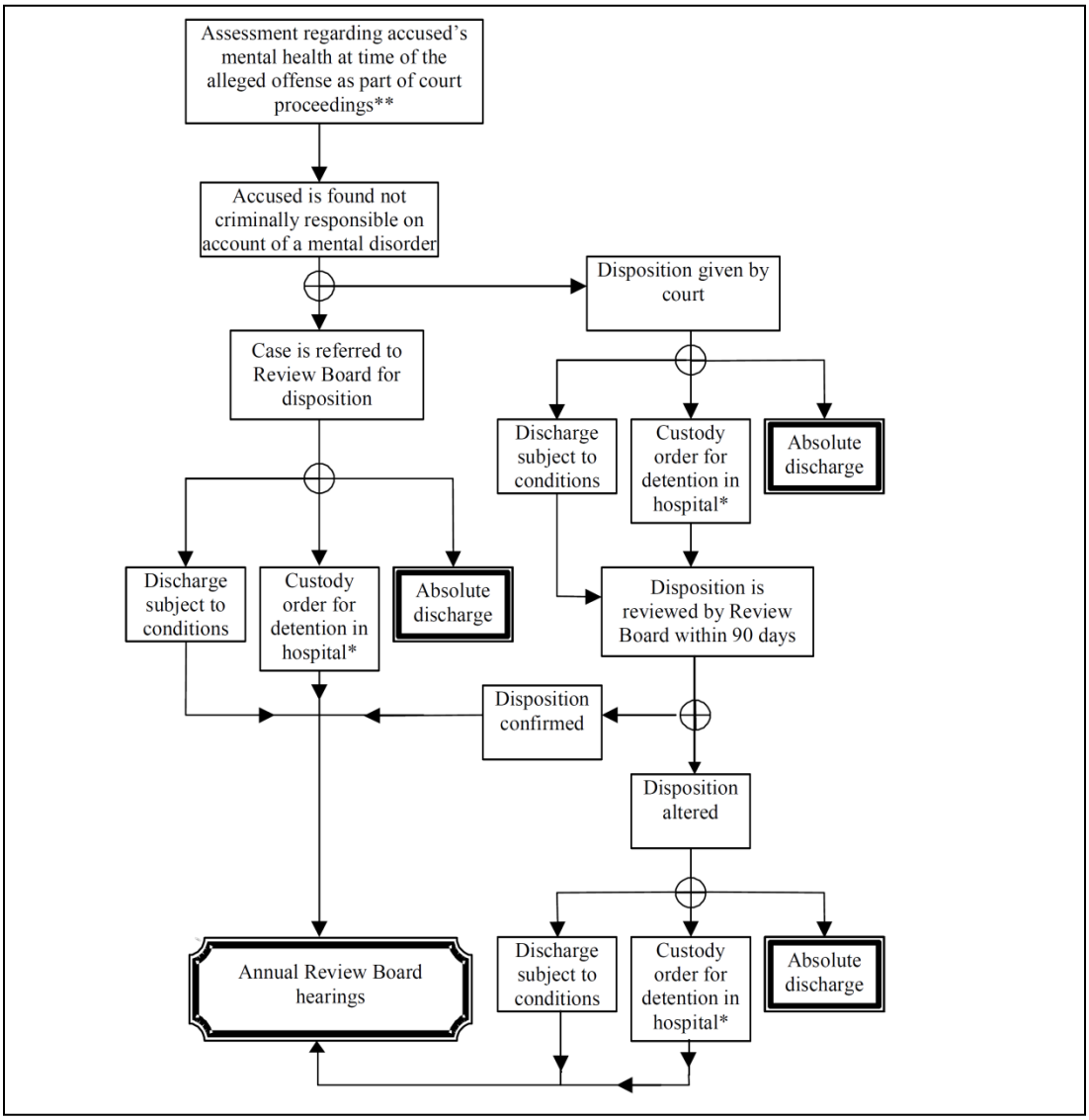
2005 – Parliament passes Bill C-10,[12] amending Part XX.1 of the *Criminal Code*. Most notably, it expands the powers of Review Boards by allowing them to order psychological assessments, order publication bans, and extend the time for the next hearing; provides for the possibility of psychological assessments by persons other than medical practitioners; allows victim impact statements to be presented at hearings; permits a stay of proceedings in the case of a mentally disordered accused who is permanently unfit to stand trial; and repeals unproclaimed provisions that would have limited the length of detention of a mentally disordered accused, or allowed this period to be extended for particularly dangerous persons.[13]

NOTES

1. The source of this chronology is Wade Raaflaub, *The Mental Disorder Provisions of the Criminal Code*, Publication no. 2005-05-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 22 June 2005.
2. *Daniel M'Naghten's Case* (1843), 8 E.R. 718 (H.L.).
3. *Criminal Code*, S.C. 1892, c. 29, s. 11.
4. *R. v. Swain*, [1991] 1 S.C.R. 933.
5. *Criminal Code*, R.S.C. 1970, c. C-34, s. 542(2), later *Criminal Code*, R.S.C. 1985, c. C-46, s. 614(2).
6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. The Supreme Court suspended the declaration of invalidity of the relevant section of the *Criminal Code* to give Parliament an opportunity to adopt remedial legislation, which was introduced as Bill C-30.
7. *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, S.C. 1991, c. 43. Most of Bill C-30 was proclaimed in force in February 1992.
8. *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.
9. House of Commons, Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the* Criminal Code, 14th Report, June 2002.
10. Government of Canada, *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the* Criminal Code, November 2002.
11. *R. v. Demers*, [2004] 2 S.C.R. 489. The Supreme Court suspended its declaration that the relevant provisions of the *Criminal Code* were invalid to allow Parliament the opportunity to pass amendments, which were introduced in Bill C-10.
12. *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, S.C. 2005, c. 22. See Wade Raaflaub, *Legislative Summary of Bill C-10: An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, Publication no. LS 481-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 20 May 2005.
13. These unproclaimed provisions on "capping" and "dangerous mentally disordered accused" were considered to be unnecessary, as the detention of a mentally disordered accused is not intended to punish but to treat and rehabilitate, and an accused is entitled to release if he or she poses no significant threat to public safety.

APPENDIX B – KEY DECISION POINTS

Figure B.1 – Key Processes in Determining Criminal Responsibility in Cases Involving Mentally Disordered Accused



Notes: * While both the court and Review Board have the authority to detain a person found NCRMD [Not Criminally Responsible Due to a Mental Disorder] in hospital, the accused may refuse treatment while detained.

** In accordance with the decision of the Supreme Court of Canada in *R. v. Swain* in 1991, the Crown may not raise the issue of the accused's mental state before the Crown proved that the crime had been committed or where the accused had put their mental capacity into issue.

Source: Statistics Canada, Special Study on Mentally Disordered Accused and the Criminal Justice System, 2003.