

**THE PARAMOUNT CONSIDERATION: DECISION-MAKING BY THE BRITISH
COLUMBIA REVIEW BOARD IN INITIAL DISPOSITION DECISIONS**

by

Kyle Andrew McCleery

B.A., Queen's University, 2007

J.D., University of British Columbia, 2010

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate and Postdoctoral Studies

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

August 2019

© Kyle Andrew McCleery, 2019

The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the thesis entitled:

The Paramount Consideration: Decision-Making by the British Columbia Review Board in Initial Disposition Decisions

submitted by Kyle Andrew McCleery in partial fulfillment of the requirements for

the degree of Master of Laws

in Law

Examining Committee:

Isabel Grant, Law

Supervisor

Janine Benedet

Supervisory Committee Member

Abstract

Within Canadian criminal law, the mental disorder defence grants exemptions from criminal liability to those who commit criminal acts while suffering from a mental disorder that renders “the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.” Unlike traditional defences, the mental disorder defence does not result in an outright acquittal and unconditional release. Instead, those who satisfy the requirements of the defence are found “not criminally responsible on account of mental disorder” (NCRMD) and become subject to the jurisdiction of a provincial Review Board, which is tasked with reviewing the case of each NCRMD accused annually and deciding whether each accused should be discharged absolutely, discharged with conditions, or detained in a hospital for the purpose of treatment. The Review Board also has jurisdiction over those found unfit to stand trial, but these accused are outside the scope of this thesis.

This thesis examines decision-making by the British Columbia Review Board in initial disposition decisions relating to NCRMD accused in 2015 and 2016. A quantitative analysis suggests that the best predictors of disposition in these cases are the sex, age, and diagnosis of the accused. A review of the contents of the Review Board’s decisions confirms the importance of the accused’s mental health status, but also reveals a concern for the accused’s criminal history and ongoing substance abuse. The Review Board is highly focused on risk assessment and the protection of the public to the exclusion of other considerations, including those listed in the governing legislation. This thesis examines this focus on public safety and calls for the introduction of measures to better balance the interest of the NCR accused with those of the public. It concludes with a discussion of the implications of this focus on public safety and calls

for the introduction of measures to better balance the interests of the accused with those of the public.

Lay Summary

In Canada, individuals who commit criminal acts while suffering from a mental disorder that causes them to be incapable of “appreciating the nature and quality” of those acts, or incapable of understanding that those acts were wrong are found “not criminally responsible on account of mental disorder” (NCRMD). Once a person is found NCRMD, they are placed under the supervision of a provincial Review Board, which is responsible for deciding whether they can be released unconditionally or with conditions, or whether they need to be required to remain in a psychiatric hospital for treatment. By examining Review Board decisions, this thesis considers the factors that influence Review Board decisions. It concludes that the Review Board focuses nearly exclusively on public safety and that mechanisms for better taking into account the interests of NCRMD accused should be incorporated into the Review Board process.

Preface

This thesis is the original, unpublished and independent work of the author, Kyle McCleery.

Table of Contents

Abstract	iii
Lay Summary.....	v
Preface	vi
Table of Contents	vii
List of Tables	x
List of Figures	xii
Acknowledgements.....	xiii
Chapter 1: Introduction	1
1.1 Overview	1
1.2 Research Questions.....	5
1.3 Data and Methodology.....	5
1.4 Structure of the Thesis	7
Chapter 2: The NCRMD Verdict.....	9
2.1 Overview	9
2.2 The Mental Disorder Defence and NCRMD Verdict	9
2.3 Process Following an NCRMD Verdict	11
2.4 Decision-Making in Disposition Hearings.....	14
2.5 The Purpose and Function of the NCRMD Verdict in the Canadian Criminal Justice System.....	17
2.6 Conclusion.....	19
Chapter 3: History of the NCRMD Verdict	20
3.1 Overview	20
3.2 Mental Disorder in English Criminal Law Prior to 1800	20
3.3 <i>Hadfield</i> , the <i>Criminal Lunatics Act</i> and <i>M’Naghten</i>	23
3.3.1 <i>R v Hadfield</i> and the <i>Criminal Lunatics Act</i>	23
3.3.2 <i>M’Naghten’s Case</i>	25
3.4 The Insanity Defence in Canada after <i>M’Naghten</i> : 1843-1992	26
3.4.1 The First Criminal Code	27

3.4.2 Provincial Review Boards and Enhanced Procedural Protections	29
3.5 Advent of the <i>Charter</i> and <i>R v Swain</i>	30
3.5.1 <i>R v Swain</i>	33
3.6 Bill C-30.....	35
3.6.1 The Nature of the Verdict	35
3.6.2 Disposition Following the Verdict	36
3.6.3 Capping Provisions	36
3.7 Bill C-14: The NCRMD Reform Act	39
3.8 Conclusion.....	39
Chapter 4: Changes in the Population of NCRMD Accused Over Time	41
4.1 Introduction	41
4.2 Volume of Cases.....	42
4.3 Characteristics of Cases and Accused Persons Entering the Review Board System in BC	44
4.3.1 Index Offence.....	45
4.3.2 Demographic Characteristics	46
4.3.3 Criminal and Psychiatric History	48
4.4 Review Board Dispositions	50
4.5 Discussion	52
4.6 Conclusion.....	53
Chapter 5: Results of the Quantitative Analysis	54
5.1 Introduction	54
5.2 Results.....	54
5.2.1 Initial Disposition.....	54
5.2.2 Sex	55
5.2.3 Age at Time of Index Offence	57
5.2.4 Indigeneity	59
5.2.5 Most Serious Index Offence	61
5.2.6 Criminal History.....	64
5.2.7 Diagnosis	67
5.2.8 History of In-Patient Psychiatric Treatment	69
5.2.9 History of Substance Abuse.....	71

5.3 Discussion and Comparison with the Results of Past Studies	73
5.3.1 Initial Disposition	74
5.3.2 Sex	75
5.3.3 Age at Time of Index Offence	76
5.3.4 Indigeneity	78
5.3.5 Most Serious Index Offence	79
5.3.6 Criminal History.....	81
5.3.7 Diagnosis	82
5.3.8 History of In-Patient Psychiatric Care.....	83
5.3.9 History of Substance Abuse.....	85
5.4 Conclusion.....	85
Chapter 6: Decision-Making by the Review Board.....	87
6.1 Introduction	87
6.2 Quantitative Results in Context: The Review Board’s Reasoning.....	88
6.2.1 Diagnosis, Sex, and Age: The Statistically Significant Variables	88
6.2.2 Index Offence, Criminal History and Substance Abuse: The Statistically Insignificant Variables.....	92
6.2.2 Public Safety and Decision-Making by the BC Review Board	97
6.3 Public Safety, <i>Gladue</i> , and Indigenous NCRMD Accused	100
6.4 Blameworthiness, Public Safety and the Review Board.....	108
Chapter 7: Conclusion.....	114
Bibliography	119

List of Tables

Table 5.1: Initial Disposition of Accused Entering Review Board System by Year	54
Table 5.2: Sex of Accused Entering Review Board System by Year	55
Table 5.3: Initial Disposition by Sex	55
Table 5.4: Sex and Disposition - Collapsed for Statistical Significance.....	56
Table 5.5: Sex and Index Offence.....	56
Table 5.6: Age of Accused Entering Review Board System by Year	57
Table 5.7: Initial Disposition by Age	57
Table 5.8: Age and Disposition - Collapsed for Statistical Significance	58
Table 5.9: Age and Index Offence	59
Table 5.10: Indigenous Identity of Accused Entering Review Board System by Year	59
Table 5.11: Initial Disposition by Indigenous Identity	60
Table 5.12: Indigeneity and Disposition - Collapsed for Statistical Significance	60
Table 5.13: Indigeneity and Index Offence	61
Table 5.14: Most Serious Index Offence for Accused Entering Review Board System by Year	61
Table 5.15: Initial Disposition by Offence Type	63
Table 5.16: Index Offence and Disposition - Collapsed for Statistical Significance	64
Table 5.17: Criminal History for Accused Entering Review Board System by Year	64
Table 5.18: Disposition by Criminal History	65
Table 5.19: Criminal History and Disposition - Collapsed for Statistical Significance	65
Table 5.20: Criminal History and Index Offence	66
Table 5.21: Diagnosis for Accused Entering the Review Board System by Year	67
Table 5.22: Disposition by Diagnosis	68

Table 5.23: Diagnosis and Disposition - Collapsed for Statistical Significance	68
Table 5.24: Diagnosis and Index Offence	69
Table 5.25: History of In-Patient Psychiatric Treatment for Accused Entering Review Board System by Year	69
Table 5.26: Disposition by History of In-Patient Psychiatric Care	70
Table 5.27: History of In-Patient Psychiatric Care and Disposition – Collapsed for Statistical Significance	70
Table 5.28: History of In-Patient Psychiatric Care and Index Offence	71
Table 5.29: History of Substance Abuse for Accused Entering Review Board System by Year	71
Table 5.30: Disposition by History of Substance Abuse	72
Table 5.31: History of Substance Abuse and Disposition – Collapsed for Statistical Significance	72
Table 5.32: History of Substance Abuse and Index Offence	73

List of Figures

Figure 4.1: BC Review Board Intake by Fiscal Year since 1992/93	42
---	----

Acknowledgements

I am deeply indebted to my supervisor, Isabel Grant, whose advice, guidance, and inexhaustible patience have been invaluable to the completion of this thesis. I am also very grateful to my second reader Janine Benedet for her extremely helpful feedback.

I am grateful to the Peter A. Allard School of Law and to the Law Foundation of British Columbia for their financial support, which helped to make this thesis possible.

Most of all, I would like to thank my partner, Laura Reid, for her proofreading, encouragement, and endless support.

Chapter 1: Introduction

1.1 Overview

Like most of the world's criminal justice systems,¹ Canadian criminal law offers an exemption from criminal liability in certain circumstances for those who commit criminal acts while suffering from mental disorder.² Section 16 of the *Criminal Code of Canada*³ establishes the "defence of mental disorder":

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

This formulation of the defence has changed little since the mid-19th century, when it was first recognized by the House of Lords.⁴ It continues to mirror equivalent legal mechanisms throughout the common-law world today.⁵

Where Canadian law differs from some other jurisdictions, however, is in the treatment of those who qualify for this defence. Unlike most criminal law defences such as self-defence, duress or necessity, the mental disorder defence does not result in a true acquittal or necessarily in the unconditional release of the accused. Instead these accused are subject to the verdict of "not criminally responsible on account of mental disorder" (NCRMD),⁶ which the Supreme

¹ Carl-Friedrich Stuckenberg, "Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility" (2016) 4:1 *Bergen Journal of Criminal Law and Criminal Justice* 48 at 51.

² Edwin A Tollefson & Bernard Starkman, *Mental Disorder in Criminal Proceedings* (Scarborough, Ont: Carswell, 1993) at 1-2; The phrase "mental disorder" is used here rather than mental illness for consistency with the language used in the *Criminal Code* and to indicate that the defence applies to disorders such as intellectual disabilities and dementia that may not be commonly considered illnesses.

³ RSC 1985, c C-46 [*Criminal Code*].

⁴ *Daniel M'Naghten's Case* (1843), 10 Cl & Fin 200, 8 ER 718 (HL) [*M'Naghten's Case*]; Tollefson & Starkman, *supra* note 2 at 13-16; Steven Penney, "Irresistible Impulse and the Mental Disorder Defence: The *Criminal Code*, the *Charter* and the Neuroscience of Control" (2014) 60:2 *Criminal Law Quarterly* 207 at 211.

⁵ Steven Yannoulidies, *Mental State Defences in Criminal Law* (Burlington: Ashgate, 2012) at 9; RD Mackay, BJ Mitchell & L Howe "Yet More Facts about the Insanity Defence" (2006) 31:5 *Criminal Law Review* 399 at 399.

⁶ *Criminal Code*, *supra* note 3 at s 672.34

Court of Canada held in *Winko v British Columbia (Forensic Psychiatric Institute)* is neither a conviction nor an acquittal.⁷ Once found NCRMD an accused cannot be punished but may be detained in hospital or subjected to other restrictions on his or her liberty in order to protect the public from the risk of future harm arising from the criminal behaviour of the accused.⁸ In order to make decisions about the detention and release of accused persons found NCRMD, the *Criminal Code* establishes a Review Board in each province and territory⁹ that is tasked with reviewing the case of each NCRMD accused at least once each year¹⁰ until they are found not to pose a significant threat to the safety of the public, at which point they must be unconditionally released.¹¹

The Canadian approach to the challenge posed by those who commit criminal acts as a result of mental disorder has evolved gradually over the past three decades. While the framework of the current system was enacted in 1992 as a comprehensive reform of the previous “not guilty by reason of insanity” (NGRI) regime,¹² some of the protections built into this system for

⁷ *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at paras 31-32, [1999] ACS no 31 [*Winko*].

⁸ *R v Bouchard-Lebrun*, 2011 SCC 58 at para 52, [2011] 3 SCR 575 [*Bouchard-Lebrun*]; *Winko*, *ibid.*

⁹ *Criminal Code*, *supra* note 3 at s 672.38.

¹⁰ The Review Board is required to review cases annually in most instances, but there are exceptions to this rule. The time for review may be extended up to 24 months if the accused and the Crown agree to the extension and the accused is represented by counsel. It may be extended up to 36 months where the accused is designated a “high-risk accused” under s 672.64 of the *Criminal Code* and the Review Board is satisfied that the accused’s condition is not likely to improve and that detention remains necessary for the period of the extension: *Criminal Code*, *supra* note 3 at s 672.81.

¹¹ *Criminal Code*, *supra* note 3 at s 672.54(a); *Winko*, *supra* note 7 at para 57.

¹² Simon N Verdun-Jones, “The Insanity Defence in Canada: Setting a New Course” (1994) 17:2 International Journal of Law and Psychiatry 175 at 175 [Verdun-Jones, Insanity Defence]; Tollefson & Starkman, *supra* note 2 at 16-17.

NCRMD accused were never proclaimed into force.¹³ Since then, it has been altered by further legislative reform¹⁴ and Supreme Court of Canada jurisprudence.¹⁵

While affecting a very small proportion of those accused of crimes in Canada, it is difficult to overstate the significance of this system for these accused. Those found NCRMD can be detained indefinitely, meaning that an accused can be confined to a hospital for life, even in cases in which the verdict is the result of a minor offence unlikely to result in any time in custody were it to lead to a conviction. Despite the significance of the process to the accused, the Review Board system is subject to limited oversight. In most provinces, Review Board decisions are not routinely released publicly. While Review Board decisions can be appealed to provincial Courts of Appeal, such appeals are rare. As a result, Review Board decisions are final in most cases and subject to little scrutiny.

The uniqueness of this system and the limited oversight to which it is subject make academic examination of this segment of the criminal justice system particularly important. In the absence of careful and regular study, it will be difficult to identify the real-life impacts of this system on NCRMD accused and impossible to assess whether it is serving its intended function.

Despite the importance of research in this area, the existing body of literature falls short in two important respects. First, while somewhat regular studies of the Review Board system were conducted in the years immediately following the major reforms to the system in 1992,¹⁶

¹³ Wade Raaflaub, *Legislative Summary Bill C-10: An Act to Amend the Criminal Code (Mental Disorder) and to make Consequential Amendments to Other Acts*, LS-481E (Ottawa: Library of Parliament, 2005) at 26 and 30; *An Act to Amend the Criminal Code (Mental Disorder) and to Make Consequential Amendments to Other Acts*, SC 2005, c 22 [*Mental Disorder Amendment Act, 2005*].

¹⁴ Lisa Grantham, "Bill C-14: A Step Backwards for the Rights of Mentally Disordered Offenders in the Canadian Criminal Justice System" (2014) 19 *Appeal: Review of Current Law and Law Reform* 63 at 74-75.

¹⁵ See *Winko*, *supra* note 7; *Bouchard-Lebrun*, *supra* note 8.

¹⁶ Isabel Grant, "Canada's New Mental Disorder Disposition Provisions: A Case Study of the British Columbia Criminal Code Review Board" (1997) 20:4 *International Journal of Law and Psychiatry* 419; James D Livingston *et*

they became less frequent as time passed. The most recent such study considered Review Board decisions made between 2000 and 2005,¹⁷ meaning that it has been over a decade since the operation of any of Canada's provincial Review Boards has been meaningfully examined. Secondly, the past studies that do exist focus almost exclusively on quantitative analyses. This type of analysis is undoubtedly important, producing critical data about who is being found NCRMD, the outcomes imposed upon NCRMD accused by Review Boards, and how they vary based on different personal, offence, and diagnostic variables. While valuable, these analyses are also limited, ignoring potentially illuminating information in the Review Board's reasons that could offer explanations as to how these variables impact Review Board decision-making and why different groups of accused are treated in the way that they are.

The purpose of this thesis is to contribute towards filling these gaps in the literature. It does so in two ways. First, it provides data and statistical analysis regarding BC Review Board decisions pertaining to NCRMD accused entering the Review Board system in 2015 and 2016. It offers an updated view of who is being found NCRMD in British Columbia, the index offences leading to the verdict and the treatment of these individuals by the Review Board. In doing so, it allows for comparison with past studies and offers insight into whether the trends observed previously have continued. Secondly, following the quantitative analysis, it examines the content of the Review Board's decisions, considering the reasoning behind the decisions and seeking explanations for the quantitative results.

al, "A Follow-Up Study of Persons Found Not Criminally Responsible on Account of Mental Disorder in British Columbia" (2003) 48:6 *Canadian Journal of Psychiatry* 408.

¹⁷ Anne G Crocker, "The National Trajectory Project on Individuals Found Not Criminally Responsible on Account of Mental Disorder" (2015) 60:3 *Canadian Journal of Psychiatry* 96.

1.2 Research Questions

This thesis aims to make this contribution by answering three research questions. First, it asks who is being found NCRMD and entering the Review Board system in recent years in British Columbia and how this population has changed in the decade since this question was last considered. Secondly, it asks what relationships exist between the disposition decisions made by the Review Board and various characteristics of the accused persons and cases before it. Finally, it asks what the Review Board identifies as important factors in making these decisions and what relationships these factors have to the characteristics considered in question two. As noted above, by examining these three questions, this study is intended to contribute to the body of literature that seeks to understand the impact of Canada's unique approach to mentally disordered offenders and allow for ongoing assessment of whether it is serving its intended function in the Canadian criminal justice system and meeting the needs of both Canadian society and the NCRMD accused who are subject to it.

1.3 Data and Methodology

Answers to these questions were pursued through the review and analysis of disposition decisions made by the BC Review Board in 2015 and 2016. These included all initial disposition decisions made over the course of those two years and any subsequent decisions made during the same time period with respect to the same accused. These decisions were identified through a review of all disposition decisions made by the BC Review Board during this two-year period. The decisions, most of which are not available publicly, were provided directly to the author by the Review Board.¹⁸ The relevant decisions were identified from this larger collection.

¹⁸ These decisions were provided on the condition that no information that could be used to identify the accused be published. Accordingly, this thesis does not identify any NCRMD accused by name, does not include any other

Once all of the initial disposition decisions were identified, each decision was reviewed again and coded for a number of variables including:

- a. Sex
- b. Age
- c. Indigeneity
- d. Index Offence
- e. Criminal History (Previous Convictions/NCRMD Verdicts)
- f. Previous In-Patient Psychiatric Care
- g. History of Substance Abuse
- h. Diagnosis
- i. Disposition

Following completion of the coding process, the results were sorted to determine the prevalence of different values for each variable. The variables were also compared to the outcomes of each initial disposition hearing to examine the relationship between each variable and disposition.

The relationship between each variable and disposition was assessed for statistical significance using a chi-square test or, where statistical significance could not be reliably assessed for a variable using the chi-square test, the fisher exact test. This was not intended to be an exhaustive quantitative analysis, but rather one focused on identifying the significance of these variables, in isolation, to outcomes. The tests were conducted using SPSS (Statistical Package for the Social Sciences). Statistical significance was defined as $P < 0.05$.

Statistical significance is a measure of the likelihood that an outcome is the result of random chance.¹⁹ The lower the “p-value,” the less likely it is that the outcome was the product

identifying information and does not provide citations or other identifying information for Review Board decisions. This does not apply to information published in decisions made by courts which are already matters of public record.
¹⁹ David Freedman, Robert Pisani & Roger Purves, *Statistics, 4th ed* (New York: WW Norton & Company, 2007) at 525-526.

of chance, and the more likely there is a genuine dependent relationship between the variables. A p-value of less than 0.05 is a common threshold for statistical significance. This means that if the p-value calculated for any variable is below this number, it is likely that there is a real relationship between that variable and disposition. While this does not prove cause and effect, it indicates that it is unlikely that it is the product of random chance.

It is important to be cognizant of the limits of what can be learned from this type of analysis. That a variable is found to be a statistically significant predictor of disposition tells us little about the mechanism by which this relationship is created. For this reason, the quantitative analysis was followed by a review of the content of the Review Board's reasoning. Once each of the decisions had been coded and the quantitative analysis completed, they were each reviewed again, this time for the purpose of identifying the factors that featured most prominently in the Review Board's decision-making to assess how the variables identified as important in the quantitative analysis affected the Review Board's reasoning process and ultimately the outcome for the accused.

1.4 Structure of the Thesis

This thesis is organized into 7 chapters. Following this introduction, Chapter 2 provides an overview of the NCRMD verdict. It begins by discussing the current verdict and Review Board process before examining the purpose of the verdict and its function within the Canadian criminal justice system. Chapter 3 offers historical context, describing the origins of the NGRI verdict, the predecessor to Canada's NCRMD verdict, and its evolution in English and later Canadian law. Chapter 4 discusses the results of related, past research examining the operation of the verdict both prior to and after the enactment of Bill C-30, legislation that reformed the previous NGRI system in 1992. It outlines the impact of Bill C-30 and provides the background

necessary to understand the significance of the results of the present study. Chapter 5 presents the results of the quantitative analysis of initial disposition decisions made by the Review Board in 2015 and 2016 and compares those results to the previous studies considered in Chapter 4. Finally, Chapter 6 places the quantitative results in the context of the Review Board's reasoning. It seeks to explain the quantitative results through the reasons by exploring how the Review Board engages with these variables. It also examines how the Review Board is engaging with the test mandated by the *Criminal Code* and the factors on which the Review Board typically focuses in conducting its analysis, revealing the centrality of risk assessment and public safety in Review Board decision-making. Chapter 6 concludes with a discussion of the impact of this focus on public safety, using the experience of Indigenous NCRMD accused as an example. It concludes with a call for reform of the Review Board system through the incorporation of mechanisms for better balancing the important objective of public safety with the interests of the accused. Chapter 7 is a brief conclusion.

Chapter 2: The NCRMD Verdict

2.1 Overview

This chapter provides an introduction to the NCRMD verdict and the provincial *Criminal Code* Review Board system. It begins with a discussion of the nature of the verdict and the standard for finding an accused NCRMD, followed by an overview of the process that follows the verdict and an examination of the nature of decision-making undertaken by the provincial Review Boards. It concludes with a brief discussion of the purpose and function of the verdict in the Canadian criminal justice system. Chapter 3 will put this introduction into context through a discussion of the historical development of this area of the law.

2.2 The Mental Disorder Defence and NCRMD Verdict

The NCRMD verdict and its consequences are set out in s 16(1) and Part XX.1 of the *Criminal Code*.²⁰ The “defence of mental disorder” is established by s 16(1), which reads:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Section 2 of the *Criminal Code* defines “mental disorder” as a “disease of the mind.”

While s 16 describes this as a “defence”, unlike most defences it does not result in an acquittal. Rather, s 672.34 of the *Criminal Code* provides that where an accused is found to have committed a criminal act (or omission) but was at the time exempt from criminal responsibility by virtue of s 16, “the judge or jury shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.”

²⁰ *Criminal Code*, *supra* note 3.

In *Winko v British Columbia (Forensic Psychiatric Institute)*, the Supreme Court of Canada discussed the nature of this verdict, concluding that while it is not a conviction, it is also not a true acquittal.²¹

The verdict of NCR 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. Criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong. 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.

Nor is the verdict that a person is NCR a verdict of acquittal. Although people may be relieved of criminal responsibility when they commit offences while suffering from mental disorders, it does not follow that they are entitled to be released absolutely. Parliament may properly use its criminal law power to prevent further criminal conduct and protect society. By committing acts proscribed by the Criminal Code, NCR accused bring themselves within the criminal justice system, raising the question of what, if anything, is required to protect society from recurrences... [citations omitted.]

The latter part of this passage alludes to the most significant practical difference between the mental disorder defence and more conventional criminal law defences. While an accused who successfully raises the mental disorder defence²² is not considered responsible for his or her criminal actions, the accused is also not necessarily freed from the criminal justice system. Rather, if necessary to protect the safety of the public, the accused may be subjected to substantial restrictions on his or her liberty including detention for extended periods of time.²³

²¹ *Winko*, *supra* note 7 at paras 31-32.

²² Or with respect to whom it is successfully raised by the Crown: see *Criminal Code*, *supra* note 3 at s 16(3).

²³ *Criminal Code*, *supra* note 3 at s 672.54.

The process by which an accused's liberty is restricted following an NCRMD verdict is discussed below.

2.3 Process Following an NCRMD Verdict

Once an NCRMD verdict is entered, an initial disposition hearing must be held to determine what, if any, limits on the accused's liberty are required to protect the safety of the public.²⁴ This hearing may be held by the Court that entered the verdict,²⁵ or may be deferred to a provincial Review Board.²⁶

The *Criminal Code* requires each Province to establish a Review Board with jurisdiction over accused persons who have been found NCRMD.²⁷ Review Boards must consist of a minimum of five members who are appointed by the Lieutenant-Governor of the Province.²⁸ The membership must include at least one member entitled to practice psychiatry in the Province²⁹ and the Chairperson of the Review Board must be a federal, superior, district or county court judge "or a person who is qualified for appointment to, or has retired from, such a judicial office."³⁰ In British Columbia, appointments to the BC Review Board are governed by the *Administrative Tribunals Appointment and Administration Act*³¹ and the Review Board's Recruitment, Screening and Appointment Procedures.³² These procedures provide that in addition to psychiatrists, those entitled to practice medicine or psychology and those appointed to

²⁴ *Ibid.*

²⁵ *Ibid* at s 672.45: the Court is required to hold the hearing on the application of the accused or the Crown.

²⁶ *Ibid* at s 672.47.

²⁷ *Ibid* at s 672.38: The Review Board also has jurisdiction over accused persons found unfit to stand trial.

²⁸ *Ibid* at s 672.38(1).

²⁹ *Ibid* at s 672.39.

³⁰ *Ibid* at s 672.4.

³¹ SBC 2003, c 47.

³² British Columbia Review Board, *Recruitment, Screening and Appointment Procedures* (27 April 2004).

or qualified for appointment to the judiciary, those who may be appointed to the Review Board include:³³

[L]ay members which have over time consisted of individuals who are knowledgeable about mental health issues, from such fields as social work, psychiatric nursing, family medicine, criminology or other relevant disciplines.

If the hearing is deferred to the Review Board, which is most often the case,³⁴ it must be held within 45 days of the verdict unless exceptional circumstances warrant an extension.³⁵ In the event of such an extension the hearing must be held within 90 days of the verdict.³⁶ Any order for the detention or release of the accused pending trial which was in place prior to the verdict is extended until the initial disposition hearing takes place.³⁷

The procedure at Review Board disposition hearings is governed by s 672.5 of the *Criminal Code* which provides that the hearing “may be conducted in as informal a manner as is appropriate in the circumstances.”³⁸ At the hearing, assessments of the accused’s condition may be received, parties may adduce evidence, make submissions, call and cross-examine witnesses and, on application, cross-examine the author of any assessment submitted to the Court.³⁹ Any victim(s) of the index offence may submit a victim impact statement and at the victim’s request the Review Board must permit the victim to read the statement during the hearing.⁴⁰ In *Winko* the

³³ *Ibid*, at 7.

³⁴ Anne G Crocker *et al*, “To Detain or to Release? Correlates of Dispositions for Individuals Declared Not Criminally Responsible on Account of Mental Disorder” (2011) 56:5 Can J of Psychiatry 293 at 294; Livingston *et al*, *supra* note 16 at 411.

³⁵ *Criminal Code*, *supra* note 3 at s 672.47.

³⁶ *Ibid* at s 672.47(2).

³⁷ *Ibid* at s 672.46.

³⁸ *Ibid* at s 672.5(2).

³⁹ *Ibid* at s 672.5(11).

⁴⁰ *Ibid* at s 672.5 (14) and (15.1).

Supreme Court of Canada held that Review Board hearings are inquisitorial, describing Review Board or Court hearings in this context as follows:⁴¹

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 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.

Following the hearing the Court or Review Board is required to make one of three orders. The accused may be discharged absolutely, discharged with conditions, or detained in hospital.⁴² The analysis the Court or Review Board is required to undertake to make this decision is discussed in detail below. If the accused is detained or discharged with conditions, the accused will remain under the jurisdiction of the Review Board. A subsequent hearing to review the initial order is required every 12 months and in some cases the Review Board may require an earlier hearing.⁴³ The time for review may be extended⁴⁴ up to 24 months if the accused and the Crown agree to the extension and the accused is represented by counsel.⁴⁴ It may be extended up to 36 months where the accused is designated a "high-risk accused" under s 672.64 of the *Criminal Code*, the Review Board is satisfied that the accused's condition is not likely to

⁴¹ *Winko*, *supra* note 7 at para 54.

⁴² *Criminal Code*, *supra* note 3 at s 672.54.

⁴³ *Ibid* at s 672.81.

⁴⁴ *Ibid* at s 672.81(1.1).

improve and that detention will remain necessary for the period of the extension.⁴⁵ Any decision of the Review Board may be appealed directly to the Court of Appeal of the Province in which the decision was made.⁴⁶

2.4 Decision-Making in Disposition Hearings

At the conclusion of any disposition hearing, whether an initial disposition hearing in a Court or an initial or subsequent disposition hearing before a Review Board, the accused must receive one of three dispositions - detention in a hospital, a discharge with conditions, or an absolute discharge.⁴⁷ In the case of an absolute discharge, the accused is freed from the Review Board's jurisdiction, subject to no further restrictions on his or her liberty, and no further disposition hearings are required.⁴⁸ An accused that is detained or conditionally discharged will remain under the supervision of the Review Board until absolutely discharged.⁴⁹

Decision-making in any initial or subsequent disposition hearing is governed by s 672.54 of the *Criminal Code*. This provision requires the Court or Review Board to make a disposition that is "necessary and appropriate in the circumstances", a standard held by the Courts of Appeal of both Ontario and British Columbia to require that the "least onerous and least restrictive" disposition be imposed.⁵⁰ In determining the "necessary and appropriate" disposition, the Court or Review Board is obliged to consider "the safety of the public, which is the paramount

⁴⁵ *Ibid* at s 672.81(1.32).

⁴⁶ *Ibid* at s 672.72(1).

⁴⁷ *Ibid* at s 672.54.

⁴⁸ *Ibid* at s 672.81.

⁴⁹ *Ibid* at s 672.81.

⁵⁰ *Ranieri (Re)*, 2015 ONCA 444, at paras 19-20, 336 OAC 88; *Carrick (Re)*, 2015 ONCA 866, at para 15, 127 OR (3d) 209; *Nelson v British Columbia (Adult Forensic Psychiatric Services)*, 2017 BCCA 40, at para 26, [2017] BCJ No 118.

consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused.”⁵¹

An absolute discharge is mandatory where the Court or Review Board does not conclude that the accused represents a “significant threat to the safety of the public.”⁵² In *Winko*, the majority held that there is no burden on the accused to demonstrate that he or she does not represent such a threat and that in the absence of a positive finding that the standard is met, the accused must be discharged absolutely. The Court expanded on this inquiry and the concept of “dangerousness” in the following passage:⁵³

To assist with this difficult task, and to protect the constitutional rights of the NCR accused, Parliament in Part XX.1 has given “dangerousness” a specific, restricted meaning. Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a “significant threat to the safety of the public”. To engage these provisions of the Criminal Code, the threat posed must be more than speculative in nature; it must be supported by evidence. The threat must also 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 a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused’s liberty. [citations omitted.]

If the Court or Review Board concludes that the accused does pose a significant threat to the safety of the public, it must then decide between two alternative dispositions. It may discharge the accused subject to conditions, or it may order that the accused be detained in

⁵¹ *Criminal Code*, *supra* note 3 at s 672.54.

⁵² *Ibid.*

⁵³ *Winko*, *supra* note 7 at para 57.

hospital, again subject to the conditions the Court of Review Board believes to be appropriate in the circumstances.⁵⁴ Both the disposition and conditions must be determined in accordance with the standard set in s 672.54, in that both must be “necessary and appropriate” and must be determined with consideration of public safety - the paramount consideration - and the accused’s mental condition, reintegration and other needs.

In *Forensic Psychiatric Institute v Johnson*, The British Columbia Court of Appeal described the role of Courts or Review Boards in setting conditions in the following terms:⁵⁵

It is apparent from the scheme of Part XX.1 as a whole that the paramount duty of the Review Board is to craft disposition orders which achieve an appropriate balance between the liberty interests of an accused, who has been found either unfit to stand trial or not criminally responsible by reason of mental disorder, and the public safety interests of the community as a whole. It is also clear that, in enacting Part XX.1, Parliament anticipated that striking an appropriate balance would, in some cases, require that conditional discharge orders be made with respect to accused persons who could not be ruled out as posing a significant risk to public safety. In such cases, the Review Board is charged with the responsibility of crafting conditions which are relevant to the special and differing needs of each accused person. The principal object of those conditions is to achieve the maximum protection for the public safety with a minimum degree of interference with the accused’s liberty, and not simply to enhance the accused’s treatment, although in many cases, and this is one of them, the two considerations will be inextricably linked.

The *Criminal Code* places few limits on the conditions that may be placed on an accused who is conditionally discharged or detained in hospital. Among the limits that do exist are that the Court or Review Board may not mandate “psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment” except with the consent of the

⁵⁴ *Ibid* at para. 62.

⁵⁵ 66 BCAC 34, 1995 CanLII 399, at para 50 [*Johnson*].

accused.⁵⁶ Section 672.54 has also been interpreted to prohibit conditions requiring NCRMD accused who are conditionally discharged to reside in hospital.⁵⁷

The Court or Review Board may also delegate the authority to vary conditions associated with either a conditional discharge or detention to the “person in charge” of the hospital responsible for an accused’s care.⁵⁸ In the event a variation made under this provision results in an order that is significantly more restrictive than the original conditions and remains in place for more than seven days, the variation must be reported to the Review Board⁵⁹ and the Review Board must hold a hearing to review the variation “as soon as practicable after receiving the notice.”⁶⁰

2.5 The Purpose and Function of the NCRMD Verdict in the Canadian Criminal Justice System

The NCRMD verdict serves two distinct functions within the Canadian criminal justice system. First, it ensures that accused persons suffering from mental illness are not improperly held criminally liable or punished for acts for which they do not bear moral responsibility. Secondly, it protects the safety of the public by limiting the freedom of those who have demonstrated that they pose a risk to public safety due to their mental illness and by ensuring that they have access to treatment that may reduce this risk in the long-term.⁶¹

Canadian criminal law is based on the presumption that people are “autonomous and rational”, can distinguish right from wrong, and as a result can justifiably be subject to criminal

⁵⁶ *Criminal Code*, *supra* note 3 at s 672.55.

⁵⁷ *Johnson*, *supra* note 55 at paras 49-54; *Brockville Psychiatric Hospital v McGillis*, 1996 CanLII 1828, [1996] OJ No 3429 (CA); *Centre for Addiction and Mental Health v Young*, 2011 ONCA 432, at paras 30-31, 273 CCC 274.

⁵⁸ *Criminal Code*, *supra* note 3 at s 672.56(1).

⁵⁹ *Ibid* at s 672.56(2).

⁶⁰ *Ibid* at s 672.81(2).

⁶¹ *Bouchard-Lebrun*, *supra* note 8 at para 52; *Winko*, *supra* note 7 at paras 31-32.

sanction as a consequence of their actions.⁶² The need for a distinct mechanism for addressing mentally disordered accused stems from the failure of this presumption to hold in the case of those eligible for the NCRMD verdict. Inherent in the verdict is a finding that the accused could not understand the “nature and quality” of the act or could not understand that it was wrong. This was explained by the Supreme Court of Canada in *R v Bouchard-Lebrun*:⁶³

Insanity is an exception to the general criminal law principle that an accused is deemed to be autonomous and rational. A person suffering from a mental disorder within the meaning of s. 16 *Cr. C.* is not considered to be capable of appreciating the nature of his or her acts or understanding that they are inherently wrong. This is why Lamer C.J. stated in *Chaulk* that the insanity provisions of the *Criminal Code* “operate, at the most fundamental level, as an exemption from criminal liability which is predicated on an incapacity for criminal intent”

...[I]t can also be said that an insane person is incapable of morally voluntary conduct. The person’s actions are not actually the product of his or her free will. It is therefore consistent with the principles of fundamental justice for a person whose mental condition at the relevant time is covered by s. 16 *Cr. C.* not to be criminally responsible under Canadian law. Convicting a person who acted involuntarily would undermine the foundations of the criminal law and the integrity of the judicial system.

An accused person eligible for an NCRMD verdict is not responsible for his or her actions, and a person not responsible for their actions cannot be convicted of a criminal offence. On the basis of this logic, the Supreme Court of Canada held in *R v Swain* that “it is a principle of fundamental justice that the criminal justice system not convict a person who was insane at the time of the offence.”⁶⁴ Because the accused is not morally responsible for their actions or the harm they have caused, they cannot be found criminally culpable, and cannot be subjected to punishment.

⁶² *Bouchard-Lebrun*, *ibid* at paras 48-49.

⁶³ *Bouchard-Lebrun*, *ibid* at paras 50-51.

⁶⁴ *R v Swain*, [1991] 1 SCR 933 at 976-977, [1991] SCJ No 32 [*Swain*].

Normally, an accused that is found not to bear moral responsibility for his or her criminal acts would be acquitted and set free. This is the premise underlying most criminal defences. This outcome, however, would frustrate the second of the verdict's two purposes - that of safeguarding the public from people likely to cause future harm due to their mental illness. In order to serve this function, an accused found NCRMD cannot be punished, but as described at length above may be detained in hospital and provided access to treatment as necessary to protect public safety.⁶⁵ Accordingly, it is only where the verdict is combined with a forward-looking assessment of risk that this preventive detention (or other restriction on liberty) is permitted.⁶⁶

2.6 Conclusion

This chapter has described the existing *Criminal Code* provisions pertaining to the NCRMD verdict. It has provided an overview of the mental disorder "defence" and the test applied in determining whether to impose the verdict, the process to be followed where an accused is found NCRMD, and the nature of the decision-making process mandated by the *Code* in an initial disposition hearing by a Court or Review Board, or a subsequent hearing by a Review Board. The current NCRMD verdict and Review Board system is, in many ways, a response to the deficiencies in the system that existed prior to its enactment. Accordingly, a complete understanding of the current system requires a sense of what came before, and the process by which it became that which is described above. The chapter that follows traces the development of the modern defence from its origins in medieval England to the modern day.

⁶⁵ *Bouchard-Lebrun*, *supra* note 8 at para 52; *Winko*, *supra* note 7, at paras 31-32.

⁶⁶ *Winko*, *ibid* at paras 31-32.

Chapter 3: History of the NCRMD Verdict

3.1 Overview

This chapter identifies the origins of the modern Canadian mental disorder defence in 19th century England and traces its evolution through to the modern day. In doing so, it provides historical context necessary to understand why the law exists in its current form and how it developed. It focuses in particular on the evolution of the manner in which those subject to NCRMD verdicts (or its predecessors) were treated following the verdict.

The chapter begins with an overview of mental disorder “defences” prior to 1800, before discussing two key 19th century English cases which continue to resonate in Canadian law today. This is followed by a review of the evolution of the Canadian *Criminal Code* provisions, focusing on reforms enacted in 1992 following the Supreme Court of Canada’s decision in *R v Swain*.⁶⁷

3.2 Mental Disorder in English Criminal Law Prior to 1800

Exemptions from criminal liability for those with diminished or compromised mental capacity have a long history in Western legal traditions dating back to Talmudic, Roman and ancient Greek law.⁶⁸ Within the English-speaking world, the origins of such exemptions can be traced back to the 11th century.⁶⁹ As part of their efforts to centralize English law, the Norman kings spread religiously-based notions of moral guilt, which eventually evolved into modern

⁶⁷ *Supra* note 64.

⁶⁸ RP Ogloff, Derek Eaves & Ronald Roesch, “The Mental Disorder Provisions of the Criminal Code: Background and Overview” in Derek Eaves, RP Ogloff & Ronald Roesch, eds *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Mental Health Law and Policy Institute at Simon Fraser University: Burnaby, BC, 2000) at 4-5; Debra Wood, “Ancient Origins - or Otherwise - of the Insanity Defence” (2009) 16:sup1 *Psychiatry, Psychology and Law* 145 at 146-151.

⁶⁹ Cyril Greenland, “Crime and the Insanity Defence, An International Comparison: Ontario and New York State (1979) 7:2 *Bulletin of the American Academy of Psychiatry and Law*, 125 at 125.

mens rea requirements.⁷⁰ With the recognition of mental state requirements for criminal liability came exemptions founded on the same basis, including those grounded in mental disorder.⁷¹

Despite this long history there was little consistency in the treatment of accused persons suffering from mental disorder prior to 1800. Cases involving such accused were sometimes resolved informally between victims and the family of the offender, sometimes dismissed prior to trial due to the absence of the capacity to be tried, and in some cases proceeded to trial resulting in an acquittal on the basis of ‘insanity’ or a conviction along with a recommendation for a royal pardon.⁷² Just as there was little consistency in how charges against mentally ill accused were resolved, there was likewise significant variability in the treatment of these accused following the conclusion of legal proceedings. Regardless of how the charges were formally resolved, they could result in any of a number of practical outcomes for the accused. They may have been released from custody and entrusted to the care of their families, detained in jail, or confined to ‘madhouses,’ even following an acquittal.⁷³

In addition to this lack of consistency in how mental disorder was treated by the Courts, the common understanding of mental illness at the time, which had little grounding in science, also had a significant impact on who had access to the defence and what happened to them after the charges were resolved. It was common during this era to analogize those suffering from

⁷⁰ Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (New Haven: Yale University Press, 1995) at 35.

⁷¹ *Ibid.*

⁷² Dana Y Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (New York: Palgrave Macmillan, 2004) at 24.

⁷³ *Ibid* at 43.

mental illness to animals and children. In one 1724 case, the judge instructed the jury as follows:⁷⁴

When a man is guilty of a great offence, it must be very plain and clear before a man is allowed such an exemption . . . it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast...⁷⁵

Understandings of mental illness such as that reflected in this passage contributed to the arbitrariness of the application of the defence by excluding those who were genuinely not responsible for their actions, but whose mental illness did not manifest in a way that satisfied this standard. This understanding of mental illness may well have contributed to the “great confinement” - the rise of isolation and institutionalization as the preferred treatment for ‘insanity’ beginning at the end of the 18th century,⁷⁶ which seems likely to have influenced the formalization of detention and institutionalization following insanity verdicts at the beginning of the 19th century, discussed below.

Over the course of the 18th century greater formality was introduced into the criminal justice system. With the emergence of the modern adversarial trial, complainants began to lose the control over proceedings they had previously enjoyed.⁷⁷ Counsel became increasingly common for both the prosecution and defence and accused persons gained new rights including the right to be present for the examination of their accuser and the right to cross-examine.⁷⁸ These and other changes constrained existing mechanisms for the informal resolution of charges

⁷⁴ Edward Arnold (1724) 16 St Tr 695; Daniel R Robinson, *Wild Beasts & Idle Humours: The Insanity Defence from Antiquity to the Present* (Cambridge: Harvard University Press, 1996) at 134; See also: Eigen, *supra* note 70 at 35.

⁷⁵ Ogloff, Eaves & Roesch, *supra* note 68 at 5.

⁷⁶ David Wright, “Getting Out of the Asylum: Understanding the Confinement of the Insane in the Nineteenth Century” (1997) 10:1 *Social History of Medicine* 137 at 139; Andrew Scull *Madness in Civilization* (Princeton: Princeton University Press, 2015) at 203-205.

⁷⁷ Rabin, *supra* note 72 at 27.

⁷⁸ *Ibid* at 27 and 36-37.

against mentally disordered accused and may have contributed to the formalization of the ‘insanity’ defence as discussed below.⁷⁹

3.3 *Hadfield, the Criminal Lunatics Act and M’Naghten*

The modern mental disorder defence began to take shape at the beginning of the 19th century. In 1800, *R v Hadfield*⁸⁰ prompted legislative changes to the treatment of accused persons acquitted on the basis of insanity. Nearly half a century later, *M’Naghten’s Case*⁸¹ and the resulting commentary from the House of Lords would bring uniformity to the test applied to assess claims of ‘insanity’. Each of these developments played an important role in shaping the modern Canadian NCRMD verdict.

3.3.1 *R v Hadfield and the Criminal Lunatics Act*

The origins of the modern mental disorder defence can be traced back to the evening of May 15, 1800. On that night a former military officer named James Hadfield attempted to fire a pistol into the royal box at the Drury Theatre, which was occupied by King George III.⁸² A member of Scotland Yard who was seated next to Hadfield interfered, saving the King’s life.⁸³ Hadfield was immediately arrested and charged with treason.⁸⁴

Hadfield entered a plea of insanity at trial.⁸⁵ Both the Crown and defence took the position that Hadfield was entitled to an acquittal on that basis and the jury found him not guilty,

⁷⁹ *Ibid* at 33.

⁸⁰ (1800) 27 St Tr 1281.

⁸¹ *Supra* note 4.

⁸² Rabin, *supra* note 72 at 143-144.

⁸³ *Ibid* at 143-144.

⁸⁴ *Ibid* at 146

⁸⁵ Ogloff, Eaves & Roesch, *supra* note 68 at 4-5.

concluding that he was “under the influence of insanity at the time the act was committed.”⁸⁶

Alongside the apparent consensus that an acquittal was appropriate, there was also shared concern about the risk posed both to the public and to Hadfield himself were he to be released. Hadfield’s counsel asserted that “the safety of the community requires that this unfortunate man be taken care of.”⁸⁷

Four days after the verdict, Parliament took steps to satisfy this demand. On June 20th, 1800, the Attorney General introduced a bill that eventually resulted in the enactment of *An Act for the Safe Custody of Insane Persons Charged with Offences*,⁸⁸ more commonly known as the *Criminal Lunatics Act*. This Act formally established the special verdict of “not guilty but insane.” Section 1 of the Act provided for the automatic detention of any person subject to the verdict:⁸⁹

That in all cases . . . of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until his Majesty’s pleasure shall be known.

While Hadfield was not the first ‘insane’ accused to be detained,⁹⁰ the *Criminal Lunatics Act* provided the first legislated authority for such detention.⁹¹ As will be discussed later in this

⁸⁶ Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012) at 109; Rabin, *supra* note 72 at 156; Ogloff, Eaves & Roesch, *supra* note 68 at 6.

⁸⁷ Rabin, *supra* note 72 at 156.

⁸⁸ 39&40 Geo 3, c 94.

⁸⁹ Loughnan, *supra* note 86 at 110.

⁹⁰ Eigen, *supra* note 70 at 45.

⁹¹ Tollefson & Starkman, *supra* note 2 at 14; Rebecca Sutton, “Canada’s Not Criminally Responsible Reform Act: Mental Disorder and the Danger of Public Safety” (2013) 60:1 Criminal Law Quarterly 41 at 43.

chapter, the automatic and indefinite detention of those acquitted on the basis of insanity would persist in Canadian law nearly two centuries following the enactment of the *Criminal Lunatics Act*.⁹²

3.3.2 *M’Naghten’s Case*

While the *Criminal Lunatics Act* governed the fate of those found “not guilty but insane” following the verdict, the modern test for determining when the verdict ought to be applied was not established for nearly another half century. On January 20, 1843, Daniel M’Naghten shot and killed Edward Drummond, the private secretary to Prime Minister Robert Peel, believing Drummond to be the Prime Minister himself.⁹³ M’Naghten was charged with murder.⁹⁴

At trial, the Crown took the position that M’Naghten could not be found not guilty but insane as he was not ‘totally deprived of reason’ at the time of the offence.⁹⁵ The defence argued for a lower standard, asserting that M’Naghten should be acquitted as “the fierce and fearful delusion that he was being persecuted subsisted at the time of killing and meant he was unable to control his actions.”⁹⁶ Upon hearing the medical evidence regarding M’Naghten’s mental state, the presiding justice stopped the trial declaring that “the whole of the medical evidence is on one side”⁹⁷ and the jury found M’Naghten not guilty but insane.⁹⁸

M’Naghten’s acquittal sparked public outrage, fueled by concern that a lowered standard would permit the mentally ill to kill without fear of consequence.⁹⁹ The public concern over the

⁹² Verdun-Jones, *Insanity Defence*, *supra* note 12 at 175.

⁹³ Ogloff, Eaves & Roesch, *supra* note 68 at 6; Loughnan, *supra* note 86 at 113.

⁹⁴ Loughnan, *ibid* at 113.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at 113-114.

⁹⁸ *Ibid* at 114.

⁹⁹ Ogloff, Eaves & Roesch, *supra* note 68 at 7.

verdict prompted the House of Lords to call before it the 15 judges of the Queen’s Bench to explain the decision.¹⁰⁰ 14 expressed agreement with the standard articulated by the Chief Justice of Common Pleas, Nicholas Tindal:¹⁰¹

[T]he jurors ought to be told in all cases that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must clearly be proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

This pronouncement soon came to be accepted as an authoritative statement of the law.¹⁰² It continues to form the basis for the standard against which NCRMD claims are evaluated in Canada and equivalent verdicts assessed in much of the common law world.¹⁰³

3.4 The Insanity Defence in Canada after *M’Naghten*: 1843-1992

Prior to Confederation, the law applicable to those who committed criminal acts while “insane” in Canada mirrored that of England.¹⁰⁴ Parliament passed no legislation on this subject in the years between Confederation and the enactment of the first *Criminal Code* in 1892 and so English law remained in effect for several decades following Confederation as well.¹⁰⁵ Jury instructions consistent with the *M’Naghten Rules* were delivered in two reported cases from this era, including the trial of Louis Riel, in which defence counsel pursued the verdict against the wishes of

¹⁰⁰ Christoph Safferling, “Insanity and Intoxication” in Marus D Dubber & Tatjana Hörnle *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 214) at 654; Sentencing Advisory Council, *Mental Impairment and the Law: A Report on the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)*, (South Australia: Government of South Australia, Attorney General’s Department, 2014) at para 2.15.

¹⁰¹ Penney, *supra* 4 at 211, *Loughnan*, *supra* note 86 at 114.

¹⁰² *Loughnan*, *ibid* at 114.

¹⁰³ Yannoulidis, *supra* note 5 at 9; Mackay *et al*, *supra* note 5 at 399.

¹⁰⁴ Simon Verdun-Jones, “The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country” (1979) 14:1 *University of British Columbia Law Review* 1 at 1 [Verdun-Jones, Evolution].

¹⁰⁵ *Ibid* at 2.

and without the cooperation of their client,¹⁰⁶ and in *The Queen v Dubois*.¹⁰⁷ The jury instructions delivered in Riel's trial with respect to the insanity defence were affirmed on appeal to the Manitoba Court of Queen's Bench.¹⁰⁸

3.4.1 The First Criminal Code

The NGRI verdict was codified in Canada in 1892 in the first *Criminal Code*.¹⁰⁹ Ninety-two years after *Hadfield* and 49 years after *M'Naghten*, the provisions are evidence of the influence these two cases continued to hold over the common-law world. The disposition of accused persons found NGRI was addressed in s 736 of the 1892 Code:¹¹⁰

Whenever it is given in evidence upon the trial of any person charged with any indictable offence, that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence, the court before which such trial is had, shall order such a person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known.

The similarity of this text to that of the *Criminal Lunatics Act* reproduced above is striking. Despite the passage of 92 years between their enactments, they are virtually identical, the only substantive difference being the reference to the Lieutenant-Governor in the Canadian provision in place of the reference to the King in the English version.

¹⁰⁶ *Ibid* at 8-11; *The Queen v Louis Riel*, 20 July 1885.

¹⁰⁷ (1890) QLR 203 (QB); Verdun-Jones, *Evolution*, *ibid* at 14-16.

¹⁰⁸ Verdun-Jones, *Evolution*, *ibid* at 11; *The Queen v Louis Riel*, 9 September 1885. Leave to appeal to the Judicial Committee of the Privy Council denied: *Riel v The Queen*, [1885] UKPC 37.

¹⁰⁹ Tollefson & Starkman, *supra* note 2 at 15; Penney, *supra* note 4 at 211; *The Criminal Code*, 1892, 55-56 Victoria, s 16 [1892 *Criminal Code*].

¹¹⁰ 1892 *Criminal Code*, *ibid* at s 736.

A similar correlation between the new *Criminal Code* and its English antecedents is evident in the provisions codifying the *M’Naghten Rules*. Aside from a handful of minor variations, the language found in s 11 of the 1892 Code¹¹¹, which was based directly on the unsuccessful 1880 English *Criminal Code Bill*,¹¹² closely mirrors that found in *M’Naghten*:

No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission

Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

While clearly reflecting the *M’Naghten* principles, this provision does diverge in three important respects. First, “natural imbecility” was added as a possible cause of the incapacity, while “defect of reason” was removed. Secondly, where the *M’Naghten Rules* indicated that the accused must not know the nature and quality of the act *or* not know that it is wrong, the 1892 *Code* seems to have required both. This was identified as a drafting error by the Ontario Court of Appeal in 1931,¹¹³ and corrected in 1954.¹¹⁴ Finally, and most significantly, the verb “know” as used in *M’Naghten* was replaced in the Code with “appreciate”, such that it required an accused to be unable to “appreciate the nature and quality of his act.” The Supreme Court of Canada has interpreted this to require a

¹¹¹ *Ibid*, at s 11.

¹¹² Tollefson & Starkman, *supra* note 2 at 16.

¹¹³ *R v Cracknell*, [1931] OR 634 at 637, 56 CCC 190.

¹¹⁴ Verdun-Jones, *Evolution*, *supra* note 104 at 25.

higher level of understanding than the original *M’Naghten Rules*.¹¹⁵ The text of these provisions remained virtually unchanged in the century that followed.¹¹⁶

3.4.2 Provincial Review Boards and Enhanced Procedural Protections

While the provisions discussed above changed little in the 100 years following the creation of the first *Criminal Code*, the procedural protections available to NGRI acquittees began to improve in the late 1960s. In 1969, Parliament amended the *Criminal Code* to permit the Lieutenant-Governor of each Province to appoint a review board to provide non-binding advice regarding those found NGRI while the Lieutenant-Governor retained final decision-making authority.¹¹⁷

At this time, the Provinces were not obliged to appoint a Review Board and final decision-making authority continued to rest with the Lieutenant-Governor.¹¹⁸ Further, the detention of an accused found NGRI remained mandatory following the verdict.¹¹⁹ However, where a Review Board was appointed, it was required to review each case within six months of the verdict and annually after that, providing accused persons with a measure of procedural certainty in the form of a guarantee of regular review.¹²⁰

Procedural protections available to NGRI accused continued to expand in the 1980s. In *Re Abel et al and Advisory Review Board*, the Court held that Review Boards, where established, had a duty to act fairly, which includes an obligation to disclose information, typically including at least

¹¹⁵ *R v Chaulk*, [1990] 3 SCR 1303, [1990] SCJ No 139.

¹¹⁶ Verdun-Jones, Evolution, *supra* note 104 at 25.

¹¹⁷ Tollefson & Starkman, *supra* note 2 at 1.

¹¹⁸ (1986), 72 NSR (2d) 347, 27 CCC (3d); 166 Simon N Verdun-Jones, “Tightening the Reins: Recent Trend in the Application of the Insanity Defence in Canada (1991) 10:3 Medicine and Law 285 at 298 [Verdun-Jones, Tightening the Reins].

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

“the substance of [the] facts” before the Board.¹²¹ A similar decision was reached in British Columbia two years later in *McCann v. Duffy*,¹²² which also guaranteed NGRI acquittees the right to be heard.¹²³ The duty of procedural fairness was later extended to the Lieutenant-Governor in *Re Jollimore and the Queen*, in which the Court held that the Lieutenant-Governor was required to at least consider the opinion of the Review Board, though not necessarily to follow its recommendation.¹²⁴ By the early 1990s every Province in Canada had established a Review Board, though not always under the above provisions of the *Criminal Code*,¹²⁵ and it had become rare in any province for the Lieutenant-Governor to fail to act on advice received from the Review Board.¹²⁶

3.5 Advent of the *Charter* and *R v Swain*

Scrutiny of the NGRI system increased throughout the 1970s and 1980s amid concern that the existing regime would be incompatible with the forthcoming *Canadian Charter of Rights and Freedoms*.¹²⁷ After the Law Reform Commission of Canada expressed concerns in the mid-1970s, the federal government launched a protracted process of study and consultation resulting in a failed attempt at legislative reform in the 1980s.¹²⁸ These efforts were renewed a few years later when the Supreme Court of Canada declared the existing NGRI regime unconstitutional.¹²⁹

¹²¹ (1980), 31 OR (2d) 520; 1980 CanLII 1824 (CA); Verdun Jones, Tightening the Reins, *ibid* at 298.

¹²² (1982), 35 BCLR 133; 1982 CanLII 426 (CA).

¹²³ *Ibid*.

¹²⁴ (1986), 72 NSR (2d) 347, 27 CCC (3d) 166 (SC); Verdun-Jones, Tightening the Reins, *supra* note 118 at 298.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.

¹²⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11; Stephanie Penney, Andrew Morgan & Alexander IF Simpson, “Motivational Influences in Persons Found Not Criminally Responsible on Account of Mental Disorder: A Review of Legislation and Research” (2013) 31:4 *Behavioural Sciences and the Law* 494 at 495.

¹²⁸ Tollefson and Starkman, *supra* note 2 at 7.

¹²⁹ Swain, *supra* note 64.

In 1976, the Law Reform Commission released a report titled *Mental Disorder in the Criminal Process*.¹³⁰ Deeply critical of the NGRI system in place at the time, the Commission claimed that the existing provisions were “largely the result of myth and misunderstanding about the character and nature of the problems created by mentally ill offenders”¹³¹ and cautioned against the “blanket assumption that all mentally ill persons are prone to violence.”¹³² The report included over 40 recommendations, among them that the criminal process be employed only where no viable alternative was available.¹³³

Many of the Law Reform Commission’s recommendations focused on the treatment of those found NGRI following the verdict.¹³⁴ In particular, the Report called for the treatment of an NGRI acquittal as a true acquittal resulting in the release of the accused “subject only to a post-acquittal hearing to determine whether the individual should be civilly detained on the basis of his psychiatric dangerousness.”¹³⁵ The report also advocated for the elimination of the Lieutenant-Governor’s role in reviewing the detention of NGRI acquitees, the expansion of procedural rights for those found NGRI and a requirement that any disposition following the verdict be of determinate length.¹³⁶ In recognition of the expanded role its recommendations would entail for Review Boards, the report

¹³⁰ Tollefson & Starkman, *supra* note 2 at 2; EA Tollefson, “Prologue” in Derek Eaves, RP Ogloff & Ronald Roesch, eds *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Mental Health Law and Policy Institute at Simon Fraser University: Burnaby, BC, 2000) at xvii; Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Law Reform Commission of Canada, 1976).

¹³¹ Tollefson & Starkman, *supra* note 2 at 2; Law Reform Commission of Canada, *supra* note 130 at 6.

¹³² Marilyn Pilon, *Mental Disorder and Canadian Criminal Law* (Canada: Library of Parliament Parliamentary Research Branch, 2002) <<http://publications.gc.ca/Collection-R/LoPBdP/BP/prb9922-e.htm>>.

¹³³ Law Reform Commission of Canada, *supra* note 130 at 41-42.

¹³⁴ Tollefson & Starkman, *supra* note 2 at 2.; Law Reform Commission of Canada, *supra* note 130.

¹³⁵ Law Reform Commission of Canada, *ibid* at 22.

¹³⁶ Tollefson, *supra* note 130 at xvii; Tollefson & Starkman, *supra* note 2 at 2; Law Reform Commission of Canada, *supra* note 130 at 22 and 38.

also called for further study of how the Review Boards and their processes could change to respond to the concerns raised by the Law Commission.¹³⁷

In 1982, the Department of Justice established the “Mental Disorder Project” as part of a national criminal law review.¹³⁸ The Project was tasked with overseeing research, engaging in consultation and making recommendations for the reform of the NGRI verdict.¹³⁹ The consultation undertaken was extensive and engaged with a number of contentious issues including the appropriateness of the *M’Naghten Rules* test for insanity, the nature of the verdict, the question of decision-making power over those subject to the verdict and the duration of detention.¹⁴⁰

The Mental Disorder Project released its final report in September 1985.¹⁴¹ The report included 52 recommendations on a diversity of subjects ranging from the treatment of those found unfit to stand trial, to the defence of automatism, to the availability of appropriate treatment for those suffering from mental illness while serving conventional sentences.¹⁴² It included several recommendations pertaining to the NGRI verdict and the disposition of those subject to it. With respect to the verdict itself, the report’s recommendations included that the existing *M’Naghten* test be retained but that the wording of the verdict be modernized.¹⁴³ With respect to disposition, the report made several recommendations including that the role of the Lieutenant-Governor in making

¹³⁷ Tollefson and Starkman, *ibid* at 2; Law Reform Commission of Canada, *ibid* at 49.

¹³⁸ Pilon, *supra* note 132.

¹³⁹ Tollefson & Starkman, *supra* note 2 at 3; Mental Disorder Project, Criminal Law Review, *Final Report* (Ottawa: Department of Justice, 1985).

¹⁴⁰ Mental Disorder Project *ibid* at 1; Tollefson & Starkman, *ibid* at 3-4; Tollefson, *supra* note 130 at xvii.

¹⁴¹ Mental Disorder Project, *supra* note 139.

¹⁴² *Ibid* at 71-80.

¹⁴³ *Ibid* at 26-27.

dispositions be abolished in favour of the Court and the Review Board and that limits be placed on total detention following the verdict.¹⁴⁴

Many of the recommendations made in the report were incorporated into a bill presented in the House of Commons in 1986.¹⁴⁵ These included changing references to insanity to “mental disorder”, broadening the range of dispositions available following the verdict, empowering Review Boards to make decisions in place of the Lieutenant-Governor and establishing temporal limits on NCRMD dispositions.¹⁴⁶ The bill was never passed into law, its progress halted by the 1988 federal election.¹⁴⁷

3.5.1 *R v Swain*

The NGRI verdict was forced back onto the legislative agenda in 1991 by the Supreme Court of Canada’s decision in *R v Swain*.¹⁴⁸ Owen Swain was charged with assault and aggravated assault for violently attacking his spouse and two young children, causing minor injuries.¹⁴⁹ Mr. Swain testified that he believed at the time of the incident that “his family was being attacked by devils” and that his actions were necessary to protect them.¹⁵⁰ After his arrest, but prior to his trial, Mr. Swain was committed under the Ontario *Mental Health Act*¹⁵¹ and his condition improved rapidly in

¹⁴⁴ *Ibid* at 40-49.

¹⁴⁵ Pilon *supra* note 132; Canada, Parliament, Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code*, 37th Parl, 1st Sess (June 2002) at 2.

¹⁴⁶ Tollefson and Starkman, *supra* note 2 at 4-5; Standing Committee on Justice and Human Rights, *ibid* at 2.

¹⁴⁷ Tollefson and Starkman, *ibid* at 7.

¹⁴⁸ *Supra* note 64.

¹⁴⁹ *Ibid* at 954.

¹⁵⁰ *Ibid* at 955.

¹⁵¹ RSO 1980, c 262.

response to anti-psychotic medication.¹⁵² He was released from hospital seven weeks later, granted bail, and lived in the community for approximately 18 months prior to trial.¹⁵³

The Crown sought to adduce evidence relevant to the NGRI verdict and was permitted to do so over the objections of the defence.¹⁵⁴ At the conclusion of the trial, Mr. Swain was found NGRI.¹⁵⁵ The defence immediately applied for a declaration that s 542(2) of the *Criminal Code*, which provided for indefinite, automatic detention following an NGRI verdict was unconstitutional, and of no force and effect.¹⁵⁶ The application was denied¹⁵⁷ and the decision upheld by the Ontario Court of Appeal.¹⁵⁸

On appeal to the Supreme Court of Canada, Swain challenged the detention provisions of the NGRI regime on the basis of sections 7 and 9 of the *Charter of Rights and Freedoms*.¹⁵⁹ The Court overturned the decision of the Court of Appeal, concluding that the existing legislation violated both sections and struck down s 542(2) of the *Criminal Code*.¹⁶⁰ The focus of the Court's decision was the automatic detention of NGRI acquittees in the absence of any determination of the accused's mental state at the time of the verdict. The majority held that because NGRI acquittees will not necessarily pose a threat to the public, automatic detention beyond what is required to assess their present mental condition and dangerousness violates the s 9 right to be free from arbitrary detention and the s 7 liberty interests of the accused and could not be saved under s 1.¹⁶¹

¹⁵² *Swain*, *supra* note 64 at 955.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *R v Swain* (1986), 53 OR (2d) 609, 13 OAC 161.

¹⁵⁹ *R v Swain*, *supra* note 64 at 1008-1009.

¹⁶⁰ *Ibid* at 1019.

¹⁶¹ *Ibid* at 1009-1019.

3.6 Bill C-30

Parliament responded to the *Swain* decision by introducing Bill C-30 on September 16, 1991.¹⁶² The legislative changes enacted through Bill C-30 were substantial, far exceeding the totality of changes made to the NGRI provisions in the 100 years since it first appeared in the *Criminal Code*.¹⁶³ These reforms were of two types. The first includes changes to the nature of the verdict as defined in the *Criminal Code*. These were largely cosmetic changes, with little practical impact on the existing law. The second includes changes to the treatment of those found NGRI/NCRMD following the verdict, which were far more substantive.

3.6.1 The Nature of the Verdict

Likely the most visible change enacted in Bill C-30 was the renaming of the “not guilty by reason of insanity” verdict, to “not criminally responsible on account of mental disorder.” In addition to the need to update the antiquated reference to “insanity”, this change was motivated in part by a desire to make clear that those subject to the verdict had not been entirely absolved of wrongdoing as may be implied by the use of the phrase “not guilty.”¹⁶⁴ While over 20 alternatives to the *M’Naghten Rules* were considered during the research and consultation process, this change in language was not accompanied by any significant change in the formulation of the standard to be met to qualify for the verdict.¹⁶⁵ Additional semantic changes to the language of the *M’Naghten Rules* included the elimination of antiquated references to “natural imbecility” and “specific

¹⁶² Verdun-Jones, *Insanity Defence*, *supra* note 12 at 175.

¹⁶³ *Ibid* at 175.

¹⁶⁴ Carol Snell, “The Criminal Code Amendments: The Legal Background” in Derek Eaves, RP Ogloff & Ronald Roesch, eds, *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Mental Health Law and Policy Institute at Simon Fraser University: Burnaby, BC, 2000) at 23.

¹⁶⁵ Tollefson, *supra* note 130 at xix.

delusions” and the codification of the burden and quantum of proof already being applied by the Courts.¹⁶⁶

3.6.2 Disposition Following the Verdict

The substantive changes enacted in Bill C-30 primarily affected the treatment of accused persons following the verdict. Among the most significant were the following. First, Bill C-30 abolished automatic, indefinite detention.¹⁶⁷ Following the amendments, accused persons found NCRMD would be detained for up to 45 days, or 90 days in exceptional circumstances, to allow for a hearing either by the Court or the Review Board to assess whether the accused represented a “significant threat to the safety of the public” and determine the appropriate disposition.¹⁶⁸ Secondly, the amendments eliminated the role of the Lieutenant-Governor, elevating Review Boards from an advisory role to that of decision-maker and mandating that they review the status of each NCRMD accused regularly.¹⁶⁹ Thirdly, the legislation introduced new dispositional options. As discussed in the previous chapter, the Review Board now had the option of detaining an accused, discharging with conditions or granting an absolute discharge.¹⁷⁰ Finally, the NCRMD verdict was made available to those charged with summary conviction offences.¹⁷¹

3.6.3 Capping Provisions

In addition to these changes, Bill C-30 included provisions that would have limited the amount of time a person could remain under Review Board jurisdiction following an NCRMD verdict. The legislation created three categories of offences with separate limits or “caps” for each.

¹⁶⁶ Tollefson & Starkman, *supra* note 2 at 16-17; Tollefson, *ibid*.

¹⁶⁷ Penney, Morgan & Simpson, *supra* note 127 at 495.

¹⁶⁸ *Criminal Code*, *supra* note 3 at s 672.54.

¹⁶⁹ Penney, Morgan & Simpson, *supra* note 127 at 495; *Criminal Code*, *ibid* at s 672.81.

¹⁷⁰ Grant, *supra* note 16 at 424.

¹⁷¹ Standing Committee on Justice and Human Rights, *supra* note 145 at 3.

Those found NCRMD after being charged with murder, high treason, certain offences under the *National Defence Act*, and other offences with a minimum sentence of life imprisonment could be detained for life.¹⁷² For those found NCRMD for offences against the person or offences that endangered the security of the state and which were prosecuted by indictment, the cap would be the lesser of ten years or the maximum sentence available under the *Criminal Code* for the index offence.¹⁷³ For all other offences, the cap would be the lesser of two years or the maximum sentence available for the index offence.¹⁷⁴ These provisions would have been retrospective and applicable to those found NGRI before Bill C-30 came into force.¹⁷⁵

Bill C-30 also included an associated provision which would have permitted the Court, on the application of the Crown, to designate individual accused “Dangerous Mentally Disordered Accused” (DMDA) following the verdict, but prior to disposition.¹⁷⁶ Where the designation was applied the Court would have had the discretion to increase the cap on disposition up to the life of the accused, regardless of the underlying index offence.¹⁷⁷

While the capping provisions enjoyed some support, they were subject to significant opposition from the provinces and from treatment providers. The concerns underlying this opposition related to fears for public safety associated with the prospect of the mandatory release of NCRMD accused who had not been successfully treated and who continued to represent a threat to the public.¹⁷⁸ Several provinces also expressed concern that the release of these accused would increase costs for civil mental health systems on which the burden of treating these individuals

¹⁷² Snell, *supra* note 164 at 33.

¹⁷³ Snell, *ibid.*

¹⁷⁴ Snell, *ibid.*

¹⁷⁵ Tollefson & Starkman, *supra* note 2 at 118.

¹⁷⁶ *Ibid* at 117.

¹⁷⁷ *Ibid.*

¹⁷⁸ Tollefson, *supra* note 130 at xxix-xxx.

would fall.¹⁷⁹ The DMDA designation was considered by some to be an inadequate solution to this problem in part because the designation had to be made at the time of the verdict and could not be sought immediately prior to the expiration of the applicable cap.¹⁸⁰

Proclamation of the capping and DMDA provisions was initially delayed as the bill included transitional provisions which required appointment of a commissioner to review the cases of those under Lieutenant-Governor's warrants to determine whether any should be designated DMDA.¹⁸¹ The commissioner had not been appointed at the time the rest of the bill came into force and was ultimately never appointed.¹⁸²

The capping and DMDA provisions were never brought into force. In 1999, the Manitoba Court of Appeal held that the NCRMD provisions of the *Code*, in the absence of the capping provisions, continued to offend s 7 of the *Charter*.¹⁸³ This decision was explicitly overruled by the Supreme Court of Canada in the same year in *Winko v British Columbia (Forensic Psychiatric Institute)*, in which the Court held that the NCRMD provisions, as established by Bill C-30, were constitutional notwithstanding the absence of the capping and DMDA provisions.¹⁸⁴ In 2002, the Parliamentary Standing Committee on Justice and Human Rights conducted a review of the NCRMD provisions and recommended that the still unproclaimed capping and DMDA provisions be repealed.¹⁸⁵ Parliament repealed the provisions in 2005.¹⁸⁶

¹⁷⁹ Tollefson & Starkman, *supra* note 130 at 119.

¹⁸⁰ *Ibid* at 121.

¹⁸¹ *Ibid* at 115-116.

¹⁸² Snell, *supra* note 145 at 37.

¹⁸³ *R v Hoepfner* (1999), 134 Man R (2d) 163, 25 CR (5th) 91 (CA).

¹⁸⁴ *Winko*, *supra* note 7 at paras 70 and 168.

¹⁸⁵ Standing Committee on Justice and Human Rights, *supra* note 145 at 20.

¹⁸⁶ Raaflaub, *supra* note 13 at 26 and 30; *Mental Disorder Amendment Act, 2005*.

3.7 Bill C-14: The NCRMD Reform Act

Following the enactment of Bill C-30, there was little further change to the NCRMD provisions until 2014. The *Not Criminally Responsible Reform Act* came into force on July 11th of that year.¹⁸⁷ The Act made two major changes to the law pertaining to dispositions for NCRMD accused. First, it directed that public safety be the paramount consideration in determining disposition of NCRMD accused. Secondly, it created a new category of “high risk accused” with special dispositional rules.

As discussed previously, s 672.54 of the *Criminal Code* identifies the factors that should be considered in making disposition decisions regarding NCRMD accused. These include the safety of the public, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused. While Bill C-14 did not change the listed factors, it amended the provision such that “the safety of the public” is now identified as the “paramount consideration.”¹⁸⁸ The amendments also created a new “high-risk accused” designation. An accused so designated must be detained in hospital and, as noted previously, the Review Board may allow up to 36 months between disposition hearings if the Review Board is satisfied that the condition of the accused is unlikely to improve in this time period.¹⁸⁹

3.8 Conclusion

The roots of the Canadian NCRMD verdict date back to 19th century England. In 1800, legislation mandating the indefinite detention of those found NGRI was enacted and later that century the legal test for assessing eligibility for the verdict was settled by the House of Lords. This

¹⁸⁷ SC 2014 c 6.

¹⁸⁸ Grantham, *supra* note 14 at 74-75.

¹⁸⁹ *Ibid* at 75.

law was inherited by Canada and codified in the first *Criminal Code* in 1892. It remained in effect until the early 1990s when, following the advent of the *Charter*, the Supreme Court found the system unconstitutional. Following the ruling, Parliament substantially reformed the system, introducing the modern NCRMD verdict, transferring the authority previously held by the Lieutenant-Governor to provincial Review Boards, and introducing new dispositional options. The chapter that follows discusses the impact of these changes. It reviews studies conducted both prior to and following the enactment of Bill C-30, and considers the effect these changes had on who was being found NCRMD and how they were treated following the verdict.

Chapter 4: Changes in the Population of NCRMD Accused Over Time

4.1 Introduction

As outlined in the previous chapter the mental disorder defence and how those subject to NCRMD or NGRI verdicts in Canada are treated following the verdict have evolved over time. This evolution has coincided with changes in the volume of cases under the jurisdiction of provincial Review Boards or, prior to Bill C-30, the Lieutenant-Governor, the nature of these cases and the characteristics of those found NGRI/NCRMD and their treatment following the verdict.

Beginning in the 1970s the NGRI defence and the treatment of “insanity acquitees” under Lieutenant-Governor’s warrants were the subject of occasional studies. These typically focused on the composition of the population found NGRI and the offences resulting in the verdict.¹⁹⁰ The passage of Bill C-30 in 1992 sparked greater interest in this subject. Several studies in the years that followed the bill sought to understand the impact of the legislation both on the composition of the population under Review Board jurisdiction and how the Review Board was applying its new authority and the new dispositional options created by Parliament.¹⁹¹

¹⁹⁰ Greenland, *supra* note 69; MS Phillips *et al*, “The Advisory Review Board and Characteristics of Patients on Warrants of the Lieutenant Governor in Ontario” (1985) 13:4 *Bulletin of the American Academy of Psychiatry and Law* 373; Michael S Phillips, Tammy Landau & Catherine Osborne, “Persons Discharged from Warrants of the Lieutenant Governor (1987) 32:5 *The Canadian Journal of Psychiatry* 343; S de St. Croix, R Dry & CD Webster, “Patients on Warrants of the Lieutenant Governor in Alberta: A Statistical Summary with Comments on Treatment and Release Procedures” (1988) 33:1 *The Canadian Journal of Psychiatry* 14; Stephen L Golding, Derek Eaves & Andrea M Kowaz, “The Assessment, Treatment and Community Outcome of Insanity Acquitees: Forensic History and Response to Treatment” (1989) 12:2 *International Journal of Law and Psychiatry* 149; Sheilagh Hodgins & Christopher D Webster, *The Canadian Database: Patients Held on Lieutenant-Governors’ Warrants* (Ottawa: Department of Justice, 1992).

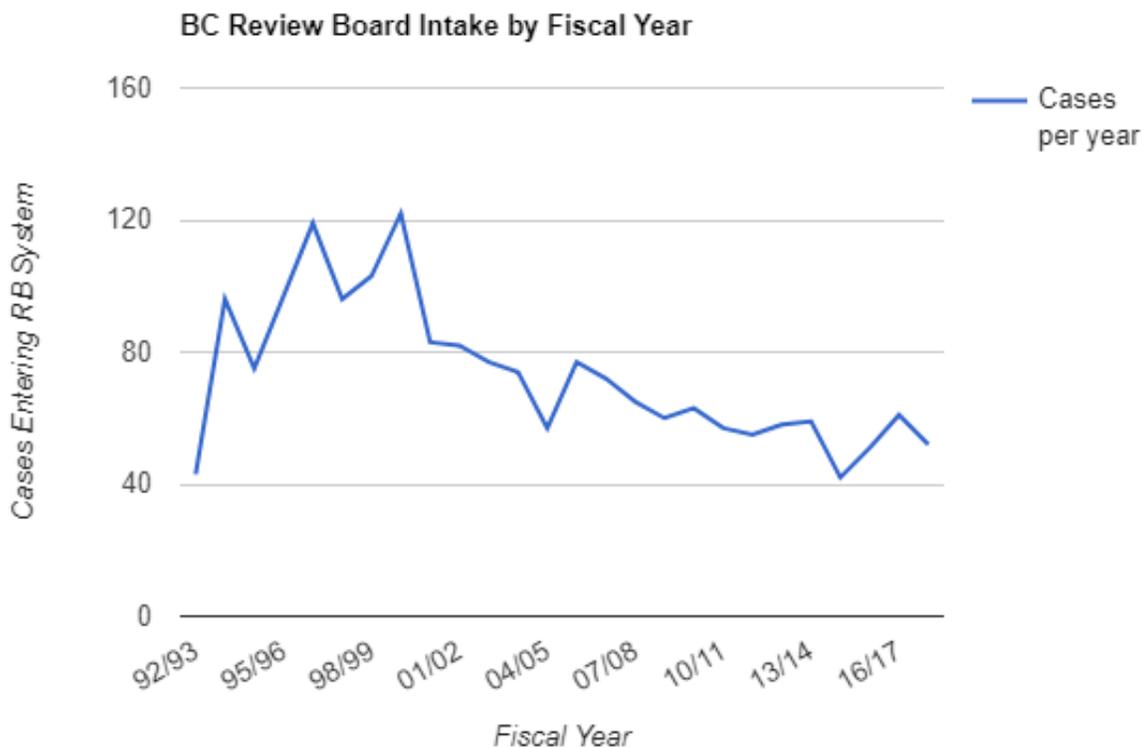
¹⁹¹ Grant, *supra* note 16; Livingston *et al*, *supra* note 16; Jeff Latimer & Austin Lawrence, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Ottawa: Department of Justice, 2006); Sarah L Desmarais *et al*, “A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the Winko Decision” (2008) 7:1 *International Journal of Forensic Mental Health* 1; Crocker *et al*, *supra* note 17.

This chapter reviews the literature relevant to the evolution of the caseload of the British Columbia Review Board over time with a particular focus on the impact of Bill C-30.

4.2 Volume of Cases

Among the most notable of the apparent effects of Bill C-30 in British Columbia was a substantial and rapid increase in the number of accused persons found NCRMD relative to those found NGRI prior to the reforms. Figure 4.1 below shows the changes in the number of new BC Review Board cases since 1992.¹⁹²

Figure 4.1: BC Review Board Intake by Fiscal Year since 1992/93



¹⁹² These statistics include those found unfit to stand trial, but these accused have consistently made up a very small proportion of the Review Board's case load. In 2017/18, for example, there were only 29 unfit accused in the Review Board's total case-load of 373 accused persons: British Columbia Review Board, *Annual Report Fiscal Year: April 2017-March 2018* (Vancouver: British Columbia Review Board, 2015) at 14.

Prior to 1992, the population of those who had successfully raised the insanity defence in Canada was small but growing at a steady pace. Between 1977 and 1990, the total national population of NGRI acquitees nearly doubled from 677 to 1156.¹⁹³ As illustrated in Figure 4.1, the reforms introduced through Bill C-30 coincided with a substantial and immediate acceleration in this rate of growth in British Columbia. In 1993, the first full year in which the reforms were in force, 38 NCRMD accused entered the British Columbia Review Board system.¹⁹⁴ This represents more than a five-fold increase from the period from March 1, 1990 to February 29, 1991, prior to the reforms, when only seven accused were found NGRI in BC.¹⁹⁵ The number of accused found NCRMD nearly doubled again in 1994, when 60 accused entered the Review Board system in the province.¹⁹⁶

These trends were not restricted to British Columbia.¹⁹⁷ Like BC, Ontario and Quebec also experienced significant increases in the number of accused found NCRMD in the years that followed Bill C-30.¹⁹⁸ In Ontario, for example, the number of accused entering the forensic mental health system annually (including both NCRMD/NGRI and unfit accused) nearly quadrupled from fiscal year 1991/92 to fiscal year 1993/94.¹⁹⁹ By 2007/08, the number of accused under the jurisdiction of the Ontario Review Board exceeded the entirety of the 1990 Canadian NGRI population.²⁰⁰

¹⁹³ Hodgins & Webster, *supra* note 190 at 2.

¹⁹⁴ Grant, *supra* note 16 at 426.

¹⁹⁵ *Ibid.*

¹⁹⁶ British Columbia Review Board, *supra* note 192 at 14.

¹⁹⁷ Penney, Morgan & Simpson, *supra* note 127 at 496.

¹⁹⁸ *Ibid.*

¹⁹⁹ Ontario Review Board, *Annual Report Fiscal Reporting Period April 1, 2017 - March 31, 2018* (Toronto: Ontario Review Board, 2018) at 8.

²⁰⁰ *Ibid* at 11.

This significant increase in NCRMD verdicts was not a sustained trend in British Columbia. Statistics reported by the BC Review Board reflect a steady increase in intake from the introduction of the reformed Review Board system until 1999/2000 when the number of new accused persons entering the Review Board system peaked at 122.²⁰¹ Following this year, intake began to decline, reaching a low of 42 new cases in 2014/15.²⁰² British Columbia is unusual in this regard, as elevated rates of intake of accused by Review Boards in most provinces continued to rise or remained steady during this period.²⁰³ This decline has received little attention in the literature and its cause is unknown. It may reflect changing perceptions among accused persons and defence counsel regarding the advantages of an NCRMD verdict relative to a conviction or, less likely given the absence of a relevant change in the law, changes in the rate of success in cases in which the verdict was sought. There is little apparent reason why this decline occurred in British Columbia, but not elsewhere in Canada.

4.3 Characteristics of Cases and Accused Persons Entering the Review Board System in BC

In addition to its impact on the number of accused persons entering the BC Review Board system, the entry into force of Bill C-30 also coincided with notable changes in the nature of those cases, including the characteristics of those found NCRMD and the nature of the charges resulting in the verdict. Detailed below is an overview of how the characteristics of NCRMD accused and cases before the BC Review Board changed following the passage of Bill C-30 and since that time.

²⁰¹ British Columbia Review Board, *supra* note 192 at 14.

²⁰² *Ibid.*

²⁰³ Latimer & Lawrence, *supra* note 191 at 12; Penney, Morgan & Simpson, *supra* note 127 at 496; Ontario Review Board, *supra* note 199 at 8.

4.3.1 Index Offence

Following the reforms there was a distinct shift in the nature and, in particular, the severity of the index offences resulting in NCRMD verdicts. Generally, the offences resulting in NCRMD verdicts following Bill C-30's entry into force were significantly less serious than those resulting in NGRI verdicts prior to its enactment. In numerous studies conducted prior to the reforms, homicides and attempted murders were consistently the most serious index offences²⁰⁴ in 40-65% of cases resulting in NGRI verdicts.²⁰⁵ Conversely, assaults and other offences against the person²⁰⁶ were the most serious index offence in less than a quarter of cases in most studies.²⁰⁷ This changed significantly following the entry into force of Bill C-30. Since 1992, most studies have found that homicides and attempted murder have been the most serious index offence in only 10-15% of cases, while assaults and other offences against the person (not including homicides and attempted murder) were the most serious offence in 50-65% of cases.²⁰⁸

As with the increase in the total number of cases entering the Review Board system, commentators have speculated that the reduced severity of index offences may be the product of a perception that the law has become more favourable to accused persons.²⁰⁹ This theory posits that during the NGRI era, accused persons may have been willing to subject themselves to the

²⁰⁴ As NCRMD accused often have multiple index offences, the most serious index offence, as determined by the length of the maximum sentence, is used when considering index offence severity.

²⁰⁵ Greenland, *supra* note 69 at 129-130; Phillips *et al*, *supra* note 190 at 380-381; Phillips, Landau & Osborne, *supra* note 190 at 346-346; St. Croix, Dry & Webster, *supra* note 190 at 16; Golding, Eaves & Kowaz, *supra* note 190 at 160.

²⁰⁶ The manner in which offences are categorized in different studies varies, and as such the relevant category and its precise composition differ between studies.

²⁰⁷ Greenland, *supra* note 69 at 129-130 and 136; Phillips *et al*, *supra* note 190 at 380-381; Phillips, Landau & Osborne, *supra* note 190 at 346-347; St. Croix, Dry & Webster, *supra* note 190 at 16; Golding, Eaves & Kowaz, *supra* note 190 at 160.

²⁰⁸ Grant, *supra* note 16 at 427-428; Livingston *et al*, *supra* note 16 at 410-411; Latimer & Lawrence, *supra* note 191 at 17-19; Desmarais *et al*, *supra* note 191 at 5-6; Anne G Crocker *et al*, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 2: The People Behind the Label" (2015) 60:3 The Canadian Journal Of Psychiatry 106 at 109-110 [Crocker *et al*, *NTP Part 2*].

²⁰⁹ Grant, *supra* note 16 at 426-427.

Lieutenant-Governor's warrant system and the risk associated with an indeterminate period of detention only when facing the alternative of the severe punishments associated with conviction for very grave offences such as murder. The reformed Review Board system, according to this theory, is viewed by accused persons as a favourable alternative even to the lesser punishment associated with comparatively minor offences.²¹⁰

4.3.2 Demographic Characteristics

In addition to the index offences that resulted in the NCRMD verdicts that brought them before the Review Board, other characteristics of the population under Review Board jurisdiction also changed following Bill C-30. The characteristics discussed below include sex, age, and Indigenous identity.

Following Bill C-30, women began to make up a higher proportion of accused persons found NCRMD in British Columbia. From fewer than 10% prior to Bill C-30,²¹¹ the proportion of new NCRMD accused who were female rose sharply to one quarter in the two years that followed the bill's entry into force.²¹² While this level was not sustained, falling to between 14% and 15% in more recent studies, the percentage of female NCRMD accused entering the Review Board system has consistently been found to exceed NGRI-era levels since the 1992 reforms.²¹³ The proportion of female NCRMD accused entering the Review Board system in the most recent studies is consistent with recent statistics for women in the general correctional system.²¹⁴ As

²¹⁰ *Ibid* at 428.

²¹¹ *Ibid*; Golding, Eaves & Kowaz, *supra* note 190 at 155.

²¹² Grant, *ibid*.

²¹³ 14-15% of those entering the Review Board system were female in two studies covering the time periods of 1992-1998 and 2001-2005: Livingston *et al*, *supra* note 16 at 410; Crocker *et al*, *NTP Part 2*, *supra* note 208 at 108-109.

²¹⁴ Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada, 2016/2017" (2018) 85:2 *Juristat* 1-20 <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=HDVyQxrt>> accessed 27 July 2019.

women generally are less likely than men to commit the most serious offences, the elevated number of females entering the Review Board system since the Bill C-30 reforms may be related to the general trend towards less serious index offences noted above.²¹⁵

While less data is available about the age of accused persons at the time of their index offence, that which does exist again indicates a change around the time that Bill C-30 came into force. Specifically, those entering the Review Board system following Bill C-30 tended to have committed their index offence at a more advanced age than those who were found NGRI prior to the reforms.²¹⁶ The percentage of accused who committed their index offence before the age of 30 between 1975 and 1984 was approximately 45%, notably higher than the 36% who committed their index offence before the age of 30 between 1992 and 1998.²¹⁷ Since the reforms, the average age of the accused at the time they committed their index offence has remained relatively constant at approximately 36 years of age.²¹⁸ As with all of the changes reflected in the results of the past studies, there is no conclusive evidence that the change in age was caused by these reforms.

There appears to be no data available about the proportion of NGRI accused who were Indigenous prior to the reforms enacted through Bill C-30. Accordingly, it is not possible to examine whether there were any changes to this population in this regard that are correlated to the bill. Since it came into force, however, researchers have begun to consider this variable. The data that is available suggests that the proportion of NCRMD accused who are Indigenous remained largely steady following the reforms in 1992. Between 1992 and 1998, Indigenous

²¹⁵ Grant, *supra* note 16 at 428-429.

²¹⁶ Golding, Eaves & Kowaz, *supra* note 190 at 155; Livingston *et al*, *supra* note 16 at 410.

²¹⁷ Golding, Eaves & Kowaz, *ibid*; Livingston *et al*, *ibid*.

²¹⁸ Livingston *et al*, *ibid*; Crocker *et al*, *NTP Part 2*, *supra* note 208 at 218.

people made up 9.1% of those entering the Review Board system in British Columbia following an NCRMD verdict.²¹⁹ By 2001-2005, this number had fallen only very slightly to 7.7%.²²⁰

These results suggest that Indigenous people are overrepresented in the forensic mental health system relative to their representation in the general population, but underrepresented relative to the population in the general criminal justice system. In the 2006 census, Indigenous people made up just under 5% of the total population of BC, a smaller proportion than the 7.7% of new NCRMD accused between 2001 and 2005 who were Indigenous. However, in 2006/07, Indigenous people made up 20% of adult males and 29% of adult females entering adult custody in the correctional system in British Columbia, well above the 7.7% entering the forensic mental health system.²²¹

4.3.3 Criminal and Psychiatric History

Past research also provides some insight into trends in the criminal and psychiatric histories of NCRMD accused entering the Review Board system in British Columbia. While no data is available regarding the frequency with which NGRI acquittees had a prior criminal history before 1992, since the reforms enacted through Bill C-30 the proportion of NCRMD accused who have a criminal record has declined substantially.²²² During the six years immediately following Bill C-30's entry into force, more than 60% of new NCRMD accused had

²¹⁹ Livingston *et al*, *supra* note 16 at 410.

²²⁰ Crocker *et al*, *NTP Part 2*, *supra* note 208 at 108.

²²¹ Malakieh, *supra* note 214.

²²² There is no data available regarding the proportion of NGRI accused who had a criminal record prior to Bill C-30. One Ontario study found that only 22.6% of those whose Lieutenant-Governor's warrants were vacated between 1969 and 1982 had criminal records, while another study found that 62.5% of those on Lieutenant-Governor's warrants in Alberta in 1984 and 1985 had criminal records: Philips, Landau & Osborne, *supra* note 190 at 346; St. Croix, Dry & Webster, *supra* note 190.

a criminal record.²²³ By 2001-2005, this number had fallen significantly, such that only 40% of NCRMD accused entered the Review Board system with one or more past convictions.

Past studies indicate that psychotic disorders have been the most common diagnosis among NCRMD accused since Bill C-30 came into force and that the proportion of accused carrying such a diagnosis has increased since that time. While there are no studies examining the diagnoses of NGRI acqutees in British Columbia prior to the reforms, several considered this variable in other provinces during this period and consistently found that a majority had been diagnosed with a form of psychosis.²²⁴ Since Bill C-30, studies considering NCMRD accused in British Columbia suggest that the proportion carrying a diagnosis that includes a form of psychosis has been increasing. Between 1992 and 1994, one third of those entering the Review Board system were diagnosed with schizophrenia, while 13% were classified as having a diagnosis of “other psychosis.”²²⁵ For those entering the system between 1992 and 1998, the prevalence of these categorizations had risen to 39.5% and 13.4% respectively.²²⁶ Finally, by 2001-2005, more than three quarters (76.5%) of new NCRMD accused in British Columbia were classified as having been diagnosed with a “psychotic spectrum disorder.”²²⁷

The proportion of NCRMD accused with a history of in-patient psychiatric treatment remained largely unchanged following Bill C-30. Of those under Lieutenant-Governor’s warrants between 1975 and 1984, 78.7% had a history of inpatient care.²²⁸ Following Bill C-30, this declined very slightly to 76.5% of NCRMD accused entering the Review Board system

²²³ Livingston *et al*, *supra* note 16 at 410.

²²⁴ Greenland, *supra* note 69 at 130; Philips *et al*, *supra* note 190 at 382; Philips, Landau & Osborne, *supra* note 190 at 346; St. Croix, Dry & Webster, *supra* note 190 at 16.

²²⁵ Grant, *supra* note 16 at 429-430.

²²⁶ Livingston *et al*, *supra* note 16 at 411.

²²⁷ Crocker *et al*, *NTP Part 2*, *supra* note 208 at 108.

²²⁸ Golding, Eaves & Kowaz, *supra* note 190 at 163-164.

between 1992 and 1998,²²⁹ and again to 72.4% for those entering the system from 2001 to 2005.²³⁰

4.4 Review Board Dispositions

As discussed in the previous chapter, one of the most significant reforms enacted through Bill C-30 was the creation of three distinct dispositional options for those with NCRMD verdicts - detention in hospital, conditional discharge, and absolute discharge. As these options did not exist in the same form prior to the reforms it is not possible to meaningfully compare dispositions imposed by the Lieutenant-Governor prior to Bill C-30 with those imposed by the Review Board afterwards. However, there is data available that provides some limited insight into trends following the reform.

The available data suggest that the rate at which the Review Board has detained NCRMD accused following initial disposition hearings has fluctuated in the years that followed Bill C-30. In the two years immediately following Bill C-30, nearly 70% of accused in BC were detained²³¹ following their initial disposition hearing, and fewer than 1% were absolutely discharged.²³² In a study examining the first eight years of Review Board operation under Bill C-30 (which included the first two years considered in the earlier study), more than half of accused persons in BC were absolutely or conditionally discharged on their initial disposition hearing, and just over 40% detained.²³³ A study conducted several years later, examining accused found NCRMD between

²²⁹ Livingston *et al*, *supra* note 16 at 410.

²³⁰ Crocker *et al*, *NTP Part 2*, *supra* note 208 at 108-109.

²³¹ This includes NCRMD accused who were conditionally discharged, but with a condition requiring residence in hospital. Such conditions were subsequently held to be illegal by the British Columbia Court of Appeal: *Johnson*, *supra* note 55.

²³² Grant, *supra* note 16 at 430-431.

²³³ Livingston *et al*, *supra* note 16 at 411-412.

2001 and 2004 again found an elevated rate of detention on initial disposition of nearly 65% in British Columbia.²³⁴

Also evident from studies both prior to and following Bill C-30 are changes in the factors most closely correlated with disposition decisions. Prior to the 1992 reforms, two studies considering NGRI acquitees across Canada identified a statistically significant relationship between index offence severity and length of time spent in custody.²³⁵ In the two years immediately following the reforms, however, the only factor found to have a statistically significant relationship with disposition decisions in initial disposition hearings in British Columbia was the custodial status of the accused prior to the hearing.²³⁶ Finally, in a larger study examining disposition decisions in BC, Ontario, and Quebec between 2000 and 2005, three factors - number of past convictions, diagnosis, and severity of index offence - were found to have a statistically significant relationship with disposition.²³⁷ It does not appear that pre-hearing custodial status was examined in this study. While these results may reflect actual changes in the relationships between these factors and disposition decisions, it is important to recognize the impact of sample size on these results as the threshold for statistical significance is more difficult to reach with a smaller sample. The greater the number of accused persons and/or decisions considered in a study, the more likely that a given factor will be found to have a statistically

²³⁴ This study did not distinguish between conditional and absolute discharges: Anne G Crocker *et al*, “The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 3: Trajectories and Outcomes Through the Forensic System” (2015) 60:3 *The Canadian Journal of Psychiatry* 117 at 120 [Crocker *et al*, *NTP Part 3*].

²³⁵ Grant, *supra* note 16 at 421; Sheilagh Hodgins, Christopher Webster and Jean Paquet, *Annual Report Year 3 Canadian Database: Patients Held on Lieutenant Governors’ Warrants* (1991); Lee J Baldwin *et al*, “Factors Influencing Length of Hospitalization for NGRI Acquitees in a Maximum Security Facility” (1992) 20:2 *The Journal of Psychiatry and Law* 257.

²³⁶ *Ibid* at 437.

²³⁷ Crocker *et al*, *NTP Part 3*, *supra* note 234 at 120.

significant relationship with disposition. Accordingly, these changes may not reflect actual changes in Review Board decision-making, but rather differences in research design.

4.5 Discussion

Three key conclusions can be drawn from the above review of past research examining disposition decisions by Canadian provincial Review Boards (and, for decisions made prior to 1992, Lieutenant-Governors.)

First, there appears to be strong evidence that Bill C-30 had a substantial impact on the number and nature of the cases before the BC Review Board. Compared to NGRI cases prior to the reforms, the Review Board began to see a much larger caseload, more diverse and generally less serious index offences, more female, and slightly older accused. These changes are notable not only for their substance, but for the evidence they provide that the Review Board's caseload is actually sensitive to legislative changes, meaning that this is an area of public policy where reform has been shown to have a real-world impact and presumably could again in the future.

Secondly, the data discussed above suggests that, at least as of the time of the most recent studies, there continues to be change in the size and composition of the caseload of the BC Review Board. The volume of cases peaked at the turn of the century and has since been in decline, while we continue to observe changes, though in some cases slight changes, in the gender, age, indigeneity, diagnoses, criminal history and psychiatric history of accused persons before the Review Board. Given that these factors continued to evolve as recently as 2005, it is possible that they have continued to change since this time, highlighting the importance of ongoing research to monitor these trends into the future.

Finally, while impossible to prove conclusively, it does appear that the reforms enacted through Bill C-30 may have made the NCRMD verdict more attractive to accused persons, at least initially, than was the NGRI verdict. As discussed above, immediately following the bill's entry into force, the number of NCRMD verdicts rose sharply and the severity of index offences resulting in the verdict dropped, suggesting that the verdict was viewed as an attractive alternative to a possible guilty verdict in a higher proportion of cases. While it is possible that there may be other explanations for these changes - perhaps the Crown began to seek the verdict more often, or the public attention brought by the bill made accused persons and defence counsel more likely to consider raising it - there does seem to be a compelling basis to believe those who have suggested the reforms initially made the defence more attractive may be correct. The more recent downturn in the number of new NCRMD verdicts since 1999/2000, however, is more difficult to explain and has not been addressed in any of the available literature.

4.6 Conclusion

As the mental disorder defence and role and operation of the Review Board have changed over time, the size and makeup of the NCRMD population and Review Board's caseload have likewise evolved. In particular, the reforms enacted in 1992 through Bill C-30 led to significant changes. These include a substantial initial increase in the number of NCRMD verdicts annually, peaking in 1999/2000, before a sustained reduction. Additionally, the severity of index offences fell following the reforms, the proportion of women among the NCRMD population increased, and the population generally became older. The chapter that follows presents new data examining the same variables for the NCRMD accused who entered the BC Review Board system in 2015 or 2016. In doing so it sheds light on whether the trends suggested by the above data have continued or changed.

Chapter 5: Results of the Quantitative Analysis

5.1 Introduction

The previous chapter discussed the evolution of the BC Review Board’s caseload prior to and after the enactment of Bill C-30 in 1992. This chapter continues this discussion by presenting the results of an analysis of initial disposition decisions made by the Review Board in 2015 and 2016. It focuses primarily on the variables examined in previous studies, including disposition, sex, age, indigeneity, index offence, criminal history, diagnosis, and history of psychiatric treatment. It also examines, seemingly for the first time, one additional variable - history of substance abuse. For each variable, data is presented regarding the composition of the NCRMD population with respect to that variable, the relationship of that variable to index offence, and its relationship with disposition.

5.2 Results

5.2.1 Initial Disposition

Table 5.1: Initial Disposition of Accused Entering Review Board System by Year

	Detain	Conditional Discharge	Absolute Discharge	Total
2015	16 (61.5%)	7 (26.9%)	3 (11.5%)	26 (100%)
2016	22 (50%)	19 (43.2%)	3 (6.8%)	44 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

The majority of those entering the Review Board system in 2015 and 2016 were detained. In both years, the second most likely outcome was a conditional discharge, while an absolute discharge was the least likely outcome.

5.2.2 Sex

Table 5.2: Sex of Accused Entering Review Board System by Year

	Male	Female	Total
2015	25 (96.2%)	1 (3.8%)	26 (100%)
2016	35 (79.5%)	9 (20.5%)	44 (100%)
Total	60 (85.7%)	10 (14.3%)	70 (100%)

As in the criminal justice system generally, where men commit the vast majority of offences,²³⁸ the initial disposition decisions reviewed as part of this study revealed a significant imbalance in the sex of those entering the Review Board system. In both years, males made up a substantial majority of NCRMD accused subject to initial dispositions, amounting to more than 85% of the total sample.

Table 5.3: Initial Disposition by Sex

	Detain	Conditional Discharge	Absolute Discharge	Total
Male	36 (60%)	20 (33.3%)	4 (6.7%)	60 (100%)
Female	2 (20%)	6 (60%)	2 (20%)	10 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

As outlined in Table 5.3, there is also a marked difference in the initial dispositions for male and female accused. In order to calculate statistical significance, conditional and absolute discharges were collapsed into a single category.

²³⁸ Rebecca Kong and Kathy AuCoin, “Female Offenders in Canada” (2008) 28:1 Juristat 1 at 2; Olivia Choy *et al*, “Explaining the Gender Gap in Crime: The Role of Heart Rate” (2017) 55:2 Criminology 465 at 465.

Table 5.4: Sex and Disposition - Collapsed for Statistical Significance

	Detain	Discharge	Total
Male	36 (60%)	24 (40%)	60 (100%)
Female	2 (20%)	8 (80%)	10 (100%)
Total	38 (54.3%)	32 (45.7%)	70 (100%)

These data suggest that male accused are more likely to be detained and less likely to be absolutely discharged on initial disposition and that sex is a statistically significant predictor of initial disposition (P=0.036; P < 0.05).

Table 5.5: Sex and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
Male	4 (6.7%)	4 (6.7%)	30 (50%)	16 (26.7%)	6 (10%)	60 (100%)
Female	0 (0.0%)	2 (20%)	3 (30%)	3 (30%)	2 (20%)	10 (100%)
Total	4 (5.7)	6 (8.6%)	33 (47.1%)	19 (27.1%)	8 (11.4%)	70 (100%)

The discrepancy between initial disposition decisions for males and females may be attributable in part to differences in the index offences committed by member of each sex. As outlined in table 5.5 above, all of the accused with an index offence of murder were male, while women were more likely to have committed an index offence that was a property or public order offence. Given the low number of female accused, caution should be exercised in drawing any firm conclusions from this data, but these results do suggest one possible explanation for these differences in disposition.

5.2.3 Age at Time of Index Offence

Table 5.6: Age of Accused Entering Review Board System by Year

	<22	22-29	30-40	>40	Total	Avg. Age
2015	2 (8%)	9 (36%)	6 (24%)	8 (32%)	25 (100%)	35.32
2016	6 (14%)	12 (27.9%)	13 (30.2%)	12 (27.9%)	43 (100%)	32.79
Total	8 (11.8%)	21 (30.9%)	19 (27.9%)	20 (29.4%)	68 (100%)	34.84

Age at the time of index offence was indicated in all but two cases. The average age at the time of index offence of the accused for whom age was indicated was 34.84 years of age, the youngest accused being 16 years of age and the oldest 77. To allow for comparison with past studies, the accused were grouped into four cohorts - under the age of 22, 22-29, 30-40 and over 40. The greatest number of accused were in the 22-29 cohort, with slightly smaller proportions in the 30-40 and over 40 cohorts. The under 22 cohort had significantly fewer members. Only four of the accused were young offenders (under the age of 18 at the time of index offence).

Table 5.7: Initial Disposition by Age

	Detain	Conditional Discharge	Absolute Discharge	Total
<22	7 (87.5%)	1 (12.5%)	0 (0.0%)	8 (100%)
22-29	13 (61.9%)	8 (38.1%)	0 (0.0%)	21 (100%)
30-40	10 (52.6%)	8 (42.1%)	1 (5.3%)	19 (100%)
>40	7 (35%)	8 (40%)	5 (25%)	20 (100%)
Total	37 (54.4%)	25 (36.8%)	6 (8.8%)	68 (100%)

The results reveal a trend towards reduced likelihood of detention with advancing age. As age increased, the proportion of accused in each cohort who were detained fell from 87.5% to 61.9% to 52.6% before finally dropping below 50% for the oldest age cohort. Absolute

discharges show a similar dynamic, becoming more likely with advancing age. The proportion of accused who were conditionally discharged is consistently approximately 40% for the older three age cohorts, but significantly lower for the youngest group of accused.

In order to have values high enough to calculate statistical significance, the age categories were collapsed into two - those aged under 30 and those aged 30 and over. Similarly, the disposition categories were collapsed into two - detention and discharge.

Table 5.8: Age and Disposition - Collapsed for Statistical Significance

	Detention	Discharge	Total
<30	20 (69%)	9 (31%)	29 (100%)
30+	17 (43.6%)	22 (56.4%)	39 (100%)
Total	37 (54.4%)	31 (45.6%)	68 (100%)

With the data collapsed in this way, age is a statistically significant predictor of initial disposition ($P=0.038$; $P < 0.05$).

As with the results relating to sex, this result could be explained in part if younger accused committed more serious index offences than older. The following table outlines index offence by age of the accused.

Table 5.9 Age and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
<22	1 (12.5%)	2 (25%)	3 (37.5%)	2 (25%)	0 (0%)	8 (100%)
22-29	1 (4.8%)	1 (4.8%)	10 (47.6%)	7 (33.3%)	2 (9.5%)	21(100%)
30-40	1 (5.3%)	2 (10.5%)	9 (47.4%)	5 (26.3%)	2 (10.5%)	19 (100%)
>40	1 (5%)	1 (5%)	9 (45%)	5 (25%)	4 (20%)	20 (100%)
Total	4 (5.9%)	6 (8.8%)	31 (45.6%)	19 (27.9%)	8 (11.8%)	68 (100%)

The differences in outcome between age cohorts may be partially explained by differences in the index offences committed by those of different ages. As outlined in Table 5.9, the index offences committed by the youngest cohort are generally more serious than those committed by the older three age cohorts. A much higher percentage of those in the youngest cohort had an index offence of murder or attempted murder than was the case for any other cohort, while a lower percentage had an index offence that was a public order or property offence. There is little difference in the index offences committed by the oldest three age cohorts.

5.2.4 Indigeneity

Table 5.10: Indigenous Identity of Accused Entering Review Board System by Year

	Indigenous	Non-Indigenous	Total
2015	3 (11.5%)	23 (88.5%)	26 (100%)
2016	8 (18.2%)	36 (81.8%)	44 (100%)
Total	11 (15.7%)	59 (84.3%)	70 (100%)

While the Review Board does not routinely identify the race or ethnicity of accused persons, it does regularly indicate Indigenous identity in disposition decisions. Eleven of the 70 accused in the present study were identified as Indigenous.

Table 5.11: Initial Disposition by Indigenous Identity

	Detain	Conditional Discharge	Absolute Discharge	Total
Indigenous	8 (72.7%)	3 (27.3%)	0 (0.0%)	11 (100%)
Non-Indigenous	30 (50.8%)	23 (39%)	6 (10.2%)	59 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

Accused persons identified as Indigenous were more likely to be detained than those who were not so identified. Among the Indigenous accused, 72.7% were detained following their initial disposition hearing, compared to 50.8% of non-Indigenous accused. 27.3% and 0% of Indigenous accused were conditionally and absolutely discharged respectively, compared with 40% and 10.2% of non-Indigenous accused.

Table 5.12: Indigeneity and Disposition - Collapsed for Statistical Significance

	Detention	Discharge	Total
Indigenous	8 (72.7%)	3 (27.3%)	11 (100%)
Non-Indigenous	30 (50.8%)	29 (49.2%)	59 (100%)
Total	38 (54.3%)	32 (45.7%)	70 (100%)

To permit assessment of statistical significance, absolute and conditional discharges were collapsed into a single category. Indigeneity was not a statistically significant predictor of initial disposition ($P=0.181$; $P > 0.05$).

Table 5.13 Indigeneity and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
Indigenous	1 (9.1%)	0 (0.0%)	7 (63.6%)	2 (18.2%)	1 (9.1%)	11 (100%)
Non-Indigenous	3 (5.1%)	6 (10.2%)	26 (44.1%)	17 (28.8%)	7 (11.9%)	59 (100%)
Total	4 (5.7%)	6 (8.6%)	33 (47.1%)	19 (27.1%)	8 (11.4%)	70 (100%)

The discrepancy between the dispositions imposed on Indigenous and non-Indigenous accused does not appear to be the product of different index offences. To the extent that Indigenous accused are more likely to be detained, it does not appear to be because these accused are committing more serious index offences.

5.2.5 Most Serious Index Offence²³⁹

Table 5.14: Most Serious Index Offence for Accused Entering Review Board System by Year

	Offence	2015	2016	Total	Offence Group Total
Murder	2nd Degree Murder	0 (0%)	4 (9.1%)	4 (5.7%)	4 (5.7%)
Attempt Murder	Attempted Murder	3 (11.5%)	3 (6.8%)	6 (8.6%)	6 (8.6%)
Offence Against Person	Aggravated Assault	3 (11.5%)	0 (0%)	3 (4.3%)	33 (47.1%)
	Aggravated Sexual Assault	0 (0%)	1 (2.3%)	1 (1.4%)	
	Assault Causing Bodily Harm ²⁴⁰	3 (11.5%)	3 (6.8%)	6 (8.6%)	
	Assault	1 (3.8%)	5 (11.4%)	6 (8.6%)	
	Assault Peace Officer	1 (3.8%)	1 (2.3%)	2 (2.9%)	

²³⁹ Severity of index offence was determined by severity of the maximum sentence available for the offence.

²⁴⁰ Includes Assault with a Weapon.

	Offence	2015	2016	Total	Offence Group Total
	Sexual Assault ²⁴¹	2 (7.7%)	3 (6.8%)	5 (7.1%)	
	Robbery	0 (0%)	2 (4.5%)	2 (2.9%)	
	Criminal Harassment	2 (7.7%)	1 (2.3%)	3 (4.3%)	
	Uttering Threats	2 (7.7%)	3 (6.8%)	5 (7.1%)	
Property Offences	Arson	1 (3.8%)	5 (11.4%)	6 (8.6%)	19 (27.1%)
	Break and Enter	4 (15.4%)	5 (11.4%)	9 (12.9%)	
	Mischief Under \$5000	1 (3.8%)	0 (0%)	1 (1.4%)	
	Possession of Stolen Property Over \$5000	1 (3.8%)	0 (0%)	1 (1.4%)	
	Theft Under \$5000	1 (3.8%)	0 (0%)	1 (1.4%)	
	Theft Over \$5000	0 (0%)	1 (2.3%)	1 (1.4%)	
Offences Against Public Order	Impaired Driving Causing Death ²⁴²	0 (0%)	1 (2.3%)	1 (1.4%)	8 (11.4%)
	Dangerous Driving	1 (3.8%)	2 (4.5%)	3 (4.3%)	
	Breach of Undertaking	0 (0%)	1 (2.3%)	1 (1.4%)	
	Poss Weapon	0 (0%)	2 (4.5%)	2 (2.9%)	
	Poss Prohibited Weapon	0 (0%)	1 (2.3%)	1 (1.4%)	
Total	All Offences	26 (37.1%)	44 (62.9%)	70 (100%)	70 (100%)

Index offence was identified by the Review Board in all cases. The most serious index offence in nearly half (47.1%) of the cases reviewed was a form of assault or another offence

²⁴¹ Includes Sexual Interference.

²⁴² This category includes both driving with a blood alcohol concentration above eighty milligrams of alcohol in 100 milliliters of blood and driving while impaired by alcohol or drug; see *Criminal Code*, *supra* note 3 at ss 253(1)(a) and 253(1)(b).

against the person, not including murder or attempted murder. Murder or attempted murder was the most serious index offence in 14.3% of cases. The percentage of cases in which an offence against the person was the most serious index offence, including murder and attempted murder, was 61.4%. Property offences were the most serious index offence in 27.1% of cases, and offences against public order were the least common index offences, being the most serious offence in 10% of cases.

Table 5.15: Initial Disposition by Index Offence Type

	Detain	Conditional Discharge	Absolute Discharge	Total
Murder	4 (100%)	0 (0.0%)	0 (0.0%)	4 (100%)
Attempt Murder	5 (83.3%)	1 (16.7%)	0 (0.0%)	6 (100%)
Offence Against Person	18 (54.5%)	14 (42.4%)	1 (3%)	33 (100%)
Property Offence	9 (47.4%)	8 (42.1%)	2 (10.5%)	19 (100%)
Public Order Offence	2 (25%)	3 (37.5%)	3 (37.5%)	8 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

At first glance, the results suggest a relationship between the nature of the index offence and initial disposition. Over 90% of those found NCRMD for murder or attempted murder were detained (including all of those with an index offence of murder), while none of the accused were absolutely discharged. Conversely, only a quarter of those found NCRMD for public order offences were detained. While the offence categories do not directly correspond with offence severity, the trends visible in the table above suggest that the Review Board is more likely to detain those who commit more serious index offences.

Table 5.16: Index Offence and Disposition - Collapsed for Statistical Significance

	Detain	Discharge	Total
Offence Against Person	27 (62.8%)	16 (37.2%)	43 (100%)
Offence Not Against Person	11 (40.7%)	16 (59.3%)	27 (100%)
Total	38 (54.3%)	32 (45.7%)	70 (100%)

To create values high enough to reliably assess statistical significance, the offence categories were collapsed into two - offences against the person, including murder and attempted murder and those not against the person, including property offences and offences against public order. As with the previous variables, conditional and absolute discharges were collapsed into a single category. Most serious index offence was not a statistically significant predictor of disposition ($P=0.071$; $P > 0.05$) but was very close to the threshold for statistical significance.

5.2.6 Criminal History

Table 5.17: Criminal History for Accused Entering Review Board System by Year

	Past Conviction	Past NCRMD Verdict	Total with Criminal History²⁴³
2015	14 (53.8%)	2 (7.7%)	15 (57.7%)
2016	12 (27.3%)	2 (4.5%)	14 (31.8%)
Total	26 (37.1%)	4 (5.7%)	29 (41.4%)

The Review Board decisions considered frequently addressed the accused's criminal history prior to the index offence. Of the 70 accused represented in the decisions reviewed, 26 were identified as having a past adult or youth conviction, while four were identified as having a previous NCRMD verdict. Only one accused was identified as having both a past conviction and

²⁴³ The numbers in this column do not align perfectly with those in the two previous columns as one accused had both a previous conviction and a previous NCRMD verdict. This column accurately reflects the number of accused with a criminal history.

NCRMD verdict. The decisions did not consistently indicate the number of past convictions or NCRMD verdicts, or the nature of the charges underlying the verdicts.

Table 5.18: Disposition by Criminal History

	Detain	Conditional Discharge	Absolute Discharge	Total
No History	13 (56.5%)	7 (30.4%)	3 (13%)	23 (100%)
Past Conviction	12 (46.2%)	12 (46.2%)	2 (7.7%)	26 (100%)
Past NCRMD	3 (75%)	1 (25%)	0 (0%)	4 (100%)
Not Indicated	10 (55.6%)	7 (38.9%)	1 (5.6%)	18 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

The results do not reflect substantial differences in initial disposition for those with different criminal histories. Accused with no criminal history were detained and absolutely discharged slightly more often than those with a criminal record, while accused with a past conviction were more likely to be conditionally discharged, but these differences are not dramatic. More substantial differences were observed in those with a past NCRMD verdict, but as there were only four such accused in this study, caution should be exercised in drawing any conclusions from this group.

Table 5.19: Criminal History and Disposition - Collapsed for Statistical Significance

	Detain	Discharge	Total
Criminal History	15 (51.7%)	14 (48.3%)	29 (100%)
No Criminal History	13 (56.5%)	10 (43.5%)	23 (100%)
Total	28 (53.8%)	24 (46.2%)	52 (100%)

Again, conditional and absolute discharges were collapsed into a single category for the purpose of calculating statistical significance. Those accused for whom criminal history was not

indicated were not included. The difference between the dispositions for accused with and without a criminal history does not indicate that criminal history is a statistically significant predictor of initial disposition ($P = 0.730$; $P > 0.05$).

Table 5.20: Criminal History and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
Past Conviction	0 (0.0%)	1 (3.8%)	17 (65.4%)	7 (26.9%)	1 (3.8%)	26 (100%)
Past NCRMD	1 (25%)	0 (0.0%)	2 (50%)	1 (25%)	0 (0.0%)	4 (100%)
No History	1 (4.3%)	2 (8.7%)	6 (26.1%)	10 (43.5%)	4 (17.4%)	23 (100%)
Not Indicated	2 (11.1%)	3 (16.7%)	8 (44.4%)	2 (11.1%)	3 (16.7%)	18 (100%)
Total	4 (5.7%)	6 (8.6%)	33 (47.1%)	19 (27.1%)	8 (11.4%)	70 (100%)

A comparison of the index offences leading to NCRMD verdicts for those with and without criminal histories does not suggest a dramatic difference in the index offence leading to the NCRMD verdict depending on criminal history.

5.2.7 Diagnosis

Table 5.21: Diagnosis for Accused Entering the Review Board System by Year²⁴⁴

	2015	2016	Total
Bipolar Disorder ²⁴⁵	3 (11.5%)	11 (25%)	14 (20%)
Schizophrenia ²⁴⁶	9 (34.6%)	21 (47.7%)	30 (42.9%)
Schizoaffective Disorder ²⁴⁷	7 (26.9%)	0 (0%)	7 (10%)
Other Psychosis ²⁴⁸	4 (15.4%)	10 (22.7%)	14 (20%)
Other ²⁴⁹	3 (11.5%)	2 (4.5%)	5 (7.1%)
Total	26 (100%)	44 (100%)	70 (100%)

A variety of diagnoses were identified among those entering the Review Board system in 2015 and 2016. Diagnoses were identified in every case, though with varying levels of certainty. The most common diagnosis was schizophrenia. The second most common diagnosis was bipolar disorder, followed by schizoaffective disorder.

²⁴⁴ While most accused were identified as having multiple diagnoses, the categories identified here allowed each accused to be placed in a single category.

²⁴⁵ Includes: Bipolar Disorder; Bipolar Mood Disorder; Bipolar Affective Disorder; Bipolar One Disorder.

²⁴⁶ Includes: Schizophrenia; Paranoid Schizophrenia; Schizophreniform Psychosis.

²⁴⁷ Includes Schizoaffective Disorder; Schizoaffective Disorder-Bipolar Type.

²⁴⁸ Includes: Psychosis Not Specified; Psychosis; Chronic Psychotic Disorder NOS; Psychosis NOS; Psychosis (Drug-Induced); Delusional Disorder; Psychotic Disorder; Substance-Induced Psychosis.

²⁴⁹ Includes: Vascular Dementia; Intellectual Development Disorder; Generalized Anxiety Disorder; Major Depressive Disorder; PTSD; Fetal Alcohol Spectrum Disorder; ADHD; Early Childhood Trauma.

Table 5.22: Disposition by Diagnosis

	Detain	Conditional Discharge	Absolute Discharge	Total
Bipolar Disorder	2 (14.3%)	11 (78.6%)	1 (7.1%)	14 (100%)
Schizophrenia	22 (73.3%)	6 (20%)	2 (6.7%)	30 (100%)
Schizoaffective Disorder	6 (85.7%)	1 (14.3%)	0 (0%)	7 (100%)
Other Psychosis	6 (42.9%)	6 (42.9%)	2 (14.3%)	14 (100%)
Other	2 (40%)	2 (40%)	1 (20%)	5 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

Initial disposition decisions also differed substantially with diagnosis. Accused persons were much more likely to be detained if they carried a diagnosis of schizophrenia or schizoaffective disorder. A substantial majority of those diagnosed with bipolar disorder were conditionally discharged.

Table 5.23: Diagnosis and Disposition - Collapsed for Statistical Significance

	Detention	Discharge	Total
Psychotic Disorders	34 (66.7%)	17 (33.3%)	51 (100%)
Other	4 (21.1%)	15 (78.9%)	19 (100%)
Total	38 (54.3%)	32 (45.7%)	70 (100%)

Cases in which the accused person was diagnosed with a psychotic disorder²⁵⁰ were compared to those in which the accused was identified as having another diagnosis. Absolute and conditional discharges were again collapsed into a single category. When categorized in this way, diagnosis was a statistically significant predictor of disposition ($P=0.001$; $P < 0.05$).

²⁵⁰ Includes those with schizoaffective disorder.

Table 5.24 Diagnosis and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
Bipolar Disorder	0 (0%)	0 (0%)	7 (50%)	4 (28.6%)	3 (21.4%)	14 (100%)
Schizophrenia	3 (10%)	3 (10%)	12 (40%)	8 (26.7%)	4 (13.3%)	30 (100%)
Schizoaffective Disorder	0 (0%)	1 (14.3%)	4 (57.1%)	2 (28.6%)	0 (0%)	7 (100%)
Other Psychosis	1 (7.1%)	0 (0%)	7 (50%)	5 (35.7%)	1 (7.1%)	14 (100%)
Other	0 (0%)	2 (40%)	3 (60%)	0 (0%)	0 (0%)	5 (100%)
Total	4 (5.7%)	6 (8.6%)	33 (47.1%)	19 (27.1%)	8 (11.4%)	70 (100%)

Comparison of diagnosis with index offence suggests that the higher rate of detention for those with schizophrenia may be associated with the more serious index offences committed by these accused. Whereas none of the accused diagnosed with bipolar disorder had an index offence of murder or attempted murder, 20% of those diagnosed with schizophrenia did. Those with bipolar disorder were more likely to have committed a property or public order offence.

5.2.8 History of In-Patient Psychiatric Treatment

Table 5.25: History of In-Patient Psychiatric Treatment for Accused Entering Review Board System by Year

	Past In-Patient Care	No Past In-Patient Care	Total
2015	22 (84.6%)	4 (15.4%)	26 (100%)
2016	35 (81.4%)	8 (18.6%)	43 (100%)
Total	57 (82.6%)	12 (17.4%)	69 (100%)

The Review Board decisions considered in this study consistently indicate whether an accused has a history of in-patient psychiatric treatment. In only one of the cases reviewed was no such indication of treatment history (or the absence thereof) provided. This case is not included in the statistics outlined below. Of the 69 remaining accused, only 12 are identified as not having a history of in-patient psychiatric treatment.

Table 5.26: Disposition by History of In-Patient Psychiatric Care

	Detain	Conditional Discharge	Absolute Discharge	Total
Past Care	33 (57.9%)	19 (33.3%)	5 (8.8%)	57 (100%)
No Past Care	4 (33.3%)	7 (58.3%)	1 (8.3%)	12 (100%)
Total	37 (53.6%)	26 (37.7%)	6 (8.7%)	69 (100%)

The results do not reflect substantial differences in initial disposition based on whether the accused had previously received psychiatric treatment. Those with a history of psychiatric treatment were detained at rates similar to those without.

Table 5.27: History of In-Patient Psychiatric Care and Disposition - Collapsed for Statistical Significance

	Detain	Discharge	Total
Past Care	33 (57.9%)	24 (42.1%)	57 (100%)
No Past Care	4 (33.3%)	8 (66.7%)	12 (100%)
Total	37 (53.6%)	32 (46.4%)	69 (100%)

In order to calculate statistical significance, absolute and conditional discharges were collapsed into a single category. History of in-patient care was not a statistically significant predictor of disposition (P=0.121; P > 0.05).

Table 5.28: History of In-Patient Psychiatric Care and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
Past Care	4 (7%)	4 (7%)	26 (45.6%)	15 (26.3%)	8 (14%)	57 (100%)
No Past Care	0 (0.0%)	2 (16.7%)	6 (50%)	4 (33.3%)	0 (0.0%)	12 (100%)
Total	4 (5.8%)	6 (8.7%)	32 (46.4%)	19 (27.5%)	8 (11.6%)	69 (100%)

With such a low number of accused with no history of in-patient psychiatric care, it is difficult to draw meaningful conclusions from the index offences committed by these accused compared with those committed by accused with a history of in-patient psychiatric care.

However, the data available does not disclose any dramatic difference.

5.2.9 History of Substance Abuse

Table 5.29: History of Substance Abuse for Accused Entering Review Board System by Year

	Substance Abuse	No Substance Abuse	Not Indicated	Total
2015	23 (88.5%)	2 (7.7%)	1 (3.8%)	26 (100%)
2016	34 (77.3%)	7 (15.9%)	3 (6.8%)	44 (100%)
Total	57 (81.4%)	9 (12.9%)	4 (5.7%)	70 (100%)

A history of substance abuse was highly prevalent among those entering the Review Board system during the period under study. Past alcohol and/or drug abuse was indicated in over 80% of cases. Reliable data indicating the proportion of the overall population or the total incarcerated population of British Columbia with a history of substance abuse does not seem to

be available,²⁵¹ but even in the absence of this context, the proportion of NCRMD accused with a history of substance abuse seems very high.

Table 5.30: Disposition by History of Substance Abuse

	Detain	Conditional Discharge	Absolute Discharge	Total
Substance Abuse	31 (54.4%)	25 (43.9%)	1 (1.8%)	57 (100%)
No Substance Abuse	7 (77.8%)	1 (11.1%)	1 (11.1%)	9 (100%)
Not Indicated	0 (0%)	0 (0%)	4 (100%)	4 (100%)
Total	38 (54.3%)	26 (37.1%)	6 (8.6%)	70 (100%)

Those without a history of substance abuse seemed somewhat more likely to be detained following their initial disposition hearing, with over three quarters of such accused being detained, compared to slightly more than half of those with a history of substance abuse. Those with a history of substance abuse were much more likely to receive a conditional discharge than those without. Curiously, all of the accused for whom substance abuse history was not addressed received absolute discharges.

Table 5.31: Disposition by History of Substance Abuse

	Detain	Discharge	Total
Substance Abuse	31 (54.4%)	26 (45.6%)	57 (100%)
No Substance Abuse	7 (77.8%)	2 (22.2%)	9 (100%)
Not Indicated	0 (0%)	4 (100%)	4 (100%)
Total	38 (54.3%)	32 (45.7%)	70 (100%)

²⁵¹ The information available about substance abuse within the general population indicates that it is far less prevalent than is the case for the NCRMD population considered in this study: Canadian Centre on Substance Abuse, *Canadian Addiction Survey (CAS)* (Ottawa: Canadian Centre on Substance Abuse, 2004) <<https://www.ccsa.ca/sites/default/files/2019-04/ccsa-004804-2004.pdf>>.

As it seems likely that the accused in cases in which substance abuse is not mentioned had no history of substance abuse, or at least no recent significant history, statistical significance was examined both without these cases and with them included among those with no history of substance abuse. Substance abuse was not a statistically significant predictor of initial disposition when the ‘not indicated’ cases were excluded from the sample ($P=0.282$; $P > 0.05$), nor was it a statistically significant predictor when they were included among the cases with no substance abuse ($P=1$; $P > 0.05$).

Table 5.32: History of Substance Abuse and Index Offence

	Murder	Attempt Murder	Offence Against Person	Property Offence	Public Order Offence	Total
Substance Abuse	2 (3.5%)	4 (7%)	30 (52.6%)	17 (29.8%)	4 (7%)	57 (100%)
No Substance Abuse	2 (22.2%)	2 (22.2%)	2 (22.2%)	2 (22.2%)	1 (11.1%)	9 (100%)
Not Indicated	0 (0%)	0 (0%)	1 (25%)	0 (0%)	3 (75%)	4 (100%)
Total	4 (5.7%)	6 (8.6%)	33 (47.1%)	19 (27.1%)	8 (11.4%)	70 (100%)

A comparison of the index offences committed by those with and without histories of substance abuse suggests that the trends seen in disposition may be explained in part by severity of index offence. Murder and attempted murder made up a much higher proportion of index offences for those without a history of substance abuse, while those with a history of substance abuse were more likely to have committed an offence against the person.

5.3 Discussion and Comparison with the Results of Past Studies

Broadly speaking, the results described above are not dramatically different from those of the past studies conducted since Bill C-30, as discussed in the previous chapter. As has

consistently been the case since 1992, the population of NCRMD accused that entered the Review Board system in 2015 and 2016 was predominantly comprised of males in their 20s and 30s who were not Indigenous. Their index offence was most likely to have been an offence against the person and the majority had been diagnosed with a psychotic disorder, most frequently schizophrenia. These accused were highly likely to have had past in-patient psychiatric care and were about as likely as not to have a past conviction or NCRMD verdict. In addition, this analysis revealed that these accused were highly likely to have a history of substance abuse, though it is not possible to determine if this represents a change as it has not been considered in past studies.

The discussion below examines what the results above tell us about the population of NCRMD accused in British Columbia and take a closer look at the similarities and differences between the results of the present study and those conducted in the past.

5.3.1 Initial Disposition

When compared with past studies, these results indicate a growing willingness on the part of the Review Board to absolutely discharge NCRMD accused at the time of initial disposition. In previous studies, the percentage of accused detained at their initial disposition hearing has ranged from just over 40%²⁵² to just under 70%,²⁵³ leaving the present study in the middle of this range at just under 55%. The proportion of accused conditionally discharged is similarly consistent with past studies.

With respect to absolute discharge, however, the present study is something of an outlier. Previously, the highest proportion of accused in any study that received absolute discharges was

²⁵² Livingston *et al*, *supra* note 16 at 412.

²⁵³ Grant, *supra* note 16 at 431.

a mere 2.5%.²⁵⁴ At 8.6% the proportion of accused absolutely discharged in the present study represents a greater than three-fold increase. This suggests a growing willingness on the part of the Review Board to make use of this disposition at the initial disposition stage, though there is little to suggest why this may be the case.

5.3.2 Sex

The results pertaining to sex are unsurprising. They are highly consistent with past studies, which have almost invariably shown female accused to make up between 14% and 15% of those found NCRMD since the enactment of Bill C-30 in 1992.²⁵⁵ This is also consistent with the proportion of offenders in the criminal justice system in British Columbia generally that are female.²⁵⁶

While these results suggest that male and female accused are accessing the verdict with similar frequency, it is noteworthy that the female accused tended to enter the Review Board system with somewhat less serious index offences. All of the accused with an index offence of murder were male, while higher proportions of female accused were found NCRMD for index offences that were property offences and public order offences.

Again, given the very small number of female accused, more research is required to determine if similar results would be found in a larger study. If so, this would suggest that women are interacting with the mental disorder defence differently than men. As the present

²⁵⁴ Livingston *et al*, *supra* note 16 at 412.

²⁵⁵ The exception to this is a study of those entering the Review Board system in the two years immediately following the enactment of Bill C-30, during which 25% of NCRMD accused were female: Grant, *supra* note 16 at 428-429. This same time period was included within that considered by a later study examining those entering the Review Board system between 1992 and 1998. Over this longer time period, the proportion of accused who were female fell to 14.5%: Livingston *et al*, *supra* note 16 at 410.

²⁵⁶ Malakiah, *supra* note 214.

study is based only on decisions made after an accused has entered the Review Board system, it offers little insight into the process that results in different accused being found NCRMD in the first place. It is possible that women accused of lesser offences are genuinely more likely to suffer from mental illness than men, but it is also possible that women in the criminal justice system are being treated differently in a way that results in a greater likelihood of NCRMD verdicts for lesser offences.

This distinct experience is also reflected in the conclusion that sex is a statistically significant predictor of disposition. This conclusion is notable, particularly in light of the fact that variables that might have a more intuitive connection with dangerousness - such as criminal history or index offence - were not statistically significant predictors of disposition. It seems plausible that there is some relationship between the lesser index offences committed by women and the greater likelihood that they will receive an absolute discharge. It also suggests that even though women are being found NCRMD for lesser offences, subjecting themselves to the risk associated with indefinite detention, this is not necessarily resulting in worse outcomes as there is a higher likelihood that women will be released from custody almost immediately. The reasoning behind the different treatment of women by the Review Board will be discussed further in the next chapter.

5.3.3 Age at Time of Index Offence

Age at time of index offence for the accused in this sample was largely consistent with the results of past studies, though reflective of a slight shift towards a higher number of younger accused. As in all past studies both prior to and since Bill C-30 that considered this variable, a significant majority of accused were between the ages of 22 and 40 at the time of their index

offence.²⁵⁷ Approximately 45% of accused were under the age of 30, compared to only 36% of accused in the most recent previous study that considered this variable, which focused on accused found NCRMD in BC between 1992 and 1998.²⁵⁸ The average age of the accused at the time of index offence fell from 36 years of age in that study,²⁵⁹ to slightly under 34 years of age in the present study. While these results are generally consistent with the results of past research indicating that propensity to commit criminal acts decreases with age,²⁶⁰ there is insufficient data to determine whether this slight reduction in the average age of NCRMD accused reflects trends in the criminal justice system generally.

There is no readily apparent explanation for why the age of those found NCRMD would have declined from what it was immediately following the enactment of Bill C-30. Given the relatively modest change and the absence of an obvious explanation, it seems likely that it may simply reflect random variation rather than a meaningful change in the population.

As with sex, it may be that the relationship between age and disposition is reflective, to a degree, of the generally more serious index offences committed by younger accused. As noted above, the youngest age cohort was much more likely to have committed an index offence of murder or attempted murder and less likely than the older cohorts to have committed a property or public order offence. However, this does not seem to be a complete explanation. Among the three older cohorts, there is little distinction in index offence, yet the relationship with disposition seems to hold. The place of age in the Review Board's reasoning will be discussed further in the next chapter.

²⁵⁷ Livingston *et al*, *supra* note 16 at 410; Golding, Eaves & Kowaz, *supra* note 190 at 155.

²⁵⁸ Livingston *et al*, *ibid*.

²⁵⁹ *Ibid*.

²⁶⁰ Peter J Carrington, "Population Aging and Crime in Canada, 2000-2041" (2001) 43:3 Canadian Journal of Criminology 331 at 333-334.

5.3.4 Indigeneity

While Indigenous accused continue to represent a small proportion of the Review Board's total caseload, that proportion is notably larger than was found to be the case previously. Studies conducted prior to the entry into force of Bill C-30 did not consider this variable. Since that time, Indigenous accused were found to represent 9.1% of new NCRMD accused in BC between 1992 and 1998, and 7.7% between 2001 and 2005. That Indigenous accused represented 15.7% of the accused in the present study indicates not only a relatively large increase in the proportion of NCRMD accused that are Indigenous, but also the possible reversal of a slight trend towards a declining proportion of the NCRMD population. This does not necessarily mean that the total number of Indigenous accused found NCRMD is increasing but at the very least it indicates the total number of Indigenous accused entering the Review Board system is not declining as rapidly as non-Indigenous accused.

As indicated above, at 15.7% of new NCRMD accused, Indigenous people are overrepresented in the Review Board system relative to the proportion of the general population of British Columbia that is Indigenous,²⁶¹ but underrepresented relative to the proportion of the population of *incarcerated* people in BC that are Indigenous.²⁶²

The reason for this increase is not immediately apparent from the data available. That Indigenous accused are overrepresented relative to the general incarcerated population may suggest that once in the criminal justice system, Indigenous people may face barriers to successfully raising the NCRMD verdict.²⁶³ In this sense, growth in the proportion of NCRMD

²⁶¹ Malakiah, *supra* note 214.

²⁶² *Ibid.*

²⁶³ It is also conceivable that this discrepancy is the product of different rates of mental illness among the Indigenous population or different levels of access to medical and psychiatric care which may deprive Indigenous people of access to a diagnosis.

accused could be a positive development as it may suggest progress in overcoming these barriers. This assumes, however, that access to the NCRMD verdict should be considered a benefit and an advantageous outcome compared to a conviction. This is not necessarily the case, as the advantages of an NCRMD verdict relative to a conviction will depend on a myriad of factors including the nature of the index offence and likely sentence upon conviction, the conditions of incarceration compared to detention in hospital, and the duration of Review Board supervision.

These results also suggest that the forces responsible for the trend towards declining numbers of NCRMD verdicts may not be affecting Indigenous accused in the same way they are affecting non-Indigenous accused. Without an understanding of why the total number of NCRMD verdicts in BC has been declining since the turn of the century, it is difficult to identify what this distinction means for Indigenous accused but further supports the notion that Indigenous accused are interacting with the NCRMD verdict in a distinct way.

What is clear is that these results call for more research regarding Indigenous people and the NCRMD verdict. Why the proportion of NCRMD accused who are Indigenous is increasing while the total number of NCRMD accused is falling is an important question. Understanding this dynamic, alongside the question of when and why Indigenous accused pursue the verdict, and the barriers they face in doing so may offer valuable insight into the treatment of Indigenous accused in the Canadian criminal justice system generally.

5.3.5 Most Serious Index Offence

As in all past studies conducted since Bill C-30, the most common category of index offence (nearly half of all cases) was ‘offences against the person’ (not including homicides or

attempted murder).²⁶⁴ In this sense the results support the continued existence of a trend towards less serious index offences present since the enactment of Bill C-30. This suggests that the initial effect observed following the entry into force of Bill C-30 of non-homicide offences against the person replacing homicides as the most common group of index offences has been a lasting one. It also suggests that the reversal of the trend towards a greater number of NCRMD verdicts that followed the reforms is not simply part of a complete reversion towards the pre-*Swain* state of affairs, as the composition of index offences resulting in NCRMD verdicts has remained constant even while the total number has begun to drop, trending back towards pre-Bill C-30 levels.

However, the results of the present study also suggest that some evolution in the composition of index offences remains ongoing. This is the first study conducted since 1992 in which this group of offences comprised the most serious index offence in less than half of all cases. In the most recent previous study examining this factor, such offences were found to be the index offence in 59.9% of new NCRMD cases in BC between 2001 and 2005.²⁶⁵ This lower proportion of cases with an index offence that is an offence against the person corresponds to increases in the proportion of cases with an index offence within each of the other three categories of offence relative to past studies conducted since Bill C-30. This indicates an increase in the proportion of cases with both very serious and relatively minor index offences.

It is possible that these differences relative to past studies are simply the product of normal variation and do not reflect real changes in the composition of the Review Board's caseload. However, if future studies suggest that this is a sustained trend, it may suggest changes

²⁶⁴ Grant, *supra* note 16 at 427-428; Livingston *et al*, *supra* note 16 at 410-411; Latimer & Lawrence, *supra* note 191 at 17-19; Desmarais *et al*, *supra* note 191 at 5-6; Crocker *et al*, *NTP Part 2*, *supra* note 208 at 109-110.

²⁶⁵ Crocker *et al*, *NTP Part 2*, *ibid*.

in how accused persons and their counsel perceive the risks associated with seeking an NCRMD verdict, or that cases involving different types of index offences are being treated differently by the Crown, and may be worthy of further study.

5.3.6 Criminal History

The majority (58.6%) of the NCRMD accused in this sample were not identified as having a prior conviction or previous NCRMD verdict. This result is consistent with the most recent past study, which found that of those accused entering the Review Board system with NCRMD verdicts between 2001 and 2005, 40% had criminal records.²⁶⁶ It represents a decline from the results of a study examining those found NCRMD between 1992 and 1998, when 63% of those entering the Review Board system had a criminal record.²⁶⁷

This shift towards fewer NCRMD accused with criminal histories seems worthy of further study. It may suggest that the verdict is operating more frequently as a first intervention than as a ‘last resort’ and could be an indication that accused with criminal histories face barriers in pursuing the verdict.

It is noteworthy that criminal history was in no way predictive of the outcome of Review Board hearings. Given the Review Board’s mandate to protect the safety of the public by preventing future criminal acts, it is surprising that an NCRMD accused’s history of committing such acts seems to have no impact on disposition. The relationship between criminal history and disposition and how the Review Board considers criminal history will be considered further in the chapter that follows.

²⁶⁶ Crocker *et al*, *NTP Part 2*, *ibid* at 110-111.

²⁶⁷ Livingston *et al*, *supra* note 16 at 410.

5.3.7 Diagnosis

The most common diagnosis among those entering the Review Board system in BC in 2015 and 2016 was schizophrenia. This is consistent with the results of past studies both prior to and since the enactment of Bill C-30 which have consistently shown schizophrenia (or psychotic disorders generally) to be the most common diagnosis among those found NCRMD.²⁶⁸

There are a number of possible explanations for why psychotic disorders would be so prevalent among NCRMD accused. The first and perhaps most obvious possibility is that the symptoms of such disorders are most likely to meet the standard set out in s 16 of the *Criminal Code*. As discussed in Chapter 2, the mental disorder defence is not available to all accused who suffer from mental disorders, that mental disorder must render “the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.” It seems logical that accused persons with mental illnesses that lead to delusions and breaks with reality would be more likely to meet this standard. It is also plausible that those with other diagnoses may face barriers to the verdict not inherent in the applicable legal standard. It is plausible, for example, that defence counsel may be more likely to raise the possibility of pursuing an NCRMD verdict where an accused has a diagnosis of schizophrenia, or that the Crown or members of the judiciary more open to such arguments where the accused carries a diagnosis commonly associated with the verdict.

It is also notable that diagnosis is a statistically significant predictor of disposition. While this result tells us little about the mechanism by which diagnosis influences Review Board decisions, it does indicate that the Review Board is, appropriately, focused on the accused’s

²⁶⁸ Greenland, *supra* note 69 at 130; Philips *et al*, *supra* note 190 at 382; Philips, Landau & Osborne, *supra* note 190 at 346; St. Croix, Dry & Webster, *supra* note 190 at 16; Grant, *supra* note 16 at 428-429; Livingston *et al*, *supra* note 16 at 411; Crocker *et al*, *NTP Part 2*, *supra* note 208 at 108.

mental health status. In the chapter that follows, this result will be considered in light of the Review Board's reasoning, providing greater insight into precisely how diagnosis affects disposition.

5.3.8 History of In-Patient Psychiatric Care

The results relating to previous in-patient care reveal that it is unusual for an accused to be found NCRMD without a history of past psychiatric treatment. More than four out of five of the accused in this sample had previously been in in-patient care for psychiatric treatment. This is generally consistent with past studies which, both prior to and since Bill C-30, have consistently found that over 70% of accused persons found NCRMD in British Columbia have a history of in-patient care.²⁶⁹ Notably, this is the first study in which that proportion rose above 80%. Given the relatively small sample size and the small discrepancy between this result and those of previous studies, caution should be exercised in drawing conclusions from these differences, but it may suggest that the proportion of accused with a history of in-patient care is rising.

That such a high proportion of NCRMD accused have previously received in-patient care is noteworthy. It indicates that the criminal acts committed by NCRMD accused are not the result of the sudden and unexpected onset of mental illness and that generally society does have an opportunity to intervene in the lives of these accused prior to the index offence (particularly considering that some of the few accused without a history of in-patient care had received out-patient psychiatric treatment). It suggests that British Columbia has been relatively successful in

²⁶⁹ Golding, Eaves & Kowaz, *supra* note 190 at 163-164; Livingston *et al*, *supra* note 16 at 410; Crocker *et al*, *NTP Part 2*, *supra* note 208 at 108-109.

identifying these accused in advance of their criminal acts and ensuring some level of access to treatment, but less successful in preventing future dangerous and criminal activity.

Building on the discussion of the results relating to criminal history, it may also suggest a preference on the part of the authorities for detention under the *Mental Health Act* over laying criminal charges. Given that the majority of accused do not have a criminal history prior to the NCRMD verdict, the fact that most have a history of in-patient care suggests that the first attempt to intervene in the lives of these individuals is more likely to be through the mental health system rather than the criminal justice system. If indeed this is the case, it would be worthwhile examining the relationship from the opposite perspective. A better indicator of the effectiveness of this approach may be obtained by examining the proportion of individuals in the mental health system that eventually find themselves charged with crimes. If high, this may suggest that the mental health system is not effectively preventing individuals with mental illness from committing criminal acts.

These results could also reflect the attitudes or expectations of actors within the criminal justice system. For example, they may indicate that there is an expectation on the part of judges, the Crown, or defence counsel that an accused with a meritorious NCRMD claim will typically have a documented history of serious mental illness and that attempts to seek the verdict by those without such a history are met with skepticism. These explanations are highly speculative and there is nothing in the results of this study that suggests which, if any, may be correct. Still, they offer intriguing possibilities for understanding how the Canadian forensic mental health system functions and how it interacts with the civil mental health system and present areas for future research.

5.3.9 History of Substance Abuse

A large majority of the accused in this sample had a history of substance abuse. This includes both alcohol and drug abuse, and in many cases, both. This variable has not been considered in previous research, making it impossible to compare these results to those of past studies. Accordingly, the value of this data is not in comparing it to past results, but as a baseline against which future research can be compared.

It is notable that such a high proportion of NCRMD accused have a history of substance abuse and important to consider what this may tell us about the role that substance abuse plays in criminal behaviour committed by those with mental disorders. In particular, the somewhat surprising pattern indicating that accused with a history of substance abuse seemed less likely to be detained suggests that the conditions of these accused may improve rapidly as a result of forced abstinence from substances, leading to less restrictive dispositions. Or, placing the focus on those without a history of substance abuse, that mental disorder absent the use of substances is more intractable and harder to treat resulting in more restrictive dispositions. It should be noted, however, that accused with a history of substance abuse also tended to have less serious index offences, which may offer an alternative explanation for the greater rate of discharge.

5.4 Conclusion

This chapter detailed the results of a quantitative analysis of initial decisions made by the BC Review Board in 2015 and 2016. It discusses the composition of the population entering the Review Board system during these years. Overall, this population is relatively young, with an average age of just under 34 years old, overwhelmingly male, and predominantly non-Indigenous. This population was highly likely to have a history of both substance abuse and in-patient psychiatric care, and about as likely as not to have a previous criminal conviction or past

NCRMD verdict. The majority of these accused carried a diagnosis of schizophrenia or another psychotic disorder and were most likely to have committed an index offence that was an assault or another offence against the person.

These results are largely consistent with those of past studies examining the composition of the population of NCRMD accused in British Columbia since the entry into force of Bill C-30. This suggests that the impact of Bill C-30, discussed in the previous chapter, have been relatively stable. It is unclear, however, whether the high rate of past substance abuse among NCRMD accused represents continuity in this population over time as this variable has not been considered in past studies.

This chapter also revealed the variables that were the strongest predictors of disposition. Diagnosis, sex, and age at time of index offence were all revealed to be statistically significant predictors of initial disposition. While the remaining variables were not shown to be statistically significant predictors of disposition, some showed stronger relationships than others. In particular, indigeneity and index offence both appear to have some level of relationship with disposition, with index offence in particular quite close to the threshold for statistical significance. Conversely, criminal history, history of in-patient psychiatric care and history of substance abuse all appeared to have no relationship at all with disposition.

The chapter that follows begins by examining these results in the context of the Review Board's reasoning. This analysis attempts to explain *how* the Review Board is engaging with these variables to produce the results discussed above.

Chapter 6: Decision-Making by the Review Board

6.1 Introduction

The results discussed in the previous chapter and the relationship between the variables considered as part of this study and disposition decisions made by the BC Review Board offer an important, but ultimately incomplete understanding of decision-making by the Review Board. While these results provide some insight into the factors that may affect the outcome of an initial disposition hearing, they tell us little about how the Review Board makes decisions and the role these variables play in its analysis. This chapter places the results outlined in Chapter 5 in context by examining how the Review Board engages with the test mandated by s 672.54 of the *Criminal Code* to produce these results, and what this tells us about the Review Board system generally.

It begins by considering the results of the quantitative analysis alongside the content of the Review Board's decisions to provide insight into the reasoning processes underlying the results discussed in the previous chapter, revealing a near-exclusive focus by the Review Board on public safety. It then explores the challenges this poses for the Review Board and for NCRMD accused using the example of Indigenous accused and the applicability of the principles identified in the Supreme Court of Canada's decision in *R v Gladue*.²⁷⁰ The chapter then concludes by broadening this discussion beyond the specific example of Indigenous accused, exploring the implications of a Review Board system so heavily focused on protecting public safety generally.

²⁷⁰ [1999] 1 SCR 688, [1999] SCJ No 19.

6.2 Quantitative Results in Context: The Review Board's Reasoning

The results set out in Chapter 5 provide only limited insight into how the Review Board makes decisions. While these results offer an indication of the variables that are correlated to different dispositions, they tell us little about how these variables factor into the Review Board's analysis to influence outcomes. In order to understand why variables like diagnosis, sex and age are predictive of disposition while others such as criminal history and past substance abuse are not, it is necessary to examine what the Review Board says (or does not say) about these variables in its reasons. The discussion that follows considers first the variables that were found to be statistically significant before addressing those that were not. The only variable not considered among these is indigeneity, which is addressed in detail in section 6.3.

6.2.1 Diagnosis, Sex, and Age: The Statistically Significant Variables

The quantitative analysis identified three variables as statistically significant predictors of disposition: diagnosis, sex, and age at time of index offence. Despite their similar predictive abilities, the Review Board treats these variables very differently in its reasons - demonstrating significant concern for diagnosis and the accused's mental health status, while paying little attention to the accused's sex or age. Despite this differential treatment, the predictive capacity of each of these variables can be connected to the Review Board's focus on public safety as mandated by s 672.54 of the *Criminal Code*.

That the accused's diagnosis is highly predictive of disposition is unsurprising. The reason NCRMD accused are spared from conviction is that their criminal acts are connected to a mental illness or other mental disorder, so it is to be expected that the body charged with supervising these individuals following the verdict would demonstrate concern for the accused's mental health status. This is reflected in the Review Board's reasons. In virtually every case, the

Review Board discusses the accused's diagnosis, receives evidence from the accused's doctors and considers the accused's symptoms and the progress the accused has made in treatment.

The accused's symptoms and progress in treatment seem to be of particular concern to the Review Board because of the close connection between these factors and public safety.

Where an accused's symptoms include a propensity for violence or otherwise may pose a threat to members of the public and where those symptoms are uncontrolled by medication or other medical interventions, the Review Board is, understandably, highly unlikely to discharge that accused. Reasoning along these lines can be found in the following passage from a 2016 decision:

We have no hesitation in finding the accused continues to present a significant threat to the safety of the public. While we are encouraged by his progress over the past year, he has been detained in a maximum security unit under close supervision. He has an extensive history of violent behaviour, substance abuse dating to adolescence, medication non-compliance and elopement. His substance abuse is untreated. Were he to be absolutely discharged and return to substance abuse, according to [the accused's doctor], he would decompensate within weeks. When ill, the accused suffers from paranoid delusions and becomes impulsive, unpredictable, and violent.

In this passage, we see how the Review Board considers the accused's symptoms and the progress the accused has made in treatment in making disposition decisions. This accused has demonstrated that he can be violent as a result of his illness and it is clear that compliance with medication is an ongoing concern, indicating that his symptoms are not under control. As a result, the accused is ultimately detained.

This passage also suggests how diagnosis might influence disposition decisions. As the accused's specific diagnosis is not mentioned in this paragraph, the influence of diagnosis seems to operate indirectly. It is not the specific illness with which the Review Board is concerned but

rather the symptoms that are the manifestation of that illness, and the ease with which the symptoms can be treated. The variable of diagnosis may be a proxy for those symptoms.

Turning to sex and age at time of the index offence, the identification of the source of the predictive relationship between these variables and disposition in the Review Board's reasoning is more difficult. While the Review Board consistently indicates sex and age in its reasons when providing biographical information about the accused, they are virtually never mentioned in the Review Board's analysis or cited as reasons for imposing a particular disposition. Despite the predictive relationship between sex and disposition and age and disposition, the Review Board rarely seems to consider these factors directly in making disposition decisions.

The absence of any relevant reasoning makes it difficult to identify the mechanism by which sex and age at time of index offence influence Review Board decisions. While it seems clear that the Review Board is not detaining males and young people with greater frequency simply because it views these accused as inherently more dangerous than others, this conclusion does little to explain what is causing this relationship.

Accordingly, any effort to identify the source of the relationship between these variables and disposition is necessarily speculative. It is plausible that these results could be a statistical anomaly, and that there is no actual relationship, although given the finding of statistical significance and the fact that there are two otherwise distinct variables so identified, this seems unlikely. It is also conceivable that these results could be the product of unconscious bias - that despite the absence of a deliberate reasoning process, the Review Board members perceive male accused or younger accused as being more dangerous than female and older accused.

Perhaps more likely is the possibility that these variables are correlated with others that are of more direct interest to the Review Board. This explanation makes some intuitive sense given the Review Board's legislated focus on public safety. There is a logical connection between a process focused on identifying individuals more likely to cause harm through criminal activity and one that draws distinctions based on sex and age. Men are far more likely to commit criminal acts than women,²⁷¹ and offending behaviour tends to decrease with age.²⁷² As such, it stands to reason that a process intended to identify individuals likely to commit future criminal harm would treat males and younger people with greater caution.

The results do suggest that younger accused and male accused tend to have criminal histories that indicate greater risk. Males in the sample had typically committed more serious index offences, especially within the youngest age cohort. The female accused were highly unlikely to have a criminal history, with none having a past conviction indicated and only one with a past NCRMD verdict. While less pronounced, accused persons aged 30 and over were slightly less likely to have a criminal history, which is noteworthy given the additional life experience (and opportunities to offend) that come with advanced age. Accordingly, while the Review Board does not rely directly on sex or age in assessing dangerousness and arriving at disposition decisions, it appears that there are correlations between these variables and others that might explain some of the relationship between sex, age and disposition.

However, the quantitative analysis also suggests that this explanation is not entirely adequate. As noted in chapter 5, criminal history does not have a statistically significant relationship with disposition. If it was the case that sex and age are really just proxies for

²⁷¹ Kong and AuCoin, *supra* note 238 at 2; Choy *et al*, *supra* note 238 at 465.

²⁷² Carrington, *supra* note 261 at 333-334.

criminal history, one would expect to see a very strong relationship directly between this variable and disposition. That this relationship does not exist suggests that this explanation is not itself entirely sufficient and is perhaps just one element of a much more complex relationship between these variables that may prove a fruitful area for future research.

6.2.2 Index Offence, Criminal History and Substance Abuse: The Statistically Insignificant Variables

Index offence, criminal history and substance abuse were each found not to be statistically significant predictors of disposition. As with sex and age at time of index offence, the results of the statistical analysis do not seem to align with the focus of the Review Board's reasoning, at least on the surface.

Along with the accused's mental health status, discussed above, the Review Board typically demonstrates significant concern for the accused's criminal history (including both index offence and past convictions and NCRMD verdicts) as well as the accused's history of substance abuse. The Review Board's interest in these factors is demonstrated in the following passage, drawn from a 2016 decision:

We are unanimous that the accused continues to represent a significant threat to the safety of the public. He has an extensive history of violence including an assault in 2010 when the accused stabbed the victim in the neck several times because he was angry with him. He also has a history of rapid and severe mental status deterioration and significant violence when ill. The accused has abstained from substances while in a controlled environment but it is unclear how he would do without that level of close monitoring and subject to the stresses of residing in the community. We accept the evidence of the accused's doctor that if the accused does not continue with his treatment, uses substances or if his cognitive abilities become overwhelmed, his mental status will deteriorate and the risk of violence increase.

This excerpt demonstrates how the Review Board connects these factors to the issue of public safety - identified as the paramount consideration in s 672.54 of the *Criminal Code*. It

illustrates the primacy of public safety in Review Board decision-making and demonstrates the Review Board's adherence to the view that the accused's past behaviour is a reliable predictor of future behaviour absent meaningful intervention, such as effective treatment or progress in addressing substance abuse.

Given the significance of public safety in the s 672.54 test, it is unsurprising that the Review Board would focus on the accused's past criminality and substance abuse in making disposition decisions. The question that arises, however, is why index offence, criminal history, and substance abuse are not statistically significant predictors of disposition despite the Review Board's obvious concern for these factors. The answer may have more to do with how these variables were defined for the purpose of this study than the Review Board's actual decision-making, and further underscores the significance of public safety to Review Board decision-making.

For the purpose of the quantitative analysis, accused with any past convictions or NCRMD verdicts were counted among those accused with a criminal history. As the Review Board's decisions do not consistently provide information about the nature of the offences underlying a criminal record, it was not possible to further categorize accused based on the recency of their record or the nature of past convictions or NCRMD verdicts. The Review Board's reasons, however, indicate that these distinctions may be more important than the mere presence or absence of a criminal record. They suggest that the Review Board is unlikely to be concerned about criminal records for minor offences unrelated to the index offence and is likely to instead view the absence of a record for more serious offences as an indication that an accused does not pose a risk to the public.

Similarly, an accused with a history of criminal acts that have not resulted in convictions may be viewed as posing a serious risk to public safety because of these acts, even in the absence of a formal criminal record. This is illustrated in the following passage from a 2016 decision:

Although [the accused] has no prior criminal record, he came into significant conflict with the law. Police records disclose some 116 encounters with law enforcement officers in relation to matters that included investigation of missing persons, assault, animal cruelty, mischief, causing a disturbance, theft, fraud, uttering threats and arson. In the months preceding the index offences, [the accused]'s violence began to escalate. He got into an altercation with his father around Christmas and ended up getting a black eye. There was an incident in which [the accused] threw a can of soup at a family friend, hitting him in the head. The victim sustained a cut that required stitches. [the accused] reportedly assaulted his stepmother on five occasions within a two week period, but she refused to press charges. There were several instances of the accused physically abusing the family dog.

Despite the absence of a criminal record, the Review Board treats this accused's history of criminal behaviour as indicative of an elevated risk to public safety. It accepts the reports of criminal conduct as demonstrating an increased likelihood of future criminal harm even though these acts have not resulted in a conviction. While in the quantitative analysis this accused would have been coded as having no criminal history, the Review Board clearly does not view the accused in this way.

The concern for the substance of an accused's criminal past over the formal record is reflected in the relationship between index offence and disposition. While still not statistically significant, this relationship was much stronger than that between criminal history and disposition. Because index offences were categorized by the nature of the offence, the relationship between this variable and disposition does reflect, to a degree, the seriousness of the offence. As the index offences would also typically be recent, they would also reflect the accused's recent criminal activity in a way that past convictions may not. Accordingly, the

stronger relationship between index offence and disposition is consistent with an interest in the nature of the criminal behaviour underlying a conviction or NCRMD verdict as the index offence data takes into account the recency and nature of offending behaviour.

In principle, this focus on criminal and violent behaviour rather than past convictions makes sense. If the Review Board is acting on the presumption that an accused's past behaviour is predictive of future behaviour, it is sensible to take into account the nature of past offending and the entirety of the accused's history, rather than just that which resulted in convictions or NCRMD verdicts. The actions described in the passage reproduced above, for example, certainly seem relevant to the accused's future risk to the public. The difficulty with this practice, however, is the potential unreliability of the information on which the Review Board relies in making findings of fact about past criminal behaviour. In the 2016 decision from which the above passage is drawn the Review Board provides no indication of where this information came from or whether and how it assessed it for reliability. Similar treatment of reports of past criminal behaviour in other decisions is not uncommon. As a result, there is reason to be concerned about its reliability and the accused's ability to respond to these allegations. If the Review Board continues to rely on allegations of criminal activity that have not resulted in convictions, it is important that greater attention be devoted to assessing the reliability of such information, and that steps be taken to ensure that accused persons be provided a meaningful opportunity to respond.

Similarly, for accused with histories of substance abuse it seems to be the details of such histories that are of concern to the Review Board rather than their mere presence. Whereas the quantitative results considered only the presence or absence of a history of substance abuse, the Review Board seems to be much more concerned with the progress an accused has or has not

made in addressing their substance abuse issues. The quantitative results treat an accused with a distant history of substance abuse that an accused has overcome as being identical to one still struggling with an addiction, while the Review Board would view these accused as being entirely different. An active addiction would be seen to make an accused more dangerous and justify greater infringement on his or her liberty, while having overcome an addiction would be viewed as justification for granting a less restrictive disposition. In these ways, the apparent discrepancies between the quantitative results and the Review Board's reasons may better indicate limitations in research design (and in the data available from Review Board decisions alone) than they do genuine inconsistencies between what the Review Board says it is doing in its decisions and the outcomes created by those decisions. As with criminal history, this approach to past substance abuse seems sensible. An accused with a distant history of drug or alcohol dependency should not be 'penalized' for this history and is rightfully viewed very differently than one actively struggling with addiction.

Alongside the insights that it is the nature of the accused's past criminal behaviour and substance abuse that is important to the Review Board rather than their mere presence, there are also lessons to be learned for future research in this area. With respect to variables such as criminal history and substance abuse, it is the details that are important, not simply their existence or absence. As noted above, however, to allow for more nuanced coding of these variables, additional information would be necessary. While the Review Board decisions consistently indicate whether an accused has a criminal record or a history of substance abuse, they do not consistently include details about the nature of past offences (let alone criminal conduct that did not result in a conviction) or the accused's history of substance abuse. Accordingly, to effectively assess the impact of these kinds of variables on Review Board

dispositions would require significantly greater access to information than was available for the present study.

6.2.2 Public Safety and Decision-Making by the BC Review Board

In addition to providing insight into how the Review Board engages with the variables considered in the previous chapter, the discussion above also highlights the importance of public safety in Review Board decision-making. To an extent, the Review Board's concern for protecting the safety of the public is unsurprising. Parliament has identified public safety as the "paramount consideration" in Review Board disposition decisions,²⁷³ and in *Swain* the Supreme Court of Canada held that the Lieutenant-Governor's warrant system violated the *Charter* precisely because it permitted detention even where there was no compelling public safety rationale.²⁷⁴

Nevertheless, in the course of reviewing the Review Board decisions, the extent to which the s 672.54 test seems to drive the Review Board to focus nearly exclusively on public safety was striking. As discussed in Chapter 2, the *Criminal Code* mandates a two-stage analysis in Review Board disposition decisions. First, the Review Board is required to consider whether the accused poses a "significant threat to the safety of the public" (referred to below as the "significant threat analysis.") If the accused is not found to pose a significant threat to the safety of the public, s 672.54(a) requires that the accused be granted an absolute discharge. If the Review Board concludes that the accused does pose a significant threat and is therefore not absolutely discharged, the Review Board must then move to the second stage of the analysis and decide whether to detain the accused or grant a conditional discharge (referred to below as the

²⁷³ *Criminal Code*, *supra* note 3 at s 672.54.

²⁷⁴ *Swain*, *supra* note 64 at 1009-1019.

“disposition analysis.”) In either case, the Review Board may also set conditions that will attach to the disposition.

At both stages of the test, the Review Board is obliged to consider “the safety of the public..., the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused.” The *Criminal Code* specifies that the safety of the public is to be the “paramount consideration.” Despite the presence of the other identified considerations, the effect of designating public safety as paramount seems to be the relegation of these other factors to near irrelevance at both stages of the analysis.

At the first stage, the scope of the Review Board’s decision-making is further limited by s 672.54(a), which requires the Review Board to decide whether or not to absolutely discharge the accused based solely on whether the accused poses a “significant threat to the safety of the public.” Section 672.5401 defines “significant threat” as “a risk of serious physical or psychological harm to members of the public... resulting from conduct that is criminal in nature but not necessarily violent.”

At this stage, the Review Board typically adheres closely to the task set out in s 672.54(a), and consistently recognizes the definition of “significant threat” in s 672.5401. As a result, there is little scope for consideration of the accused’s ‘mental condition, reintegration, or other needs’ or really anything at all beyond that which it views as directly relevant to assessing the threat posed by the accused to the public. As indicated above, this results in the Review Board focusing primarily on factors such as the accused’s mental health status, history of criminal behaviour, and ongoing substance abuse.

Less guidance is offered to the Review Board by the *Criminal Code* regarding the second stage of this decision-making process. The parameters set for this stage include only the general direction in s 672.54 that the Review Board must make an order that is necessary and appropriate and that it must consider public safety - the paramount consideration - as well as the mental condition, reintegration, and other needs of the accused. At this stage of the analysis the Review Board is also freed from the constraints imposed by s 672.54(a) which requires the Review Board to focus on whether the accused poses a “significant threat” in determining whether an absolute discharge is mandatory and s 672.5401 which further focuses the Review Board’s attention on the prospect of future criminal acts. Whereas these constraints make it difficult for the Review Board to consider all the factors identified in s 672.54 of the *Criminal Code* in the significant threat analysis, it would seem that at this second stage, the Review Board would have a greater capacity to do so.

However, despite the removal of these limitations, the Review Board does little to expand the scope of its analysis to encompass potentially relevant factors that do not fit within the significant threat analysis. While the Review Board clearly treats this second step as a distinct stage in its decision-making process, it maintains its focus on the same issues that typically ground the first stage, treating this stage of its decision-making process as a second risk assessment but one aimed at deciding between detention and conditional discharge rather than deciding on whether an absolute discharge is required.

The result of the combination of these two stages is a process with a near exclusive focus on public safety. In light of the identification of other factors as necessary considerations in s 672.54 of the *Criminal Code*, it is arguable that this was not the intent of Parliament, but given the designation of public safety as the “paramount consideration” this outcome should not be

viewed as too great a departure. Regardless of the underlying intention, it certainly appears that the effect of this emphasis on public safety has been the relegation of considerations other than public safety to near irrelevance.

The remainder of this chapter will explore the implications of a Review Board system so focused on public safety. In the next section, I argue that this exclusive focus on public safety makes it impossible for the Review Board to consider factors that relate to the over-detention of Indigenous NCRMD accused. The final section considers the implications of this focus on public safety for NCRMD accused and the Review Board system more generally.

6.3 Public Safety, *Gladue*, and Indigenous NCRMD Accused

The results set out in Chapter 5 indicate that the NCRMD verdict and Review Board system have a distinct impact on Indigenous accused. Indigenous people are overrepresented in the Review Board system relative to the general population, just as they are in the criminal justice system generally. However, Indigenous people are underrepresented in the Review Board system relative to the population of incarcerated persons. In addition, Indigenous people were more likely to be detained and less likely to receive an absolute discharge than other accused. This suggests that while the Review Board system is one additional component of the criminal justice system in which the overrepresentation of Indigenous people is reflected, there may also be some level of differential access to the mental disorder defence and NCRMD verdict that means that once an Indigenous accused is in the criminal justice system, they are less likely than other accused to be found NCRMD.

The impact of the Review Board's focus on public safety is particularly evident in the treatment of Indigenous accused. Indigenous people occupy a unique place in the Canadian

criminal justice system. The legacy of colonization and ongoing systemic racism has resulted in the overrepresentation of Indigenous people among Canada's incarcerated population.²⁷⁵ In addition to the effects on individual accused, the Review Board's focus on public safety also prevents the Review Board from recognizing the legacy of colonialism and the disproportionate impact the criminal justice system has on Indigenous people in the way other decision-makers in the criminal justice system can.

The overrepresentation of Indigenous people in the Canadian criminal justice system has been acknowledged by Parliament and the Canadian courts. In 1996, Parliament enacted s 718.2(e) of the *Criminal Code*.²⁷⁶ This provision established the following as a principle of sentencing that must be considered by a sentencing court:

[A]ll available sanctions, 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*. [Emphasis added.]

In *Gladue* the Court considered the meaning of s 718.2(e). The Court held that the purpose of the provision is to respond to the “acute problem of the disproportionate incarceration of aboriginal people” in Canada, in part by recognizing the role of “systemic and direct discrimination” that has resulted in over-incarceration.²⁷⁷ The Court directed that in *every* case involving an Indigenous offender, the sentencing judge must take judicial notice of the systemic and background factors affecting Indigenous people and that even where it is not adduced by

²⁷⁵ *Gladue*, *supra* note 271 at para 50.

²⁷⁶ *Supra* note 3; Verdun-Jones, *Insanity Defence*, *supra* note 12 at 175.

²⁷⁷ *Gladue*, *supra* note 271 at para 50.

counsel, the judge is obliged to seek out information about the offender “as an aboriginal person.”²⁷⁸

The Supreme Court had further opportunity to consider s 718.2(e) in *R v Ipeelee*.²⁷⁹ In *Ipeelee*, the Court specified that the provision “does not create a race-based discount on sentencing”, but rather obligates sentencing judges to consider the circumstances of Indigenous people to arrive at a fit sentence and as such is consistent with an individualized approach to sentencing.²⁸⁰ The Court affirmed that the failure to apply s 718.2(e) in *any* case involving an Indigenous offender, regardless of the severity of the offence or the existence of an obvious connection between the offender’s Indigenous identity and the offence would “result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality.”²⁸¹

While s 718.2(e) is directly applicable only to sentencing, in *Gladue* the Court refers to the broader relevance of the principles underlying the decision that go beyond sentencing to the criminal justice system generally:²⁸²

Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal people from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court noted in *R v Williams*, [1998] 1 SCR 1128, at para 58, there is widespread bias against aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.”

²⁷⁸ *Gladue*, *supra* note 271 at para 81.

²⁷⁹ 2012 SCC 13, [2012] 1 SCR 433.

²⁸⁰ *Ibid* at para 75.

²⁸¹ *Ibid* at paras 84-87.

²⁸² *Gladue*, *supra* note 271 at para 61.

Lower courts have since seized on this principle and applied *Gladue* to other decision-making processes within the criminal justice system including bail,²⁸³ parole²⁸⁴ and extradition.²⁸⁵ In its decision in *R v Sim*,²⁸⁶ the Ontario Court of Appeal held that *Gladue* does apply in the NCRMD context to “compliment the analysis” mandated by s 672.54 of the *Criminal Code*.²⁸⁷ Further, the Court held that the Review Board’s positive duty to seek out information, as identified in *Winko*,²⁸⁸ applies equally to information about the accused’s “aboriginal background.”²⁸⁹ In *Sim*, the Court relied on a 2003 decision of the BC Review Board, in which the Review Board held that:²⁹⁰

I also consider that in order to satisfy *Winko*’s requirement to undertake highly individualized and broadly based evaluation and assessment, for this particular accused, it is not only entirely appropriate, but indeed necessary to include in the analysis the unique, historic, cultural, political, and systemic components of his aboriginal heritage and traditions: see *R v Gladue*.

While there is no binding authority in British Columbia requiring the Review Board to apply *Gladue*, it seems clear that there is good reason to do so in this context. Review Board disposition decisions are fundamentally about whether an individual should be deprived of his or her liberty as a result of criminal conduct. As reasoned by the Federal Court in its decision in *Twins v Canada (Attorney General)*, which extended *Gladue* to parole decisions, this should be sufficient to justify the application of these principles to the Review Board context:²⁹¹

²⁸³ Jillian Rogin, “*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017) 95:2 Canadian Bar Review 325; *R v Robinson*, 2009 ONCA 205, 95 OR (3d) 309; *R v Hope*, 2016 ONCA 648, 133 OR (3d) 154.

²⁸⁴ *Twins v Canada*, [2017] 1 FCR 79 at para 58; [2016] FCJ No 520.

²⁸⁵ *United States v Leonard*, 2012 ONCA 622, at para 94, [2012] 4 CNLR 305.

²⁸⁶ (2005), 78 OR (3d) 183, [2005] OJ No 4432; See also *R v Conway*, 2008 ONCA 326, 90 OR (3d) 335.

²⁸⁷ *Sim*, *ibid* at para 19.

²⁸⁸ [1999] 2 SCR 625

²⁸⁹ *Sim*, *supra* note 287 at paras 26-27.

²⁹⁰ *Ibid* at para. 28.

²⁹¹ *Supra* note 284 at para 57.

The common thread underlying all these decisions is a recognition of the systemic and background factors that have contributed to the over-incarceration of Aboriginal people in Canada and to what has been described as the estrangement of Aboriginal people from the Canadian justice system. These factors apply more broadly than just to the process of criminal sentencing addressed by section 718.2(e) of the Code, and consideration of these factors, as well as consideration of alternatives to incarceration, apply to a range of circumstances in which Aboriginal people interact with the justice system.

Despite the importance of *Gladue* for Indigenous NCRMD accused, the Review Board has given limited and inconsistent recognition to the *Gladue* principles in deciding cases involving Indigenous accused. In some cases, the Review Board does seem to apply *Gladue*. In one 2016 decision, the Review Board seemed to accept the reasoning in *Sim* (without referring to the case) noting that “we are mindful of the strictures in the *Gladue* case about the importance of [the accused’s culture and heritage] in cases involving First Nations offenders.” In others, the Review Board seems to give effect to these principles, without specifically mentioning *Gladue*. In another 2016 decision for example, the Review Board recognized the importance of the accused’s connection to his “family and First Nations community” and shortened the time until the next review of his disposition in response. In a 2015 decision involving a different accused, the Review Board acknowledged the importance of providing “access to First Nations programs” while the accused was detained in hospital.

In the majority of decisions involving Indigenous accused however, there is no such consideration of the accused’s indigeneity and certainly no examination of its relevance to disposition. Despite consistently identifying the accused as an Indigenous person, in these cases the Review Board’s analysis does not differ in any notable way from that found in cases involving accused who are not Indigenous. There is no recognition of systemic discrimination against Indigenous people in Canada or their disproportionate representation in the criminal

justice system and no discussion of how the accused's Indigenous identity may be relevant to the accused's reintegration or "other needs."

It is not possible to identify with certainty why *Gladue* is acknowledged, implicitly or explicitly, in some decisions but not others. However, based on the decisions reviewed for the purpose of this study, it appears that in those cases in which the accused's Indigenous identity is considered, it seems to invariably be prompted by something in the evidence of the accused or other information before the Review Board that suggests a pre-existing connection between the accused and his or her Indigenous culture or at the very least an interest in establishing such a connection. In decisions in which there is no such consideration of the accused's Indigenous identity, there is typically no indication that the accused has an existing connection with his or her cultural background.

This limited application of *Gladue* is concerning. First, it is inconsistent with the Supreme Court of Canada's reasoning in *Gladue* and *Ipeelee*, and the Ontario Court of Appeal's decision in *Sim*. In *Ipeelee*, the Court affirmed that it is an error to fail to consider the *Gladue* principles in *any* case involving an Indigenous offender,²⁹² and in *Sim*, the Court held that the Review Board is required to seek out information about the background of *every* Indigenous accused "as an aboriginal person."²⁹³ Further, the Review Board's passive approach is of particular concern given the unsettled upbringing of many of the Indigenous accused under Review Board jurisdiction, often involving family separation and foster care or other arrangements which may result in alienation from Indigenous identity.²⁹⁴ By refusing to

²⁹² *Ipeelee*, *supra* note 280 at para 84.

²⁹³ *Sim*, *supra* note 287 at para 28; see also *Gladue*, *supra* note 271 at para 81.

²⁹⁴ Notably, the Indigenous accused in the sample are significantly younger than the sample as a whole, with an average age of 24. Accordingly, these accused are typically not far removed from these features of their upbringing.

acknowledge the importance of an accused's cultural identity in the absence of evidence of an obvious, pre-existing connection the Review Board is arguably exacerbating the "community fragmentation" identified as a central concern in *Gladue*.²⁹⁵

Even where the Review Board does consider the accused's Indigenous identity however, there remains reason to question whether it is genuinely giving effect to the principles set out in *Gladue*. Even in these cases, the Review Board takes the accused's identity into account only to the point of considering whether it is relevant to the conditions associated with the accused's disposition, for example, by ensuring access to an accused's community or to programming designed for Indigenous people. In no case is there any consideration of how the "systemic and background factors affecting Indigenous peoples" may have contributed to the index offence or the accused being found NCRMD as required by *Gladue*,²⁹⁶ or the role of colonialism in causing and constructing mental illness.²⁹⁷

It is difficult, however, to identify precisely how the Review Board should do so given the current structure of the s 672.54 decision-making process. In a process devoted exclusively to protecting public safety it is difficult to see where the accused's Indigenous identity and in particular the impact of colonialism is supposed to fit within the analysis. At the first stage of the test, the accused will only be absolutely discharged if found not to constitute a significant threat to the safety of the public. While colonialism may be highly relevant to *why* an accused poses a

²⁹⁵ *Gladue*, *supra* note 271 at para 67.

²⁹⁶ *Ibid* at para 68.

²⁹⁷ Sarah E Nelson & Kathi Wilson, "The Mental Health of Indigenous Peoples in Canada: A Critical Review of Research" (2017) 176 *Social Science & Medicine* 93 at 94; Rupert Ross, *Indigenous Healing: Exploring Traditional Paths* (Toronto: Penguin, 2014) at 106-156.

significant threat to the public, it seems unlikely to have an impact on *whether* an accused poses such a threat.

While there could be greater scope to consider *Gladue* factors at the second stage - as relevant to the accused's mental condition, reintegration, and "other needs" - these factors are unlikely to have a significant impact on the disposition decision while public safety remains the "paramount consideration." Further, to the extent they do allow for a *Gladue* analysis, it is a limited one that would not permit the kind of in-depth examination of the impact of colonialism contemplated by *Gladue* and *Ipeelee*. In *Ipeelee*, the Court identified an offender's moral blameworthiness as one of the mechanisms by which the *Gladue* analysis affects sentencing:²⁹⁸

First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.

The reference in the above passage to the relationship between the *Gladue* analysis and moral culpability points to a larger issue with the s 672.54 test and the broader mental disorder regime. If the *Gladue* principles operate by diminishing the accused's moral culpability, it should be unsurprising that the Review Board struggles to apply *Gladue* to NCRMD accused who, by virtue of the verdict, bear *no* moral responsibility for their criminal acts. Whereas Indigenous

²⁹⁸ *Ipeelee*, *supra* note 280 at para 73.

accused persons convicted of criminal offences can ‘benefit’ from this reduction in blameworthiness, because NCRMD accused are not responsible for their offences at all, these principles would not apply. Even where there may be space for practical considerations about the appropriateness of dispositional options for Indigenous accused, the statutory test would not allow for the kind of recognition of the impact of colonialism that *Gladue* normally requires. Accordingly, while the effects of colonialism may well result in the accused being perceived to pose (or actually posing) a greater risk to the safety of the public, there is no opportunity for the Review Board to acknowledge this impact in making disposition decisions.

The findings regarding Indigenous accused demonstrate the negative repercussions that can arise for accused from the Review Board’s focus on public safety and the exemption the NCRMD verdict offers from criminal culpability and ultimately punishment. The absence of moral blameworthiness is a foundational principle upon which the mental disorder defence, NCRMD verdict and Review Board system are built. However, this impact is not limited to Indigenous accused. In the discussion that follows, the broader implications of removing NCRMD accused from the punitive aspects of the criminal justice system are considered.

6.4 Blameworthiness, Public Safety and the Review Board

The Review Board’s focus on public safety, to the near exclusion of other considerations, is highly unusual within the criminal justice system. While crime prevention and the protection of the public from criminal activity is undoubtedly a core objective of criminal law generally, in most instances it is tempered by other important considerations - most importantly the principle of proportionality.²⁹⁹ In sentencing, for example, the task of the sentencing judge is to balance

²⁹⁹*R v KRJ*, 2016 SCC 31, at para 32, [2016] 1 SCR 906; Yannoulidis, *supra* note 5 at 52-53.

the safety of the public against other considerations such as the rehabilitation of the accused.³⁰⁰ A sentencing judge may conclude that the protection of the public is the most important factor in an individual case, but this is based on the particular circumstances of the offender and the offence. At the conclusion of a sentence, the accused must be released, even if he or she continues to pose a “significant threat” to the safety of the public. Even if the accused remains a danger to society, the accused’s liberty interest and the importance of proportionality outweigh the interest in public safety.³⁰¹

The source of this distinct treatment is found in the exemption of NCRMD accused from criminal culpability. An accused that is convicted of an offence is morally responsible for his or her crime and accordingly may be punished for it. This allows the Court to impose a sentence for the purpose of punishing the accused simply because the accused is deserving of punishment, even where the sentence will not significantly advance any of the utilitarian objectives of sentencing such as deterrence, protecting public safety or rehabilitation of the offender.³⁰² However, because the sentence is imposed for punitive reasons, it also comes with protections for the accused against disproportionality - limiting the sentence that may be imposed. Any sentence must be proportional to the offence and the degree of responsibility of the offender.³⁰³ This means that even where a longer sentence may advance utilitarian objectives - such as the

³⁰⁰ Erik Luna, “Sentencing” in Markus D Dubber & Tatjana Hörnle, eds *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 966-967; *R v KRJ*, *ibid* at para 32.

³⁰¹ The indeterminate sentence that can follow from the designation of an offender as a dangerous offender is another exception to this principle: *Criminal Code*, *supra* note 3 at s 753.

³⁰² HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968) 8-12.

³⁰³ *R v Suter*, 2018 SCC 34 at para 168, [2018] 2 SCR 496; *R v Lacasse*, 2015 SCC 64 at para 12, [2015] 3 SCR 1089.

protection of public safety - at some point it will exceed what the offender 'deserves' and thus the principle of proportionality puts a check on these utilitarian considerations.

As a society, however, we have decided that an NCRMD accused is not morally blameworthy for his or her criminal acts and as such is not deserving of punishment. This spares the accused from detention or other losses of liberty that do not serve the interest of public safety. An accused found NCRMD for the index offence of murder, for example, could be released far earlier than an individual convicted of that offence if the Review Board concludes that he or she does not pose a significant threat to public safety. At the same time, however, the NCRMD accused does not have access to the same protections as an offender being sentenced. The s 672.54 test does not permit the Review Board to ask whether a disposition is proportionate to the nature of the index offence or to the harm caused by the accused. Because the accused is not being punished, the question of 'how much' punishment is appropriate never enters into consideration. As a result, an NCRMD accused could be subject to a far greater loss of liberty than would be possible for an offender convicted of a similar offence.

Even though a Review Board disposition does not amount to punishment, it is nevertheless a response to criminal activity which results in significant restrictions on the liberty of an accused by the state. When it is done solely in service of public safety, it amounts to the subjugation of the interests of the individual to those of society in a way rarely permitted elsewhere in the criminal justice system.

The suggestion that the Review Board's focus on public safety subjugates the interests of the accused to those of society should not be taken to mean that the interests of the individual and society are necessarily at odds, or that this feature of the Review Board system necessarily

results in radically different outcomes for individual accused. Just as it is not in the interest of the public for an accused to be released just to reoffend violently, it is not in the interests of the accused to be put in a situation where reoffending, and possible arrest, are likely. In *Winko*, the Supreme Court of Canada recognized that the best way to ensure public safety is through the long-term recovery and reintegration of the accused.³⁰⁴

Nevertheless, it is important to recognize that the required focus on public safety circumscribes the scope of the Review Board's considerations in important ways. Even though a disposition that serves the public's interest in safety may also align with the interests of the accused, the Review Board's ability to directly consider the interests of the accused is limited. A disposition cannot be imposed simply because it serves the accused's interest in reintegration or rehabilitation - it must first advance public safety. In cases in which the interests of the public and of the accused are not aligned, rare though they may be, the interests of the public will always take precedence. Alongside the impact on the liberty interests of individual accused, this may also affect the willingness of those eligible for an NCRMD verdict to seek it. As indicated in Chapter 4, the dramatic increase in NCRMD verdicts following Bill C-30 suggests that accused persons may be sensitive to the incentives created by legislative changes in this area. It is possible that the absence of concern for the individual interests of the accused and the consequent lack of certainty about the duration of possible detention following an NCRMD verdict is discouraging those who might otherwise be eligible for such a verdict from seeking it. If so, this may be resulting in the conviction of those who, by law, are not responsible for their offences, inappropriate correctional placements, and lost opportunities to provide treatment

³⁰⁴ *Supra* note 7 at para 40.

through the forensic mental health system, which has been found to result in much lower recidivism rates than the correctional system.³⁰⁵

Given this imbalance in the system, it is worth exploring whether it is possible to reform the existing system to continue to adequately safeguard the public while better acknowledging the interests of NCRMD accused. A number of examples of mechanisms that offer the equivalent of an NCRMD accused the protections found in traditional sentencing without subjecting them to punishment can be found within the common law world. The capping provisions, discussed in Chapter 3, which were enacted in Bill C-30 but which never entered into force and were eventually repealed,³⁰⁶ are one such example. Others include the English mechanism which permits (but does not require) a judge who has found an accused not guilty by reason of insanity to impose a limit on the total length of time the accused may be hospitalized.³⁰⁷ Similarly, in South Australia, a judge that finds an accused mentally incompetent to commit an offence is required to determine the sentence that would have been imposed had the accused been convicted.³⁰⁸ The period of time the accused may be hospitalized is equivalent to the length of this sentence.³⁰⁹

Assessing the advantages and disadvantages of such reforms is a complex task beyond the scope of this thesis. One obvious challenge to these reforms is the likelihood that accused

³⁰⁵ Yanick Charette *et al*, “The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 4: Criminal Recidivism” (2015) 60:3 *The Canadian Journal of Psychiatry* 127 at 130-131.

³⁰⁶ Raaflaub, *supra* note 13.

³⁰⁷ RD MacKay & Gerry Kearns, “The Continued Underuse of Unfitness to Plead and the Insanity Defence” (1994) *Criminal Law Review* 576 at 577; MacKay, Mitchell & Howe, *supra* note 5 at 399-400; Stephen White, “The Criminal Procedure (Insanity and Unfitness to Plead) Act” (1992) *Criminal Law Review* 4 at 9.

³⁰⁸ Arie Freiberg, “The Disposition of Mentally Disordered Offenders in Australia ‘Out of Mind, Out of Sight’ Revisited” (1994) 1:2 *Psychiatry, Psychology and Law* 97 at 101; Sentencing Advisory Council, *supra* note 100 at para. 3.2, 3.127-3.128.

³⁰⁹ Sentencing Advisory Council, *ibid*; Freiberg, *ibid*.

persons released because of the expiry of such time limits may quickly find themselves detained under provincial mental health legislation.³¹⁰ This could place additional strains on civil mental health systems and - depending on the province or territory - may leave these accused with similar or greater restrictions on their liberty but fewer procedural protections.³¹¹ Despite these challenges it remains the case that the exclusive focus on public safety in the Review Board system results in inadequate protections for the accused, leaving NCRMD accused in a more precarious position than conventional offenders simply because the criminal behaviour in question is connected with mental disorder. By drawing on the experiences of other jurisdictions, it may be possible to build a Review Board system that better acknowledges the interests of the accused and provides more appropriate incentives for those eligible for the NCRMD verdict, better serving both NCRMD accused and Canadian society.

³¹⁰ *Mental Health Act*, RSBC 1996, c 288.

³¹¹ Laura Johnston, *Operating in Darkness: BC's Mental Health Act Detention System* (Vancouver: Community Legal Assistance Society, 2017).

Chapter 7: Conclusion

The question of how those who commit criminal acts associated with mental illness should be treated is a challenge faced by every criminal justice system. While these individuals may bear no moral responsibility for their acts, they have clearly demonstrated their capacity to cause harm through criminal behaviour. The criminal justice system must weigh the risks they pose to public safety in the future against their interest in reintegration in the absence of a finding of blameworthiness.

Through a combination of design and accident, Canada has developed a unique approach to this challenge. In recognition of the absence of moral responsibility, Canada spares mentally disordered accused from formal conviction, imposing instead the verdict of “not criminally responsible on account of mental disorder” (NCRMD). While not a conviction, this verdict is also not a true acquittal and does not result in the immediate and unconditional release of the accused. Instead, the accused becomes subject to the jurisdiction of a provincial Review Board, tasked with assessing the risk posed by the accused to the public to determine whether the accused should be detained in hospital for the purpose of treatment or released unconditionally or with conditions. The accused will remain under the jurisdiction of the Review Board until he or she is found to no longer pose a significant threat to the public and released. This means that every NCRMD verdict comes with the risk of a lifetime of detention, regardless of the severity of the index offence underlying the verdict.

The purpose of this thesis was to contribute to filling two gaps in the literature examining the impact of this unique Canadian approach to mentally disordered offenders. First, while several studies examining the impact of Bill C-30, the legislation that established the modern NCRMD system, and the composition of the population under Review Board jurisdiction were

conducted in the decade that followed the bill's entry into force, the most recent cases considered in the last such study were from 2005, now more than a decade old. Accordingly, we have little sense of how the population of NCRMD accused has changed in recent years, and little sense of the ongoing impact of the legislative scheme created by Bill C-30. Secondly, past studies have been highly focused on quantitative analysis, examining the composition of the NCRMD accused population and the relationships between different variables and disposition. In doing so, they have tended to ignore the Review Board's reasoning process, failing to consider how the Review Board engages with the decision-making framework and the considerations mandated by the *Criminal Code*.

To fulfill this purpose, the thesis examined all initial disposition decisions made by the British Columbia Review Board in 2015 and 2016 in order to answer three questions. First, it asked who is being found NCRMD and entering the Review Board system in British Columbia over these two years, and how has this population changed in the decade since this question was last considered. Secondly, it asked what relationships exist between various characteristics of the accused persons and cases before the Review Board, and the orders made on initial disposition hearings. Finally, it asked what factors the Review Board treats as important in making such decisions, and what connections exist between these factors and the characteristics found to have a relationship with disposition as considered in question two.

In response to the first of these questions, this study revealed that, broadly speaking, the population entering the BC Review Board system in 2015 and 2016 did not look dramatically different than that observed in the most recent previous study. As in past studies, the population was predominantly male, made up primarily of individuals in their 20s and 30s, and was mostly not Indigenous. The index offence resulting in the NCRMD verdict was most likely to be an

assault or another offence against the person and the majority of accused carried a diagnosis of schizophrenia or another psychotic disorder. A significant majority of these accused had a history of in-patient psychiatric treatment and a history of substance abuse, while these accused were about as likely to have a past criminal conviction or previous NCRMD verdict as not.

The examination into the second question revealed that three of the variables considered were statistically significant predictors of disposition - sex, age, and diagnosis. In addition, those that appeared to have some connection with disposition, though not one that was statistically significant, were index offence and indigeneity. The remaining variables - criminal history, history of in-patient psychiatric treatment, and history of substance abuse had no evident relationship with disposition.

Finally, the examination of the Review Board's reasoning revealed that the Review Board is highly focused on the protection of public safety. In its decisions, the Review Board typically focuses on the accused's symptoms and progress in treatment, criminal history, including index offence, and history of substance abuse. While the quantitative analysis and the Review Board's reasons both affirm the importance of the accused's mental health status in Review Board decision-making, the results otherwise may appear incongruent on first impression. Upon closer examination however, the predictive capacity of sex and age may be explained in part by the Review Board's focus on public safety in that males are known to be much more likely to offend than females and younger people are more likely to offend than older. This is supported by the criminal history data which indicates that the younger and male accused in the study were more likely to have a history of criminal convictions and NCRMD verdicts than female and older accused.

The Review Board's near exclusive focus on public safety may be unsurprising given the nature of the statutory test set out in s 672.54 of the *Criminal Code* and that the rationale underlying the existence of the NCRMD verdict and Review Board system is the protection of the public. However, this degree of focus on the protection of public safety is unusual within the Canadian criminal justice system and typically does not apply to those convicted of offences, even when they pose a threat to the public that equals or exceeds the threshold for detaining NCRMD accused. It also makes it difficult to give effect to the Supreme Court of Canada's decision in *Gladue* in this context. This distinct treatment seems to be the product of Canadian society's decision to declare NCRMD accused to lack moral blameworthiness for their criminal acts and exempt them from punishment.

This focus on the interests of society to the exclusion of those of the accused is not inevitable. Other common law jurisdictions have instituted mechanisms for incorporating greater protections for mentally disordered accused persons into their versions of the mental disorder defence and NCRMD verdict. By further reforming the Review Board system, the Canadian criminal justice system can better balance the legitimate interest in public safety with those of the accused.

The intention of this thesis was to provide an updated understanding of the population being found NCRMD in British Columbia and begin to develop a sense of how the Review Board is making decisions and the factors it views to be important to this task. In doing so, it has hopefully added to our understanding of the impact of recent legislative reforms on mentally disordered accused and of how the current Review Board system functions. It will hopefully also serve to highlight the need for ongoing research in this area. This thesis provides an updated analysis of how the verdict and Review Board operate in British Columbia, but it remains the

case that there is no such recent work in many provinces. The NCRMD verdict and Review Board system affect a very small number of people, but its impact on these individuals is immense. How we treat these highly vulnerable members of Canadian society when they come into conflict with the law is indicative of the values imbued within our criminal justice system. The significance of the Review Board system to NCRMD accused individually, and to our system of criminal justice as a whole demands regular, ongoing scrutiny of how this institution operates. Hopefully this thesis contributes to this important task.

Bibliography

Legislation

Administrative Tribunals Appointment and Administration Act, SBC 2003, c 47.

An Act for the Safe Custody of Insane Persons Charged with Offences, 39&40 Geo 3, c 94.

An Act to Amend the Criminal Code (Mental Disorder) and to Make Consequential Amendments to Other Acts, SC 2005, c 22.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11.

Criminal Code of Canada, RSC 1985, c C-46.

Mental Health Act, RSBC 1996, c 288.

Mental Health Act, RSO 1980, c 262.

Not Criminally Responsible Reform Act, SC 2014 c 6.

The Criminal Code, 1892, 55-56 Victoria.

Jurisprudence

Brockville Psychiatric Hospital v McGillis, 1996 CanLII 1828, [1996] OJ No 3429 (CA).

Carrick (Re), 2015 ONCA 866, 127 OR (3d) 209.

Centre for Addiction and Mental Health v Young, 2011 ONCA 432, 273 CCC 274.

Daniel M’Naghten’s Case (1843), 10 Cl & Fin 200, 8 ER 718 (HL).

Edward Arnold (1724), 16 St Tr 695.

Forensic Psychiatric Institute v Johnson, 66 BCAC 34, 1995 CanLII 399.

McCann v Duffy, 1982 CanLII 426, 35 BCLR 133 (CA).

Nelson v British Columbia (Adult Forensic Psychiatric Services), 2017 BCCA 40, [2017] BCJ No 118.

Orlowski v British Columbia (Attorney General) (1992), 16 BCAC 204, 75 CCC (3d) 138.

R v Bouchard-Lebrun, 2011 SCC 58, [2011] 2 SCR 575.

R v Chaulk, [1990] 3 SCR 1303, [1990] SCJ No 139.

R v Conway, 2008 ONCA 326, 90 OR (3d) 335.

R v Cracknell, [1931] OR 634 at 637, 56 CCC 190.

R v Gladue, [1999] 1 SCR 688, [1999] SCJ No 19.

R v Hadfield (1800), 27 St Tr 1281.

R v Hoepfner (1999), 134 Man R (2d) 163, 25 CR (5th) 91.

R v Hope, 2016 ONCA 648, 133 OR (3d) 154.

R v Ipeelee, 2012 SCC 13, [2012] 1 SCR 433.

R v KRJ, 2016 SCC 31, [2016] 1 SCR 906.

R v Lacasse, 2015 SCC 64, [2015] 3 SCR 1089.

R v Robinson, 2009 ONCA 205, 95 OR (3d) 309.

R v Sim (2005), 78 OR (3d) 183, [2005] OJ No 4432.

R v Suter, 2018 SCC 34, [2018] 2 SCR 496.

R v Swain, [1991] 1 SCR 933, [1991] SCJ No 32.

R v Swain (1986), 53 OR (2d) 609, 13 OAC 161.

Ranieri (Re), 2015 ONCA 444, 336 OAC 88.

Re Abel et al and Advisory Review Board, 1980 CanLII 1824, 31 OR (2d) 520 (CA).

Re Jollimore and the Queen (1986), 72 NSR (2d) 347, 27 CCC (3d).

Riel v The Queen, [1885] UKPC 37.

The Queen v Dubois (1890), QLR 203.

The Queen v Riel, 9 September 1885.

The Queen v Riel, 20 July 1885.

Twins v Canada, [2017] 1 FCR 79; [2016] FCJ No 520.

United States v Leonard, 2012 ONCA 622, [2012] 4 CNLR 305.

Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625, [1999] ACS no 31.

Secondary Sources

Andrew Scull *Madness in Civilization* (Princeton: Princeton University Press, 2015) 203-205.

Anne G Crocker, “The National Trajectory Project on Individuals Found Not Criminally Responsible on Account of Mental Disorder” (2015) 60:3 *Canadian Journal of Psychiatry* 96.

Anne G Crocker *et al*, “The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 2: The People Behind the Label” (2015) 60:3 *The Canadian Journal Of Psychiatry* 106.

Anne G Crocker *et al*, “The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 3: Trajectories and Outcomes Through the Forensic System” (2015) 60:3 *The Canadian Journal of Psychiatry* 117.

Anne G Crocker *et al* “To Detain or to Release? Correlates of Dispositions for Individuals Declared Not Criminally Responsible on Account of Mental Disorder” (2011) 56:5 *Can J of Psychiatry* 293.

Arie Freiberg, “The Disposition of Mentally Disordered Offenders in Australia: ‘Out of Mind, Out of Sight’ Revisited” (1994) 1:2 *Psychiatry, Psychology and Law* 97.

Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012).

British Columbia Review Board, *Annual Report Fiscal Year: April 2017-March 2018* (Vancouver: British Columbia Review Board, 2015).

British Columbia Review Board, *Recruitment, Screening and Appointment Procedures* (27 April 2004).

Carol Snell, “The Criminal Code Amendments: The Legal Background” in Derek Eaves, RP Ogloff & Ronald Roesch, eds *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Mental Health Law and Policy Institute at Simon Fraser University: Burnaby, BC, 2000).

Canada, Parliament, Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code*, 37th Parl, 1st Sess (June 2002).

Canadian Centre on Substance Abuse, *Canadian Addiction Survey (CAS)* (Ottawa: Canadian Centre on Substance Abuse, 2004) <<https://www.ccsa.ca/sites/default/files/2019-04/ccsa-004804-2004.pdf>>.

Carl-Friedrich Stuckenberg, "Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility" (2016) 4:1 *Bergen Journal of Criminal Law and Criminal Justice* 48.

Christoph Safferling, "Insanity and Intoxication" in Marus D Dubber & Tatjana Hörnle *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 214).

Cyril Greenland, "Crime and the Insanity Defence, An International Comparison: Ontario and New York State (1979) 7:2 *Bulletin of the American Academy of Psychiatry and Law*, 125 at 125.

Dana Y Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (New York: Palgrave Macmillan 2004).

Daniel R Robinson, *Wild Beasts & Idle Humours: The Insanity Defence from Antiquity to the Present* (Cambridge: Harvard University Press, 1996).

David Freedman, Robert Pisani & Roger Purves, *Statistics, 4th ed* (New York: WW Norton & Company, 2007).

David Wright, "Getting Out of the Asylum: Understanding the Confinement of the Insane in the Nineteenth Century" (1997) 10:1 *Social History of Medicine* 137 at 139.

Debra Wood, "Ancient Origins - or Otherwise - of the Insanity Defence" (2009) 16:sup1 *Psychiatry, Psychology and Law* 145 at 146-151.

EA Tollefson, "Prologue" in Derek Eaves, RP Ogloff & Ronald Roesch, eds *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Mental Health Law and Policy Institute at Simon Fraser University: Burnaby, BC, 2000).

Edwin A Tollefson & Bernard Starkman, *Mental Disorder in Criminal Proceedings* (Scarborough, Ont: Carswell, 1993).

Erik Luna, "Sentencing" in Markus D Dubber & Tatjana Hörnle, eds *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014).

HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968).

Isabel Grant, "Canada's New Mental Disorder Disposition Provisions: A Case Study of the British Columbia Criminal Code Review Board" (1997) 20:4 *International Journal of Law and Psychiatry* 419.

James D Livingston *et al*, "A Follow-Up Study of Persons Found Not Criminally Responsible on Account of Mental Disorder in British Columbia" (2003) 48:6 *Canadian Journal of Psychiatry* 408.

Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada, 2016/2017" (2018) 85:2 Juristat 1-20 <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=HDVyQxrt>> accessed 27 July 2019.

Jeff Latimer & Austin Lawrence, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Ottawa: Department of Justice, 2006).

Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Canadian Bar Review 325.

Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (New Haven: Yale University Press, 1995) at 35.

Laura Johnston, *Operating in Darkness: BC's Mental Health Act Detention System* (Vancouver: Community Legal Assistance Society, 2017).

Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Law Reform Commission of Canada, 1976).

Lee J Baldwin *et al*, "Factors Influencing Length of Hospitalization for NGRI Acquittees in a Maximum Security Facility" (1992) 20:2 The Journal of Psychiatry and Law 257.

Lisa Grantham, "Bill C-14: A Step Backwards for the Rights of Mentally Disordered Offenders in the Canadian Criminal Justice System" (2014) 19 Appeal: Review of Current Law and Law Reform 63.

Marilyn Pilon, *Mental Disorder and Canadian Criminal Law* (Canada: Library of Parliament Parliamentary Research Branch, 2002) <<http://publications.gc.ca/Collection-R/LoPBdP/BP/prb9922-e.htm>>.

Mental Disorder Project, Criminal Law Review, *Final Report* (Ottawa: Department of Justice, 1985).

Michael S Phillips, Tammy Landau & Catherine Osborne, "Persons Discharged from Warrants of the Lieutenant Governor (1987) 32:5 The Canadian Journal of Psychiatry 343.

MS Phillips, T Landau, D Sepejak & C Osborne, "The Advisory Review Board and Characteristics of Patients on Warrants of the Lieutenant Governor in Ontario" (1985) 13:4 Bulletin of the American Academy of Psychiatry and Law 373.

Olivia Choy *et al*, "Explaining the Gender Gap in Crime: The Role of Heart Rate" (2017) 55:2 Criminology 465.

Ontario Review Board, *Annual Report Fiscal Reporting Period April 1, 2017 - March 31, 2018* (Toronto: Ontario Review Board, 2018).

Peter J Carrington, "Population Aging and Crime in Canada, 2000-2041" (2001) 43:3 *Canadian Journal of Criminology* 331.

Rebecca Kong and Kathy AuCoin, "Female Offenders in Canada" (2008) 28:1 *Juristat* 1.

Rebecca Sutton, "Canada's Not Criminally Responsible Reform Act: Mental Disorder and the Danger of Public Safety" (2013) 60:1 *Criminal Law Quarterly* 41.

RD Mackay, BJ Mitchell & L Howe "Yet More Facts about the Insanity Defence" (2006) 31:5 *Criminal Law Review* 399.

RD MacKay & Gerry Kearns, "The Continued Underuse of Unfitness to Plead and the Insanity Defence" (1994) *Criminal Law Review* 576.

RP Ogloff, Derek Eaves & Ronald Roesch, "The Mental Disorder Provisions of the Criminal Code: Background and Overview" in Derek Eaves, RP Ogloff & Ronald Roesch, eds *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Mental Health Law and Policy Institute at Simon Fraser University: Burnaby, BC, 2000) at 4-5.

Rupert Ross, *Indigenous Healing: Exploring Traditional Paths* (Toronto: Penguin, 2014).

S de St. Croix, R Dry & CD Webster, "Patients on Warrants of the Lieutenant Governor in Alberta: A Statistical Summary with Comments on Treatment and Release Procedures" (1988) 33:1 *The Canadian Journal of Psychiatry* 14.

Sarah E Nelson & Kathi Wilson, "The Mental Health of Indigenous Peoples in Canada: A Critical Review of Research" (2017) 176 *Social Science & Medicine* 93.

Sarah L Desmarais *et al*, "A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the Winko Decision" (2008) 7:1 *International Journal of Forensic Mental Health* 1.

Sentencing Advisory Council, *Mental Impairment and the Law: A Report on the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)*, (South Australia: Government of South Australia, Attorney General's Department, 2014) at para 2.15.

Sheilagh Hodgins, Christopher Webster and Jean Paquet, *Annual Report Year 3 Canadian Database: Patients Held on Lieutenant Governors' Warrants* (1991).

Sheilagh Hodgins and Christopher D Webster, *The Canadian Database: Patients Held on Lieutenant-Governors' Warrants* (Ottawa: Department of Justice, 1992).

Simon Verdun-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country" (1979) 14:1 University of British Columbia Law Review 1.

Simon N Verdun-Jones, "The Insanity Defence in Canada: Setting a New Course" (1994) 17:2 International Journal of Law and Psychiatry 175.

Simon N Verdun-Jones, "Tightening the Reins: Recent Trend in the Application of the Insanity Defence in Canada" (1991) 10:3 Medicine and Law 285.

Stephanie Penney, Andrew Morgan & Alexander IF Simpson, "Motivational Influences in Persons Found Not Criminally Responsible on Account of Mental Disorder: A Review of Legislation and Research" (2013) 31:4 Behavioural Sciences and the Law 494.

Stephen L Golding, Derek Eaves & Andrea M Kowaz, "The Assessment, Treatment and Community Outcome of Insanity Acquittes: Forensic History and Response to Treatment" (1989) 12:2 International Journal of Law and Psychiatry 149.

Stephen White, "The Criminal Procedure (Insanity and Unfitness to Plead) Act" (1992) Criminal Law Review 4.

Steven Penney, "Irresistible Impulse and the Mental Disorder Defence: The *Criminal Code*, the *Charter* and the Neuroscience of Control" (2014) 60:2 Criminal Law Quarterly 207.

Steven Yannoulidies, *Mental State Defences in Criminal Law* (Burlington: Ashgate, 2012).

Wade Raaflaub, *Legislative Summary Bill C-10: An Act to Amend the Criminal Code (Mental Disorder) and to make Consequential Amendments to Other Acts*, LS-481E (Ottawa: Library of Parliament, 2005).

Yanick Charette *et al*, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 4: Criminal Recidivism" (2015) 60:3 The Canadian Journal of Psychiatry 127.