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## Extending Our Promise: Providing Help to Mentally Ill Accused As Soon As Practicable

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## ABSTRACT & KEYWORDS

This thesis examines the current state of the criminal law's interaction with mentally ill persons, with a specific interest in this interaction during pre-trial phases such as arrest and bail. It argues that the current provisions in the *Criminal Code of Canada* that allow for limited instances of pre-trial mental health assessments for adults are insufficient. The current options, including assessments to determine "not criminally responsible for reasons of mental disorder" or "fitness", are not applicable in many situations. Other options available to accused outside of the *Criminal Code* are also lacking, as they are limited to the *Mental Health Act*, and the efforts of the sparsely situated mental health courts across the country. The focus for this paper is the resulting gap which leaves mentally ill persons untreated in their illness for longer than is necessary, thus increasing their chance of re-offending or breaching their court-imposed order – if they are given bail at all. This paper explores other potential options to assist mentally ill offenders who are in need of psychiatric intervention. One such option will be a comparison to the section 34 assessment option under the *Youth Criminal Justice Act* for those under 18 years of age. This discussion compares relevant legislation, leading case law, theoretical foundations and doctrinal legal scholarship with a hope of providing guidance for future legislation.

**INDEX TERMS:** bail, bail hearing, show cause, show cause hearing, grounds for detention, primary grounds, secondary grounds, tertiary grounds, pre-trial stage, mental health, mental illness, mental disorder, depression, major depression, major depressive disorder, anxiety, bi-polar, schizophrenia, psychosis, psychotic, personality disorder, suicidal ideation, accused, accused person, not criminally responsible, not criminally responsible for reason of mental disorder, unfit, fitness, young person, section 34 assessment, assessment, mental health assessment

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## Part 1

### Introduction to Mental Health Considerations and Bail

“Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response... The need for treatment rather than punishment is rendered even more acute by the fact that the mentally ill are often vulnerable and victimized in the prison setting, as well as by changes in the health system that many suggest result in greater numbers of the mentally ill being caught up in the criminal process.”<sup>1</sup>

-Justice McLachlin (as she then was) of the Supreme Court of Canada

Mental illness and the criminal law have been intertwined for centuries. The two have shared a confusing and often difficult relationship. But in the last century, it can be argued that efforts have been made to better that relationship.

Since at least 1991, the Supreme Court of Canada has been hearing litigation involving mentally ill accused persons,<sup>2</sup> often requiring Parliament to reassess its treatment of mentally ill persons involved in the criminal justice system. As just one example, *Swain* resulted in the Supreme Court of Canada forcing the government to abandon its former regime dealing with mentally ill persons incapable of having the *mens rea*<sup>3</sup> to commit their alleged crime due to their mental disorder.<sup>4</sup> Striking down its former regime required the government to reconsider how it dealt with persons who were too mentally ill to understand the consequences of their otherwise criminal behavior. This dialogue led to the creation of Part XX.1 of the *Criminal Code*,<sup>5</sup> a Part dealing with mental disorder. It includes the provision of “not criminally responsible for reason of mental disorder” (“NCR”), which addressed the

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<sup>1</sup> *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] SCJ No 31 ¶ 41 [Winko].

<sup>2</sup> *R. v Swain*, [1991] 1 SCR 933 [Swain].

<sup>3</sup> In order to be found guilty of a crime, an accused person must have both the necessary *actus reus* [physical act], and *mens rea* [mental intention] of the requisite offence with which they are charged. If one of these elements is missing, the accused person cannot be found guilty of the crime.

<sup>4</sup> *Swain*, *supra* note 2, ¶ 150.

<sup>5</sup> *Criminal Code*, RSC 1985, c C-46 [the *Criminal Code*].

courts concerns in *Swain*.<sup>6</sup> It also codified the ability for an assessment to be ordered where the accused person is presenting as incapable of understanding the proceedings against them on account of their mental disorder. This latter test is often referred to as a “fitness” assessment. Some other options also exist, but are so sparse as to not fully respond to the issue. For example, mental health courts and the *Mental Health Act* offer some promise for those who find themselves in the system, but neither is consistent. As we will explore, the options open to adult accused are lacking.

For its part, Parliament has recognized the importance of adequately addressing mental health concerns. One such example is the allowance for assessments under section 34 of the *Youth Criminal Justice Act*.<sup>7</sup> This legislated assessment option is commendable. It allows for young persons<sup>8</sup> to be assessed for issues relating to mental health, often leading to a care plan being put in place to address any concerns explored through the process. To qualify for a section 34 assessment, the young person simply needs to consent to the assessment together with the prosecutor, or one of three conditions must be present:

- (i) the court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability,
- (ii) the young person’s history indicates a pattern of repeated findings of guilt...; or
- (iii) the young person is alleged to have committed a serious violent offence.<sup>9</sup>

Of interest is the ability for courts to order these assessments at any point in the proceedings – including pre-trial phases, like bail.<sup>10</sup>

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<sup>6</sup> *Ibid*, Part XX.1.

<sup>7</sup> *Youth Criminal Justice Act*, SC 2002, c.1, section 34 [YCJA].

<sup>8</sup> The YCJA deals exclusively with young persons, defined as those who are twelve years old or older, but less than eighteen years old. *Ibid*, s. 2.

<sup>9</sup> *Ibid*, s. 34(1)(b)

In addition to the section 34 assessment tool provided by the *YCJA*, young persons also have the ability to be assessed for fitness or NCR considerations under the *Criminal Code*. Conversely, while adult accused persons have the NCR and fitness assessment regimes, they have few other options available to them to explore their mental health issues and to create a plan of treatment.

This thesis will explore the resulting gaps left for adult accused persons suffering from mental health issues, caused by the limited options provided under the *Criminal Code* and any other potentially relevant legislation. It will argue that opportunities are being missed at earlier stages of the criminal process to help those suffering from mental health issues, leaving them more likely to re-offend while out on bail – if they are even granted bail. The treatment options available to mentally ill persons is already scant, and becomes even more fleeting for those caught up in the criminal justice system. It will be argued that more money and resources are spent in justice system processes like investigations, re-arrests, court proceedings, and detention of accused persons, than if the system simply offered treatment at an earlier stage of the process. Treatment of mental health issues could instead avoid re-offending by those dealing with such problems.

While sentencing offers some other options for additional assistance, waiting until the accused person has been found guilty is not ideal either. It means often waiting months, and sometimes years, before they are treated. While this respects the principle of innocence until proven guilty, it ignores the reality that 63% of charges result in findings of guilt.<sup>11</sup> It also ignores the fact that the accused, who is suffering in real time, is left untreated with the underlying behavior causing their criminality. To be sure, this thesis does not argue that every mentally ill person is necessarily

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<sup>10</sup> Bail is the ability of an accused person to stay out of custody, often on terms and conditions, while awaiting the disposition of their criminal proceedings.

<sup>11</sup> Statistics Canada, *Adult Criminal Court Statistics in Canada, 2013/2014*, (Ottawa: StatCan, 28 September 2015) at 3.

guilty of the crime they have been charged with. Instead, it recognizes that we can still respect the right to be presumed innocent by maintaining their rights to bail and trial, while being proactive about treatment opportunities for those who are arguably the most vulnerable. Such an approach to mentally ill accused persons has the additional benefit of treating those who will ultimately not be found guilty of their alleged crime, but nevertheless better their future prospects all the same.

Jill Presser and Anita Szigeti are two leading Ontario criminal defence lawyers in the area of mental disorders. They have written that “[m]entally disordered accused are often among the most vulnerable and the most marginalized people in our society.”<sup>12</sup> With this notion in mind, this thesis argues that we must extend the concepts of rehabilitation and treatment, as discussed by Justice McLachlin in *Winko*, to all accused persons suffering from mental health disorders. To accomplish this, legislation is suggested for the *Criminal Code* that mirrors section 34 of the *YCJA*.<sup>13</sup>

## **1.1 A Roadmap:**

Found next in our discussion, Part 2 will set the context for our discussion – bail. As the John Howard Society has written, “[w]e have a bail problem in Ontario”.<sup>14</sup> Bail is often the first interaction between an accused person and the criminal justice system. It is a crucial interaction, and one that allows opportunity for intervention early on in the process. Exploring the current state of mental health assessments will assist our bail system and accused persons alike, and so, we will start, with a doctrinal review of the laws on bail.

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<sup>12</sup> Anita Szigeti and Jill Presser, “The Responsible Approach to the Issue of Criminal Responsibility”, *For the Defence* 32:5 (3 July 2011) 26.

<sup>13</sup> *Supra*, note 7 s. 34.

<sup>14</sup> The John Howard Society, “Reasonable Bail?” (2013) The Centre of Research, Policy and Program Development.

Part 3 will then explore in depth the current options available to adult accused persons for mental health assessments. NCR and fitness assessments are the main options, but it will be seen that these options suffer from a “timing” issue, as well as the need for the accused to be suffering in the specific way of not being able to understand the consequences of their actions.<sup>15</sup> The remaining instances of mental health interacting with the criminal justice system, like the *Mental Health Act* and specialty courts, do not provide a consistent approach. We will review some of these responses to the issue, and critique each in turn. Because each option has significant limitations, it is argued that they are insufficient given the prevalence of mentally-ill accused persons appearing in court.

In Part 4, we will look to the *YCJA*. This will include a review of section 34 in more detail, including its drawbacks and potential for fine-tuning. This will allow us then to flow into a comparative analysis, which will be completed in Part 5. There, we will consider whether a section 34 assessment option could work in the adult context. We will consider the reasons for reform to our current system, and the argument will be made that as a society, we have an ethical responsibility to better deal with our mentally ill. Consideration is given to what such a legislated option should look like, and also the potential resistance to such an option.

The overarching theme of this discussion is that a better assessment option is needed in the adult context in order to help remedy the bail problem described by the John Howard Society. As one jurist offered:

“...the people who suffer mental disorders are the ones who are at the bottom of the heap, when it comes to services being provided by the provincial government.”<sup>16</sup>

Section 92 of the *Constitution Act*<sup>17</sup> leaves the administration of justice and the management of hospitals to the provincial government. Therefore, requiring the

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<sup>15</sup> *Supra*, note 5 s. 16(1).

<sup>16</sup> Janet Leiper, “Cracks in the Façade of Liberty: The Resort to Habeas Corpus to Enforce Part XX.1 of the Criminal Code” (2009) 55 CLQ 134 at page 14.



provincial government to complete assessments and offer treatment to mentally ill offenders is a solution that has likely been thought of by more jurists, practitioners, and scholars than necessary. Yet despite how obvious this proposition is, we continue to go without the solution. This solution is necessary in order to fix so many of the gaps found in our system – arguably both in the criminal and medical spheres. We cannot wait for a case to make it to the Supreme Court before Parliament is forced to respond; change can and should come from the legislature and our provincial governments as soon as practicable – much like the rate in which we should be responding to mental health concerns. Justice McLachlin’s comments in *Winko*, reproduced at the outset of this chapter,<sup>18</sup> were made in the context of the NCR and fitness regime in the *Criminal Code*. It is argued here that it is time to extend this promise to our vulnerable and mentally ill by providing the dignity and treatment they deserve at every stage in which they interact with our system.

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<sup>17</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

<sup>18</sup> *Winko*, *supra* note 1: “Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response... The need for treatment rather than punishment is rendered even more acute by the fact that the mentally ill are often vulnerable and victimized in the prison setting, as well as by changes in the health system that many suggest result in greater numbers of the mentally ill being caught up in the criminal process.”

## 1.2 An Illustration: Mental Health Assessment Options for Adult & Youth Accused

The following chart provides a visual representation of the issue this thesis seeks to explore.



**Options for Mental Health Assessments for those under 18 years old seeking bail in criminal proceedings**

*Criminal Code of Canada*  
NCRMD (section 16)

- s. 16 Criminal Code - was the person suffering from a mental disorder that rendered them incapable of appreciating the nature and quality of the act, or of knowing that it is wrong
- Time Requirement: at the time of the offence

Fitness (section 672)

- s. 672 Criminal Code - is the person fit to stand trial?
- Time Requirement: at the time they appear before the court

*Youth Criminal Justice Act*  
Medical and Psychological Reports (section 34)

- With the consent of the young person; or
- If the court believes a medical, psychological or psychiatric report will assist because:
  - There are reasonable grounds to believe that the young person is suffering from a mental illness or disorder...
  - A repeated pattern of findings of guilt...
  - An allegation of a serious violent crime
- Time Requirement: "at any stage of proceedings..."

**Options for Mental Health Assessments for those over 18 years old seeking bail in criminal proceedings**

*Criminal Code of Canada*  
NCRMD (section 16)

- Was the person suffering from a mental disorder that rendered them incapable of appreciating the nature and quality of the act, or of knowing that it is wrong
- Time Requirement: at the time of the offence

Fitness (section 672)

- Is the person fit to stand trial?
- Time Requirement: at the time they appear before the court

???

## Part 2

### Setting the Context: Bail Law in Canada

“In Ontario today, we spent hundreds of millions of dollars detaining legally innocent people every year. Our provincial jails are overcrowded and at capacity; prisoners, mostly on remand, sleep two to three to a cell designed for one, at times on a mattress on the floor. At the same time, crime rates are lower today than ever. There is something wrong with this picture.”<sup>19</sup>

-The John Howard Society

Bail is a term most individuals recognize and can understand from the various depictions of the process presented in popular media. Interestingly though, in Canada, “bail” is not the true name of the proceedings under the *Criminal Code*. Instead, the release of an accused person from custody is called “judicial interim release”,<sup>20</sup> while the process to determine release is called a “show cause hearing”.<sup>21</sup> Despite its technical name, “bail” is still the most common term for this process, and even the *Charter* refers to it as such when it guarantees the right to “reasonable bail”.<sup>22</sup> Thus, it is the term we will continue to employ for the purposes of this discussion.

The concept of bail is one that seems relatively straight-forward: pre-trial detention is to be used with restraint.<sup>23</sup> Not only is this guaranteed by the *Charter* via section 11(e),<sup>24</sup> but also by the *Criminal Code*.<sup>25</sup> In section 515(1) of the *Code*, this plays out as an instruction to courts to release the accused on their giving of an undertaking, without conditions, unless the Crown can show cause why that is not justified.<sup>26</sup>

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<sup>19</sup> *Supra*, note 13.

<sup>20</sup> *Criminal Code*, *supra* note 5 Part XVI broadly, and section 515 specifically.

<sup>21</sup> *Ibid*, s. 515(5).

<sup>22</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 at section 11(e).

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Criminal Code*, *supra* note 5.

<sup>26</sup> *Ibid*, s. 515(1) and (3).

Justification can be found by courts in one of three grounds provided under section 515(10) of the *Code*.<sup>27</sup> The primary ground, and arguably the ground that should do the majority of the work, considers whether the accused is likely to return to court to deal with their charges.<sup>28</sup> The secondary ground considers whether protection or safety of the public is needed, including the likelihood of whether the accused will commit a criminal offence or interfere with the administration of justice.<sup>29</sup> This ground is largely speculative, and therefore problematic. We will explore these issues as we move through our review. The tertiary ground, and the least commonly invoked of the three, is the newest ground. It is employed to detain those accused whose release would cause a loss of confidence in the administration of justice.<sup>30</sup>

While this may seem simple enough, our bail processes are anything but straightforward. Provisions within the *Criminal Code* reduce the presumption of condition-less bail. For examples of this proposition, consider the provisions requiring more formal processes for those crimes falling within section 469 like murder,<sup>31</sup> that reverse the onus to the accused person for certain types of offences,<sup>32</sup> and allow Courts to require accused to follow conditions, which can include the requirement of sureties (or jailers in the community), in order for the accused to be released.<sup>33</sup>

These exceptions to the otherwise presumptive rule of bail has led to increased levels of condition-filled bail orders, and worse – detention. A literature review on this subject paints a persuasive picture of the prevalence of this problem.<sup>34</sup> Many of

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<sup>27</sup> *Ibid* s. 515(10).

<sup>28</sup> *Ibid* s. 515(10)(a).

<sup>29</sup> *Ibid* s. 515(10)(b).

<sup>30</sup> *Ibid* s. 515(10)(c).

<sup>31</sup> *Ibid* ss. 515(1) and 515(11).

<sup>32</sup> *Ibid* ss. 515(6) and 524(9).

<sup>33</sup> *Ibid* s. 515(2).

<sup>34</sup> For just a few examples, see:

Allan Manson, “Pre-Sentence Custody and the Determination of a Sentence (Or how to make a mole hill out of a mountain)” (2004) 49 CLQ 292;

these contributions to the discussions will be considered in more detail as we proceed.

While the current state of bail in Canada is troublesome, it is not that bail laws in Canada have really ever been exemplary. We have experienced an ongoing battle to balance competing principles of safety of the public with individual rights to freedom and liberty. Mentally ill accused have consistently presented challenges for bail courts. Understanding this history is important in order to understand the current state of the law, and so we begin with a historical review of the law on bail.

## **2.1 A Brief History of Bail Law**

### *2.1.i The English Influence*

Like much of Canada's legal history, we look to England as the starting point of bail law. Bail is likely an impossible concept to pinpoint to a particular piece of legislation, a specific case, or a movement which brought it about. Instead, bail

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- Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75 Saskatchewan Law Review 55-96;
- Daniel Kiselbach, "Pre-Trial Criminal Procedure: Preventative Detention and the Presumption of Innocence" (1988) 31 CLQ 168;
- Don Stuart, "St. Cloud: Widening the Public Confidence Ground to Deny Bail will Worsen Deplorable Detention Realities" (2015) 10 CR (7<sup>th</sup>) 337;
- James Stribopolous, "The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning" (2008) 40 SCLR (2d) 211-248;
- Jane B. Sprott and Nicole M. Myers, "Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53 Canadian Journal of Criminology and Criminal Justice 4;
- Jane B. Sprott and Allan Manson, "YCJA Bail Conditions: "Treating" Girls and Boys Differently" (2017) 22 Canadian Criminal Law Review 77;
- Martin L. Friedland, "The Bail Reform Act Revisited" (2012) 16 Canadian Criminal Law Review 315;
- Nicholas Bala, "Changing Professional Culture and Reducing Use of Courts and Custody for Youth: The Youth Criminal Justice Act and Bill C-10" (2015) 78 Saskatchewan Law Review 127 - 180; and
- The John Howard Society, "Reasonable Bail?" (2013) The Centre of Research, Policy and Program Development.

appears to be “as old as the law of England itself... explicitly recognized by our earliest writers”.<sup>35</sup> Justice Trotter, a Jurist of the Court of Appeal of Ontario considered to be the leading authority on bail, writes about bail being the result of the inability to keep detainees alive and the frequency of escapees in 12<sup>th</sup> and 13<sup>th</sup> century England,<sup>36</sup> as opposed to “any love of an abstract liberty”.<sup>37</sup> This led to a system much like that still seen today in the United States,<sup>38</sup> where family or friends secure the release of the accused into their care by putting up some form of a financial assurance.<sup>39</sup> During this earliest-documented phase of bail in England, the process was already being criticized for being ill-defined, for the sheriffs in charge of detainees having discretion that was too wide-ranging, and for corruption amongst the sheriffs which allowed for bribes.<sup>40</sup>

From 1275 onwards, for roughly 550 years, bail was dealt with under the *Statute of Westminster, I*.<sup>41</sup> This Act formalized the process to bring definition and order to the proceedings, and created “bailable” and “non-bailable” offence categories.<sup>42</sup> If the offence was bailable, subject to a sufficient surety, the sheriff would have to release the accused person. Justice Trotter discussed the categorization of offences as seemingly being influenced by “the seriousness of the offence; the likelihood of the

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<sup>35</sup> Sir J.F. Stephen, *A History of the Criminal Law of England, Vol. 1* (New York: Burt Franklin, 1883) at 233.

<sup>36</sup> Gary T. Trotter, *The Law of Bail in Canada*, 3d ed (Toronto: Thomson Reuters Canada, 2018) at 1-3.

<sup>37</sup> F. Pollock and F. Maitland, *The History of the English Law, Vol. 2*. (Cambridge: University Press, 1953) at 584.

<sup>38</sup> This is not to say that cash deposits are not still seen in Canada. In certain situations, a cash deposit may be required to secure release of the accused. See s. 515(2)(d) & (e) of the *Criminal Code*. However, this system has largely been replaced with pledges of money instead, either from the accused, or from their surety. Conversely, money deposits are still a prevalent form of bail in most states in the United States, and are criticized and written about extensively by American theorists.

<sup>39</sup> *Supra*, note 36 at 1-3.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Statute of Westminster, I*, 1275 (UK), 3 Edw 1, c 15.

<sup>42</sup> *Supra*, note 36 at 1-4.

accused's guilt; and the 'outlawed' status of the accused."<sup>43</sup> The main bail concern during this period of time was the continued abuse of the system by sheriffs due to their discretion in determining the suitability of a proposed surety.<sup>44</sup> This led to the powers of bail being transferred to justices who were seen to be more objective and better versed in the law.<sup>45</sup>

1826 to 1848 saw a gradual shift in the concerns set out in the legislation when considering the question of bail. First, the *Criminal Justice Act, 1826*<sup>46</sup> eradicated the distinction betweenailable and non-ailable offences. This allowed for bail to be sought on all charges. Then, England's Parliament amended and extended the provisions of this act to create a new statute<sup>47</sup> which articulated the main concern for bail as being the attendance in court of the accused.<sup>48</sup> Further emphasis on attendance at court as the main bail consideration was seen with the introduction of the *Indictable Offences Act, 1848*.<sup>49</sup> This act sought sufficient sureties to ensure attendance. This shift meant that the 19<sup>th</sup> century bail laws of England became "solely concerned with ensuring the accused attended in court for trial... Other criteria for release developed much later."<sup>50</sup>

### 2.1.ii The Canadian System

Pre-Confederation, we borrowed the English system of bail<sup>51</sup> where bail was a right with respect to misdemeanors, but discretionary for felony offences.<sup>52</sup> With

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, at 1-5.

<sup>45</sup> *Ibid.*; *supra*, note 31 at 243; *Civil Procedure Act, 1330* (UK), 4 Edw. 3, c.1; *Justices of the Peace Act, 1361* (UK), 34 Edw. 3, c.1.

<sup>46</sup> *Criminal Justice Act, 1826, 1826* (UK), 7 Geo. 4, c. 64.

<sup>47</sup> *Criminal Justice Act, 1826, 1835* (UK), 5 & 6 Will. 4, c. 33.

<sup>48</sup> *Supra*, note 36 at 1-5.

<sup>49</sup> *Indictable Offences Act, 1848, 1848* (UK), 11 & 12 Vict., c. 42.

<sup>50</sup> *Supra*, note 36 at 1-6.

<sup>51</sup> M. Phelps, "The Legal Basis of the Right to Bail" (1970-71), 4 Man. L.J. 143 at 144; and P.K. McWilliams "The Law of Bail" (1966-67), 9 CLQ 21 at 23.

<sup>52</sup> In present day Canada, misdemeanors and felonies are no longer the terms used to distinguish between offences. A distinction now is made between summary

legislation titled *An Act Respecting the Duties of Justices of the Peace, Out of Sessions, in Relation to Persons Charged with Indictable Offences*,<sup>53</sup> bail was changed in 1869 and made discretionary for all offences. It allowed for discretion from the justice or judge, and persisted for over 100 years.<sup>54</sup>

The early considerations in Canadian bail law were also focused on the accused's attendance in court.<sup>55</sup> To make this decision, factors like seriousness of the offence, severity of the penalty, strength of the evidence, and the accused's standing in the community were all considered.<sup>56</sup> The other grounds for detention were not enumerated until the English case of *R. v Phillips* influenced the Canadian system.<sup>57</sup> In *Phillips*, the court criticized his pre-trial release in coming to their decision about the appropriateness of his sentence. They were concerned with the fact that he committed a number of offences while on bail, and highlighted that "housebreaking" was a crime likely to be repeated while on bail, especially by someone with a record of committing this crime.<sup>58</sup> They wrote:

"To turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the Court, a very inadvisable step. They wish the magistrates who release on bail young housebreakers, such as the applicant, to know that in nineteen cases out of twenty it is a mistake."<sup>59</sup>

There were two factors in *Phillips* that require special consideration – the seriousness of the crime, and the strong evidence against the accused. Yet, despite

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offences, and indictable offences. The original terms of misdemeanor and felonies are still used in the United States, however England no longer uses them either: see *Criminal Law Act, 1967*, 1967 c. 58.

<sup>53</sup> *An Act Respecting the Duties of Justices of the Peace, Out of Sessions, in Relation to Persons Charged with Indictable Offences*, SC 1869, c 30.

<sup>54</sup> *Supra*, note 36 at 1-7.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *R. v Phillips* (1947), 32 CR App Rep 47 (CCA) [*Phillips*].

<sup>58</sup> *Ibid.*, ¶ 48.

<sup>59</sup> *Ibid.*, ¶ 49.



its distinguishable features, Justice Trotter argues that the impact of this decision has outgrown the intended purpose.

The impact of *Phillips* was felt in Canada, where Crowns began relying on the English example to seek detention of accused persons to prevent the commission of further offences. In *R. v Samuelson*,<sup>60</sup> a case involving breaking and entering by accused persons with records for similar offences, our courts – at least at first – disagreed with *Phillips*. *Samuelson* saw this type of detention as preventative, a concept that was without authority, and therefore “disturbing”.<sup>61</sup>

Eventually, the Canadian courts accepted the “preventative” approach in various cases, including assault causing bodily harm,<sup>62</sup> theft,<sup>63</sup> and non-capital murder.<sup>64</sup> Despite the early criticism of *Phillips* by Canadian jurists, the additional ground of detention known as “prevention” became part of the legislation.<sup>65</sup>

By the 1960’s, research was being conducted that showed the bail system to be fraught with difficulties, including a major concern that many accused were suffering unnecessarily in pre-trial detention.<sup>66</sup> Professor Martin Friedland was particularly critical of the current system, and completed an empirical study of the bail procedures in the Toronto Magistrates’ Court.<sup>67</sup> His primary concerns were that attendance of accused persons could be secured by less intrusive means,<sup>68</sup> and a concern that it was unfair to require security in advance as a condition precedent to

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<sup>60</sup> *R. v Samuelson* (1953), 109 CCC 253 (Nfld TD).

<sup>61</sup> *Ibid*, at 256.

<sup>62</sup> *R. v Travers* (1963) 42 CR 21 (Que QB).

<sup>63</sup> *R. v Lagus* (1964) 42 CR 288 (Sask QB).

<sup>64</sup> *R. v Moses*, [1969] 4 CCC 307 (NWT Terr Ct).

<sup>65</sup> *Supra*, note 36 at 1-10.

<sup>66</sup> Daniel Kiselbach, “Pre-Trial Criminal Procedure: Preventative Detention and the Presumption of Innocence” (1988) 31 CLQ 168 at 2.

<sup>67</sup> M.L. Friedland, *Detention Before Trial: A Study of Cases Tried in the Toronto Magistrates’ Courts* (Toronto: University of Toronto Press, 1965).

<sup>68</sup> *Ibid*, at 43-44.

release.<sup>69</sup> Most concerning was the “disturbing relationship” he found between pre-trial detention and the outcome of trial. As Justice Trotter summarized it:

“...[Professor Friedland’s] study found that a detained accused was more likely than his or her bailed counterpart to be convicted of the offence charged. Furthermore, a detained person was more likely to receive a custodial sentence. *Simply put, accused persons who were denied bail received more jail, more often.*” (emphasis is mine)

Soon after Professor Friedland’s research, a report was created by the Canadian Committee on Corrections,<sup>70</sup> calling for a reduction in judicial discretion on decisions of bail. Recommendations were also being offered by the Royal Commission following their criticisms contained in their report.<sup>71</sup> These recommendations were accepted and included in the *Criminal Code*,<sup>72</sup> as the result of Bill (C-218) which came into force in 1972 as the *Bail Reform Act*.<sup>73</sup>

The *Bail Reform Act* was seen as a complete overhaul and codification of the law of bail.<sup>74</sup> In keeping with the recommendations of the Royal Commission and the Canadian Committee on Corrections, a number of changes were made. Powers were given to police to release, avoiding unnecessary arrest and detention.<sup>75</sup> Cash deposits were restricted in use.<sup>76</sup> Following the case law precedent first seen in *Phillips*, a “secondary ground” was enumerated, allowing for detention in the public interest and to prevent further offending.<sup>77</sup> The onus of justifying detention was

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<sup>69</sup> *Ibid*, at 110.

<sup>70</sup> C.M. Powell, “Arrest and Judicial Interim Release” in Addresses Delivered at Seminar by the Canadian Bar Association at the Queen Elizabeth Hotel, August 26, 1972 (Toronto: Canada Law Book Ltd., 1973) at 45.

<sup>71</sup> Royal Commission (Ontario), *Inquiry into Civil Rights* (1968), Vol. 2 (Chief Justice McRuer, Commissioner).

<sup>72</sup> *Criminal Code*, R.S.C. 1970, c. C-34: now R.S.C. 1985, c. C-46

<sup>73</sup> *Bail Reform Act*, S.C. 1970-71-72, c. 37 [the “*Bail Reform Act*”].

<sup>74</sup> *Supra*, note 36 at 1-12.

<sup>75</sup> *Supra*, note 73 section 449-456.

<sup>76</sup> *Ibid*, section 457(2)(d).

<sup>77</sup> *Ibid*, section 457(7).

placed on the prosecutor.<sup>78</sup> Further, procedures were codified for the process of bail hearings,<sup>79</sup> bail reviews,<sup>80</sup> and bail pending appeal.<sup>81</sup> An amended version of the *Bail Reform Act* came about four years later,<sup>82</sup> shifting the onus of proof regarding release onto the accused in a number of situations,<sup>83</sup> and also expanding the scope of the secondary ground.<sup>84</sup>

The *Bail Reform Act* has largely remained the law on bail in Canada, with some exception. One exception comes from the amendments made to offer courts a “menu of conditions... [which] has made it more difficult to obtain bail and has resulted in more stringent release orders.”<sup>85</sup> This trend is said to have followed the anti-gang amendments to the *Criminal Code*, as well as the legislation that followed the events of September 11, 2001.<sup>86</sup> The “tough on crime” trend in these amendments has arguably eroded the presumption of condition-less bail, initially sparked by the *Bail Reform Act* in the 1970’s.<sup>87</sup>

In terms of legislation, two further pieces should be considered. First, the *Canadian Bill of Rights*<sup>88</sup> specifically addresses bail in section 2(f) and calls for both the right to be presumed innocent until proved guilty, and the right to “reasonable bail without just cause”.<sup>89</sup> Despite being legislation that still remains in force, the *Bill of Rights* does not get a lot of exercise in the courts. This is because of the second remaining legislation that deserves recognition, and perhaps the most litigated: the

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<sup>78</sup> *Ibid*, section 457(1).

<sup>79</sup> *Ibid*, section 457.2 and 457.3.

<sup>80</sup> *Ibid*, section 457.5, 457.6, and 680.

<sup>81</sup> *Ibid*, section 679.

<sup>82</sup> *Criminal Law Amendment Act, 1975, SC 1974-75-76, c 93.*

<sup>83</sup> *Ibid*, section 457(5.1).

<sup>84</sup> *Ibid*, section 457(7)(b).

<sup>85</sup> *Supra*, note 36 1-13.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*, at 1-14.

<sup>88</sup> *Canadian Bill of Rights S.C. 1960, c. 44*

<sup>89</sup> *Ibid*, section 2(f).

*Canadian Charter of Rights and Freedoms*.<sup>90</sup> Because of the *Charter*, courts have held that it would be inappropriate to reassess or re-interpret the *Bill of Rights*.<sup>91</sup>

The *Charter* explicitly protects the right to bail in section 11(e):

“s. 11 Any person charged with an offence has the right...  
...(e) not to be denied reasonable bail without just cause.”<sup>92</sup>

Despite its express promise, the *Charter* was initially approached with caution as it related to bail because of the heavy lifting thought to have been done already by the *Bail Reform Act*.<sup>93</sup> By the early 1990’s, however, the courts were beginning to acknowledge the potential for continuing reform that the *Charter* could offer.

In a group of cases out of Quebec,<sup>94</sup> courts were beginning to hear and apply *Charter* considerations with more interest. One of these cases was taken to the Supreme Court of Canada, *R. v Morales*,<sup>95</sup> which in combination with *R. v Pearson*,<sup>96</sup> gave the Court its first opportunity to consider section 11(e). Led by Chief Justice Lamer, the Court provided a framework for the consideration of bail and the *Charter*. His decision focused on the presumption of innocence as the most important feature of section 11(e). The Court was required to consider this presumption against the backdrop of the facts of *Pearson*, where the accused was being detained pursuant to a reverse-onus provision of the *Criminal Code*, section 515(6)(d). Reverse-onus provisions shift the onus of showing cause why bail is justified to the accused, as

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<sup>90</sup> *Charter*, *supra* note 22.

<sup>91</sup> *R. v Cornell* (1988), 40 CCC (3d) 385 (SCC) at 391-392; *R. v Beaugard* (1986), 30 DLR (4<sup>th</sup>) 481 (SCC) at 506; and *R. v Lauzon* (1992), 73 CCC (3d) 52 (Ont CA) at 58-59.

<sup>92</sup> *Charter*, *supra* note 22 section 11(e).

<sup>93</sup> *Supra*, note 36 at 1-18.

<sup>94</sup> *R. v Lamothe* (1990), 58 CCC (3d) 530 (Que CA); *R. v Gervais* (1988) 42 CCC (3d) 352 (Que SC); *R. v Perron* (1989), 51 CCC (3d) 518 (Que CA); *R. v Morales* (February 1, 1991), (Que SC) [unreported].

<sup>95</sup> *R. v Morales* (1992), 17 CR (4<sup>th</sup>) 74 (SCC) [*Morales*].

<sup>96</sup> *R. v Pearson* (1992), 17 CR (4<sup>th</sup>) 1 (SCC) [*Pearson*].

opposed to requiring the Crown to show cause why bail is not justified. In *Pearson*, the majority held that the effect of section 515(6)(d) was to dilute the basic entitlement to bail. They found the same applied to section 515(6)(a) in *Morales*.<sup>97</sup> Two considerations were delineated in *Pearson*:<sup>98</sup> that the restriction on the basic entitlement to bail is permissible if two conditions are present. First, bail must only be denied in a narrow set of circumstances. Second, the denial of bail must be necessary to promote the proper functioning of the bail system, and is not undertaken for any purpose extraneous to the bail system. Applying this to the reverse onus provisions, it was held that they did not infringe section 11(e), as the effect of the provision was to “...establish a set of special bail rules in circumstances where the normal bail process is incapable of functioning properly.”<sup>99</sup>

Of interest is the minority decision in *Pearson*, written by Justice McLachlin (as she then was). Her decision was concurred with by Justice La Forest. The facts of *Pearson* had the Court considering reverse-onus provisions relating to the charge of drug trafficking. Justice McLachlin dissented, finding that the provision was overbroad as it captured both large-scale traffickers, and small-time dealers alike.<sup>100</sup> Because of its overbreadth, she found it was not saved by section 1.<sup>101</sup> This dissenting opinion is of particular note because nearly thirty years later, reverse onus provisions are still contained in the *Criminal Code* today, despite the passage of time, continued opposition to these provisions, and opportunity for others to re-litigate the issue.<sup>102</sup>

The second case we noted, *Morales*, was significant for its own reasons. The Court had to consider the provision under section 515(10)(b) of the *Criminal Code*, which

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<sup>97</sup> *Morales*, *supra* note 95 at 103.

<sup>98</sup> *Pearson*, *supra* note 96 ¶ 60.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, ¶ 68-72.

<sup>101</sup> *Ibid.*, ¶ 72.

<sup>102</sup> There have been some legislated amendments to these provisions: see SC 1997, c 18.

allows for pre-trial detention that is contrary to the “public interest” because of a concern that the accused may commit further offences while on bail. This idea of detention in the public interest, often referred to as preventative detention, is one that will play a significant role in our discussions relating to the intersection of mental health and bail. Therefore, a review of *Morales* and the path that preventative bail has taken is warranted.

### *2.1.iii Detention Necessary in the Public Interest*

*Morales* required the Court to employ the two-factor test from *Pearson* in determining whether section 515(10)(b), and the ability to detain in the “public interest”, was constitutional. The Court in *Morales* considered 11(e) as it related to the use of the term “public interest” in section 515(10)(b). While the Court split on this analysis, Chief Justice Lamer for the majority ruled that it was impermissibly vague, and could not be saved by Section 1. As such, the Court severed the words “or in the public interest” from the section, and declined to strike down the entire paragraph.<sup>103</sup>

The Court was unanimous in agreeing that the section was otherwise constitutional, as it engaged the “just cause” component of section 11(e) of the *Charter*. In considering the first factor in *Pearson*, the Court found that section 515(10)(b) only allowed bail to be denied in specific circumstances because of the requirement of there being a “substantial likelihood” of the accused committing an offence.<sup>104</sup> Perhaps more surprisingly, in their analysis of the second *Pearson* factor, the Court found that the rule was consistent with the objectives of the bail system as it focused on preventing pre-trial criminal conduct.<sup>105</sup> This was thought by many to be unsettling, as “[t]he Court was not troubled by the fragility of predictions of further criminality...”.<sup>106</sup>

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<sup>103</sup> *Morales*, *supra* note 95 at 102-103.

<sup>104</sup> *Ibid*, at 98.

<sup>105</sup> *Ibid*, at 99.

<sup>106</sup> *Supra*, note 36 at 1-23.

Five years after *Morales*, Parliament amended section 515(10) in 1997 in such a way that it had the effect of reintroducing “the public interest” ground for detention.<sup>107</sup> Instead of re-adding it to the secondary ground, Parliament gave it its own ground, which has since become known as the “tertiary ground” for detention.<sup>108</sup> At the time, the section read as follows:

s. 515(10) For the purposes of this section, the detention of an accused is justified only on one or more of the following grounds...

... (c) on any other just cause being shown and without limiting the generality of the foregoing where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all of the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

This new ground for detention provided for renewed litigation of the concept of “public interest”, and made its way back to the Supreme Court of Canada again in *R. v. Hall*.<sup>109</sup>

*Hall* was about a man charged with the second degree murder of a relative. The victim was stabbed 37 times, and there were signs of attempted decapitation. He was detained following a show cause hearing on the basis of the tertiary ground found in section 515(10)(c). In coming to this conclusion, the bail Judge considered the brutality of the crime, the strength of the evidence against Hall, and the fear in the community, coming mostly from the victim’s family.<sup>110</sup>

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<sup>107</sup> *Criminal Law Improvement Act*, 1996, SC 1997, c 18, s 59.

<sup>108</sup> The “primary ground” is found in section 515(10)(a), and considers whether the accused will appear for court. The “secondary ground” is found in section 515(10)(b), which considers whether there is a substantial likelihood of the accused reoffending. Thus, section 515(10)(c) is referred to as the “tertiary ground”.

<sup>109</sup> *R. v. Hall* (2002), 167 CCC (3d) 449 (SCC) [*Hall*].

<sup>110</sup> *Supra*, note 36 at 1-28.

The Supreme Court of Canada's consideration of *Hall* required them to look at this new provision to determine whether it withheld *Pearson* scrutiny. The majority, led by Chief Justice McLachlin, held that certain phrases within the provision were invalid, but the remainder was constitutional. Specifically, they invalidated the phrase "any other just cause", as it was seen to confer an open-ended judicial discretion to refuse bail, and as such was unconstitutional.<sup>111</sup> The phrase "without limiting the generality of the foregoing" was also found to be unconstitutional, and severed this too from the rest of the section. The remaining wording was allowed to stand on its own.<sup>112</sup> Justice McLachlin was careful to point out that section 515(10)(c) was not a "catch-all" for cases where the primary and secondary grounds had failed. She found it to be its own distinct ground.<sup>113</sup> The majority decision in *Hall* gave the impression that the Supreme Court was moving towards a less liberty-friendly approach to bail.

Justice Iacobucci dissented vigorously, and would have struck down the entire provision. His position was that the heart of a free and democratic society included the right to the bail, thus respecting the presumption of innocence. He did not agree that the tertiary ground respected these basic concepts. In his dissent, he quoted from the large body of empirical work that confirmed the disturbing relationship between pre-trial detention and conviction that we have previously discussed.<sup>114</sup> Justice Iacobucci found that both *Pearson* factors were not satisfied by the new provision. He pointed out that the previous five years since the Court had struck down the "public interest" portion of section 515(10)(b) had not seen any new indications that the current bail system was inadequate.<sup>115</sup> In addition to Justice Iacobucci's disagreement with the majority decision, *Hall* has also been criticized harshly by academic commentators, with Professor Don Stuart going as far as to call

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<sup>111</sup> *Hall*, *supra* note 109 at 456.

<sup>112</sup> *Ibid*, at 467.

<sup>113</sup> *Ibid*, at 462.

<sup>114</sup> *Ibid*, at 469-472.

<sup>115</sup> *Ibid*, at 479.



it “deeply disappointing”.<sup>116</sup> Concerns were raised that it would cause a disproportionate impact on visible minorities and the poor. This is because the broad wording allowed for racist and discriminatory views to be hidden under the language of a tertiary ground detention order, despite the majority’s finding that the section was not overly broad.<sup>117</sup> In other words, there is great concern among many in the legal community that the Supreme Court got it wrong in *Hall*. Arguably, the impact of the tertiary ground’s impact has also been felt by mentally ill accused resulting from arbitrary detention for mental health concerns disguised as public interest. As we will explore later, the answer to these concerns can be remedied without the need for detention.

Section 515(10)(c) has since been revisited once more in *R. v St-Cloud*.<sup>118</sup> Here, the Supreme Court of Canada clarified aspects of its previous ruling in *Hall*. Notably, they explained that “detention may be justified only in rare cases” did not mean a bail court must make a finding that the case before them is “rare” in order to detain on the tertiary ground. Instead, *St. Cloud* explained the reference to “rare” as a consequence of the application of section 515(10)(c) itself, meaning very few cases should or would have a tertiary ground detention component. It is likely that this is a distinction without a difference.

The evolution of our bail grounds has allowed for “preventative” detention. This concept of preventative detention has been explored by many theorists. It is a problematic concept, one which we will explore below. Its impact in cases involving mentally ill persons is also concerning. This is because mentally ill persons are more likely to be seen by bail courts as unreliable and unpredictable, which leads to arguments often being made by Crown Attorneys that the accused should be

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<sup>116</sup> Don Stuart, *Charter Justice in Canadian Criminal Law*, 5<sup>th</sup> ed (Toronto: Carswell, 2010) at 447.

<sup>117</sup> *Ibid*, at 449-450.

<sup>118</sup> *R. v St-Cloud* (2015), 321 CCC (3d) 307 (SCC) [*St-Cloud*].

detained for preventative reasons under the secondary and sometimes tertiary grounds.<sup>119</sup> As such, we turn now to a discussion of preventative detention.

## **2.2 Preventing Future Crime through Pre-Trial Detention**

In the days since the *Bail Reform Act*, there are certainly positive advances that have been made to our bail system. As just one obvious example, Canada does not suffer from the discriminatory and harshly criticized money bail system seen in many states in the United States.<sup>120</sup> Cash deposits for bail have been studied extensively there, and have been shown to disproportionately affect the poor, and racialized minorities.<sup>121</sup> We also no longer suffer from the broad discretion of courts at the bail level that was allowed under the former system, which lacked a mechanism to review those decisions. The right to review a bail decision has now been a consistent right of accused persons, and ensures that bail courts are held accountable for their decisions in a way that requires reasoned principles for detention.

Canada's current bail system is not worthy of all praise though. In fact, despite the efforts and good intentions of the *Bail Reform Act*, our bail system remains significantly challenged, criticized, and in need of repair. It has been described by many in negative terms, such as "broken", "failing" and "inequitable".<sup>122</sup> There

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<sup>119</sup> The unreliability of some mentally ill persons is also referenced by Crown Attorneys in bail court to try and secure detention under the primary ground.

<sup>120</sup> For a few examples of critiques of the American system, see:

Justine Olderman, "Fixing New York's Broken Bail System" (2012) 16 CUNY Law Review 9;

Jocelyn Simonson, "Bail Nullification" (2017) 115 Michigan Law Review;

Cynthia Jones, "Give Us Free: Addressing Racial Disparities in Bail Determinations" (2013) 301 Articles in Law Reviews & Other Academic Journals;

Curtis E. Karnow, "Setting Bail for Public Safety" (2008) 13 Berkeley Journal of Criminal Justice 1; and

Patricia A. Reed, "Pretrial Bail: A Deprivation Of Liberty Or Property With Due Process of Law" (1983) 40 Washington and Lee Law Review 1575.

<sup>121</sup> *Ibid.*

<sup>122</sup> See:

remains consistent call for reform to our current bail system, with many critics viewing risk aversion as an ongoing plague in our system.<sup>123</sup> The main complaint of many of these critics is this concept of preventative justice, the idea of bail being denied because of the speculative fear that they may commit future offences.

Preventative justice means that legally innocent persons are at risk of being held in custody. The idea of preventative justice has been widely studied. Those who are advocates for this kind of justice argue that specific complainants or victims, and society in general, are better off when an accused is incapacitated such that they cannot commit further offences.<sup>124</sup> Problems with this argument include that not all accused are charged with violent crime, and that at the bail stage, the state has not yet proven they are even guilty of anything.

These concerns become even more intensified when one remembers that the standard for proof of a crime is only “beyond a reasonable doubt”. Because our

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- John Howard Society of Ontario, *Reasonable Bail?*, (Toronto, 2013);  
Department of Justice Canada, *"Broken Bail" in Canada: How We Might Go About Fixing It*, (Ottawa, 2015);  
Ontario, Ministry of the Attorney General, *Bail and Remand in Ontario*, Raymond Wyant auth. (Toronto, 2016);  
Canadian Civil Liberties Association and Education Trust, *Set up to Fail: Bail and the Revolving Door of Pre-Trial Detention*, (2014);  
Martin L. Friedland, "The Bail Reform Act Revisited" (2012) 16:3 Can. Crim. L. Rev. 315;  
Legal Aid Ontario, *A Legal Aid Strategy for Bail*, (Toronto, 2016);  
Nicole Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 Current Issues in Crim. J. 127;  
Benjamin L. Berger & James Stribopoulos, "Risk and the Role of the Judge: Lessons from Bail", in Benjamin Berger, Emma Cunliffe & James Stribopoulos eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thompson Reuters, 2017).

<sup>123</sup> Cheryl Marie Webster, Anthony N. Doob, and Nicole M. Myers, "The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada" (2009), 21 Current Issues in Criminal Justice 79.

<sup>124</sup> Frederick Schauer, "The Ubiquity of Prevention" in Andrea Ashworth et al, eds, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 10 at 12.

standard of proof is not one of certainty, people will find themselves convicted of crimes who have not necessarily committed one. The standard is even less exacting at the bail stage, and thus, more problematic as it relates to detaining legally, and potentially factually, innocent persons. As RA Duff has written, “...pre-trial remand is pre-emptive rather than defensive; it coerces a defendant before he has the chance to decide whether to abscond or otherwise offend.”<sup>125</sup> These kinds of speculative detentions should not be allowed.

Preventing future crime is a laudable goal. Most people agree that crime is not something we want in our community. The real challenge, though, comes from knowing how to prevent it, since most of us do not have the ability to predict the future. Bail judges, sadly, are not immune to this shortcoming. Innocent persons become entangled in the system despite their innocence. For those who are in fact guilty of their charges, the system is doing little to address the root cause of their criminality. In cases of mentally ill offenders, this becomes increasingly challenging. Whether it is a personality disorder, mood disorder, or addiction disorder, mental health is precarious, making it difficult to predict. When courts are asked to assess the likelihood of future criminality in the case of a mentally ill accused, they are often being asked to determine whether someone is releasable while knowing very little information about their disorder - if it has even been diagnosed at all. They are asked whether a plan can be fashioned that is strong enough to safe-guard from the chances of the person continuing their alleged criminality. To add to the difficulties, they are asked to do all of this without the power or authority to order any further assessments or treatment for the accused – even where the accused is sometimes begging for help and would consent to such an order.

Let us return to the primary ground for a moment. We must also remember that bail courts are concerned about the ability of an accused person to get back to court for

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<sup>125</sup> RA Duff, “Pre-Trial Detention and the Presumption of Innocence” in Andrea Ashworth et al, eds, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 115 at 119.

their appearances. In this way, knowing more about their illness is also helpful to satisfy the primary grounds. For example, if the person has challenges with remembering dates on account of their mental disorder, then the Court will want to be assured that there is some way they will remember their future court date. Perhaps keeping a calendar is the simple answer, or if the person has a support worker in the community, the concern can be mitigated. The primary ground concerns are undoubtedly affected by the mental health of the accused person before the court. Arguably, though, the risk of re-offending is where most bail courts will be concerned as it relates to mentally ill accused persons, and so understanding the context in which we currently view preventative detention is helpful.

### *2.2.i The Presumption of Innocence is Not Absolute*

Situations other than bail considerations have required our courts to consider the liberty interests of Canadian citizens. For example, in the context of mandatory jail sentences for absolute liability offences, the Supreme Court of Canada found in *Reference Re: BC Motor Vehicle Act*<sup>126</sup> that individual rights had to be considered against the claim for the greater good.<sup>127</sup> The Court held:

“It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law.”

Through protection of individual rights, this decision ensured the greater good.<sup>128</sup>

Scholars, like Professor Martin Friedland, have also provided insight into the importance of liberty, stating that "the law should abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum."<sup>129</sup>

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<sup>126</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 (SCC) [*Reference*].

<sup>127</sup> *Supra*, note 66 at 5.

<sup>128</sup> *Ibid.*

<sup>129</sup> See: *R. v Zarinchang*, 2010 ONCA 286.

In the context of bail rights, courts are constantly reminded of the presumption of innocence as the backdrop for their decision. The right to be secure from detention prior to conviction is concentrated on the accused's status as a *legally* innocent person.<sup>130</sup> Legal innocence must be kept squarely in focus. The person may well be guilty of the offence, but the court must still treat them as if they are innocent when determining bail – and for good reason. The research is clear about the real impact that pre-trial detention can have on an accused person, including loss of their job, stigmatization, an inability to prepare their case, and also a troubling incentive to plead guilty instead of waiting for trial.<sup>131</sup> Jocelyn Simonson has written that “[s]tudies have shown time and time again that pretrial detention increases the chances of a conviction, extends the probable length of a sentence, and decreases the chance that the charges will be dismissed altogether.”<sup>132</sup> The presumption of innocence must therefore be central to the question of bail so to avoid the damaging consequences of pre-trial detention in the event the accused is actually innocent.

The United States has also struggled with this issue, seen predominantly in the case of *United States v Salerno*.<sup>133</sup> Dealing with a less-than sympathetic accused person, the court was required to determine whether Mr. Salerno – an alleged New York mafia boss – should be granted bail. In a split decision, the minority held that pre-trial detention for a “preventative” purpose was punitive, and that it violated due process. They felt that preventative detention, as a justification to deny bail, lost sight of the fact that a charge is only evidence that the person will be tried – not that they have done anything criminal, or as evidence of their likelihood to do something criminal again if released.<sup>134</sup> The majority, however, justified preventative detention as a regulatory necessity, not as a punitive function. They focused on crime

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, at 16; see also Christopher Sherrin, “Excessive Pre-Trial Incarceration” (2012) 75 Saskatchewan Law Review 55-96 at 1; and Jocelyn Simonson, “Bail Nullification” (2017) 115 Michigan Law Review at 585 and 589.

<sup>132</sup> Simonson, *ibid* at 589.

<sup>133</sup> *United States v Salerno*, 107 S. Ct. 2095, 95 L Ed 2d 697 (1987) [*Salerno*].

<sup>134</sup> *Supra*, note 66 at 2.

prevention as a legitimate aim of the law, and thus allowed detention to continue occurring on this ground. The majority may have erroneously concentrated on the particular background of this accused, Mr. Salerno. It is an interesting question to posit whether their decision would have been the same were the accused person a more palatable individual. The result, regardless of the characteristics of Mr. Salerno himself, was the ongoing pervasiveness of a culture of risk-aversion and crime prevention now being applied to all accused persons – even those who were far from being a mafia boss.

*Salerno* was decided in 1987, at a time when the Canadian courts had not yet been required to consider the issue as it related to our own similar ground for detention. Despite the acknowledgment by the Supreme Court of Canada that the U.S Constitution and the *Charter* are materially different at times,<sup>135</sup> it is interesting to realize that Canada has continued to uphold the secondary ground - a ground for detention very similar to that considered in the United States.

It was shortly after *Salerno*, in 1992, that Canada saw the secondary ground come under scrutiny in the *Morales*<sup>136</sup> case that we have already explored. Under section 515(10)(b),<sup>137</sup> detention is allowed if the accused poses a substantial likelihood of committing a new offence. The purpose of the secondary ground, like the ground under which *Salerno* was detained in the American context, is to disallow the release of an accused out of fear that they will commit another crime – even if that crime is simply breaching the court’s bail order.

The secondary ground has led to a watering down of the presumption of innocence. This dilution of the presumption of innocence is the position that is advanced by the minority in *Salerno*. Because at least some Justices in the United States Supreme Court could see this argument, it is surprising that not even one Supreme Court of

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<sup>135</sup> *R. v. Smith* (1987), 34 C.C.C. (3d) 97 at 141.

<sup>136</sup> *Morales*, *supra* note 95.

<sup>137</sup> *Supra*, note 5 s. 515(10)(b).

Canada Justice dissented on the constitutionality of the tertiary ground provision after removal of the words “in the public interest” in *Morales*. Instead, all of the Justices of the Canadian court agreed that it was a legitimate aim of the legislature to prevent crime - much like the majority found in *Salerno*. In the end, it has left the provincial bail courts with an unenviable task: how to determine when one is “substantially likely” to reoffend.

As alluded to earlier, this task is difficult because of the problems associated with predicting future criminal activity. In the context of mentally ill persons, it has been said that “[m]ental health professionals erroneously predict dangerousness up to 95% of the time. Judges are unlikely to be better predictors.”<sup>138</sup> In *R. v Lyons*,<sup>139</sup> the court recognized that psychiatric evidence can be notoriously inaccurate in its attempt to forecast future violent behavior. The Court in *Morales* was confronted with the argument that it is difficult to predict future behavior, but still did not find the secondary ground resultantly problematic. They held that “the impossibility of making exact predictions does not preclude a bail system which aims to deny bail to those who will likely be dangerous.”<sup>140</sup> Instead, they contented themselves with the review provisions provided in the bail process for those who are ordered detained.

### *2.2.ii Is Substantial Likelihood Measurable?*

So then, how do we measure “substantial likelihood” under the secondary ground? Not surprisingly, the Courts struggled with this in early days. They defined the term by substituting other words like “real” likelihood.<sup>141</sup> They have revisited the question several times, including a recent pronouncement in *R. v Young*<sup>142</sup> in 2010 that:

“...the likelihood of a particular risk materializing cannot be looked at in the abstract. Rather, it must be weighed against the gravity of the harm that will

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<sup>138</sup> *Supra*, note 66 at 8.

<sup>139</sup> *R. v Lyons*, [1987] 2 SCR 309 at 99.

<sup>140</sup> *Morales*, *supra* note 95 at 108.

<sup>141</sup> *R. v Moore* (1973), 16 CCC (2d) 286 (Ont Dist Ct) at 291.

<sup>142</sup> *R. v Young*, 2010 ONSC 4194 [*Young*].



ensue if the risk comes to pass. For example, even a very grave risk that an incorrigible petty thief will shoplift again if granted bail is one that the court might be willing to take when balanced against the accused's constitutional right to reasonable bail. On the other hand, where the anticipated harm is very grave, a more remote risk may be sufficient to meet the test of substantial likelihood."<sup>143</sup>

Justice Trotter points out that a standard that is too low will fail to satisfy the "just cause" requirement under the *Charter* that bail can only be denied in a narrow set of circumstances. If the standard is held too high, it would undermine the finding by the Supreme Court of Canada that our inability to predict future behavior is not an issue to worry ourselves about. Instead, he suggests the proper and accepted approach to be the "enhanced balance of probabilities standard".<sup>144</sup>

### *2.2.iii Making Bail: A Laddered Approach*

Despite the fact that the three grounds of detention have been in existence in their current format for years now, our courts continue to struggle with this at a very practical level. The concept of reasonable bail may seem straight-forward when discussed in the abstract, but it becomes complicated in application to a real-life accused person standing before the court. This is because every accused person will present with unique challenges, different backgrounds, varied charges, and differing abilities to put together a bail plan. The variables are endless, and therefore, each bail decision is a fact-driven inquiry.

To assist with this exercise, there are different levels of bail plans available to accused persons. The levels, often referred to as "rungs on a ladder",<sup>145</sup> become increasingly onerous. This is in keeping with section 515(3), which requires the court to release the accused person on the least onerous form of release unless the

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<sup>143</sup> *Ibid*, ¶ 21.

<sup>144</sup> *Supra*, note 36 at 3-15. See also *R. v Quick*, [1984] OJ No 1364 (HC) ¶ 27; *R. v Link* (1990), 105 AR 160 (CA); *R. v Braun* (1994), 91 CCC 3(d) 237 (Sask CA) at 253; and *R. v Le* (2006), 240 CCC (3d) 130 (Man CA) at 138.

<sup>145</sup> *R. v Antic*, 2017 SCC 27 [*Antic*].

Crown can show why that should not be the case.<sup>146</sup> Starting with a Summons to appear, issued without conditions by police, all the way up to a residential surety bail with house arrest requirements, the different levels of liberty afforded to accused persons can vary greatly. This variation allows courts to have the flexibility needed to fashion bail terms that address the three potential grounds of bail concerns. The following diagram is illustrative of these increasingly onerous rungs:



From time to time, it seems bail courts need a reminder that bail terms are to be the least onerous necessary to meet the concerns raised by either of the three grounds. Most recently, these reminders have come in the cases of *R. v Antic*<sup>147</sup> from the

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<sup>146</sup> *Ibid*, ¶ 4.

<sup>147</sup> *Ibid*.

Supreme Court of Canada in 2017, and *R. v Tunney*<sup>148</sup> from the Superior Court of Ontario in 2018.

In *Antic*, the Court dealt with an accused charged with drug and gun offences, who had been denied bail. Because he was resident in Ontario, and within 200 kilometers of the court that had jurisdiction of his charges, he was not able to put down a cash deposit to help secure his bail by virtue of section 515(2)(e). The bail court had held that if a cash deposit and a surety recognizance were available, Mr. Antic would otherwise have been releasable. In the lower appeal courts, he was able to successfully argue that section 515(2)(e) was unconstitutional as it denied him bail when it would otherwise be available to others who met the geographical conditions. The Supreme Court of Canada held, instead, that they did not need to consider the constitutionality of section 515(2)(e), as the error came from the bail court misapplying the bail provisions. The Court reminded us that a surety Recognizance with a monetary pledge is one of the highest forms of release, which was one version of the plan offered to the bail court in Mr. Antic's case. As such, bail was appropriate in his circumstances without the need to deposit the money. *Antic* reminded us of two important principles: first, that requiring cash deposits creates unfairness;<sup>149</sup> and second, that the ladder principle must be applied consistently across Canada, emphasizing again the need for bail courts to always consider the least onerous terms necessary.<sup>150</sup>

Less than a year after *Antic*, *Tunney* was released by Justice DiLuca. It seemed that, yet again, bail courts were having to be reminded that bail is to be granted on the least onerous terms possible unless the Crown can show cause otherwise. In a well-researched and persuasive decision, Justice DiLuca pointed out that there was an over-reliance on sureties, likening surety bail to the requirement of cash deposits as

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<sup>148</sup> *R. v. Tunney*, 2018 ONSC 961 [*Tunney*].

<sup>149</sup> *Antic*, *supra* note 145 ¶ 4.

<sup>150</sup> *Ibid*, ¶ 6.

the new way of holding persons in custody.<sup>151</sup> Quoting from Professor Friedland, Justice DiLuca criticized the culture of nearly automatic reliance on sureties:

“The present system is, however, not working well in Ontario. The pendulum has swung too far in the direction of requiring sureties rather than using release on one's own recognizance. In England, sureties are required in only a small fraction of the cases. About two thirds of those who appear for a bail hearing in Toronto today are required to find sureties and only about half of this number are actually released. The other half, it appears, could not find acceptable sureties. Less than 10% held for a bail hearing are released on their own undertaking or recognizance.”<sup>152</sup>

If we continue to properly employ the ladder approach to bail, then it is possible our system may come under less criticism. It has been said that the ladder principle strikes a balance between the competing interests of public safety and the presumption of innocence. For example, Benjamin Berger and James Stribopoulos have written:

“In the criminal justice context, adopting a precautionary approach to risk management can lead to a relinquishment of the burdens of judgment and the responsibility to vindicate important legal values and principles. As the Supreme Court has underscored in *Antic*, the guiding concept in bail -- the one that gives effect to the fundamental values of the system, including the presumption of innocence -- is not the precautionary principle, but the ladder principle.”<sup>153</sup>

These rungs have helped courts analyze and respond to the several considerations at play during a bail hearing. However, a bail plan is only as successful as the amount of information given to the court about the accused and the allegations. Thus, understanding the specific and individualized factors for each accused that a court has to account for is an important exercise.

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<sup>151</sup> *Tunney, supra* note 148 ¶ 30. See also Martin L. Friedland, “Criminal Justice in Canada Revisited” (2004), 48 C.L.Q. 419 at 433-434.

<sup>152</sup> *Ibid*, ¶ 30, quoting from Martin L. Friedland, “Criminal Justice in Canada Revisited” (2004), 48 C.L.Q. 419 at 433.

<sup>153</sup> Benjamin L. Berger & James Stribopoulos, “Risk and the Role of the Judge: Lessons from Bail”, in Benjamin Berger, Emma Cunliffe & James Stribopoulos eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thompson Reuters, 2017).

### *2.2.iv Some Considerations During a Bail Hearing*

There are many factors a bail court has to consider. Often times the analysis involves the potential penalty for an offence, or the strength of the evidence against an accused person.<sup>154</sup> For the purposes of this discussion, we will look at some of the considerations most prevalent in cases with a mentally-ill accused person.

Perhaps most persuasive to a Crown's argument for detention is proof of a criminal record,<sup>155</sup> especially one that is lengthy, recent, includes serious offences, and offences that are similar to the charges currently before the court. Breaches of court orders, especially previous bail conditions, are also heavily inspected, and can cause a court to detain out of a belief that the accused will not be compliant with a proposed plan of supervision and the conditions of release.

Another consideration is whether the accused is already on bail or on probation. If they are, it signals to the court that the accused is less likely to follow terms placed on them. By virtue of section 524(1) of the *Criminal Code*,<sup>156</sup> an alleged breach of a bail order shifts the onus to the accused for their subsequent bail hearing. The same is true if the accused is thought to have committed a new or different indictable offence while out on bail. This section was one of the reverse-onus provisions considered in *Morales*, and like the reverse-onus applied to drug traffickers, was upheld by the court as constitutional, since it operated only when the bail system appeared not to be working properly.<sup>157</sup>

An oft-cited reason for detention on the secondary ground is the nature of the alleged offence. For reasons that have not always been well explained or

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<sup>154</sup> *Supra*, note 36 at 3-4 – 3-8.

<sup>155</sup> The Crown can lead evidence of a criminal record via section 518(1)(c)(i) of the *Criminal Code*.

<sup>156</sup> *Supra*, note 5 s. 524(1).

<sup>157</sup> *Morales*, *supra* note 95.

supported,<sup>158</sup> courts have held that accused alleged to have committed certain offences are seen to have a propensity for committing further offences. This logic has been employed in drug trafficking cases,<sup>159</sup> burglaries,<sup>160</sup> and domestic violence cases.<sup>161</sup> In the case of domestic charges, a “cycle of violence” is often present in the relationships between accused and complainants. This relationship is further complicated by the desire of some complainants to continue the relationship even after the alleged criminal behavior, or because the sharing of children makes a clean split from the accused person difficult. In domestic cases, a specific person is often the subject of the safeguards implemented via the bail conditions, and only if meaningful conditions can be met to protect that person, is bail seen as appropriate.<sup>162</sup>

Considering the nature of the offence at the bail stage can also be helpful to an accused person seeking bail. Courts have released accused where the effect of their detention would be more punitive than the sentence they would receive if found guilty of the offence.<sup>163</sup> Like the “incorrigible petty thief” described by Justice Clarke in *Young*,<sup>164</sup> the courts have signaled that minor crimes should not be the concern of most bail courts. Despite this, we still see a number of petty crimes bogging down our bail courts.

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<sup>158</sup> A. Ashworth, *The Criminal Process – An Evaluative Study*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1998) at 215-216. The author points to statistical research that demonstrates that the conclusion reached in *Phillips*, *supra* note 53 that burglars are more likely to commit future burglaries is a “considerable exaggeration”.

<sup>159</sup> *R. v Groulx* (1974), 17 CCC (2d) 351 (Que SC).

<sup>160</sup> *Phillips*, *supra* note 57.

<sup>161</sup> Examples of this proposition in domestic violence cases are endless. For just a few examples, see *R. v B.(F.F.)*(1991), 275 APR 267 (NS CA); *R. v E.(T.R.)*, 2011 ABQB 766; and *R. v Hawryliuk*, 2012 ONSC 867.

<sup>162</sup> *Supra*, note 36 at 3-19. Domestic cases are often ripe for mental health intervention, given the prevalence of mental health disorders amongst domestic offenders. We will consider this further, below, when we discuss the types of offences and offenders who could greatly benefit from early intervention of the criminal justice system as it relates to their mental health needs.

<sup>163</sup> *R. v Walsh*, (1984), 11 WCB 31 (Nfld SCTD).

<sup>164</sup> *Young*, *supra* note 142.

The ties one has to a community are often considered as well, where primary ground considerations are at play. The theory here is that a person with “roots” to a community is less likely to abscond from their criminal matter, as they would have to walk away from a number of relationships or social attachments.<sup>165</sup> Hundreds of years of many accused persons returning to court to face their charges suggests that these social connections are likely valid considerations for bail courts.

In the context of mentally ill accused, however, the problem with this consideration becomes nearly immediate: mentally ill persons are less likely to have the kinds of roots that a court might look for, like employment, a stable home, property ownership, or a close group of friends or family members to call on for support. This means that mentally ill persons are more likely to be detained under the primary ground, as an indirect result of their mental illness.

A final consideration to help determine whether bail should be granted on the secondary grounds is the stability of the accused person. The court will consider whether drugs or alcohol were a factor in the allegations.<sup>166</sup> If they were, some evidence of the accused person dealing with the issue if it is an addiction would assist. If, instead, the behavior was seen as a one-time issue for someone who does not have addiction issues, that may also assist the court in releasing.

Stability is especially important in the context of our discussion of mentally ill accused persons. As Justice Trotter rightfully points out, it is “inappropriate to detain an accused *because of* a mental disorder or illness”. If the accused person continues to pose a risk on account of their mental illness, and they refuse to address the issue, some courts have seen detention as the only alternative.<sup>167</sup> Dr. Bloom and Justice Schneider have written about this issue, stating that “bail-

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<sup>165</sup> *Supra*, note 36 at 3-8.

<sup>166</sup> *Ibid.*

<sup>167</sup> *R. v Rondeau* (1996), 108 CCC (3d) 474 (Que CA).

worthiness of a mentally disordered accused may depend on whether he has sufficient psychiatric supervision in place”.<sup>168</sup>

Since an accused person’s stability is a consideration, one might hope to see programs available to assist those persons in stabilizing themselves. Like preparing for a trial, accessing community resources becomes infinitely more difficult for the accused person who spends their entire day in custody. While some accused might have already begun accessing these services before coming into custody, a greater number of them will not have. Therefore, it seems common sense that our criminal justice system would be interested in providing assistance or resources to those who have not already made these connections.

Instead, we need to realize that our system is ill-equipped to help those struggling with mental health issues. This is especially true during the pre-trial stages, like bail, where guilt or innocence has not yet been adjudicated. Unless the person has been found guilty and finds themselves at the sentencing stage, there are few rehabilitative options available to the courts. An assessment for “not criminally responsible on account of a mental disorder” is one such option, and an assessment for “fitness” of the accused is another. These options are not used often, but offer some options for the Courts to consider. Some other fixes exist as well, which we will explore in turn. While getting help for a young person during the bail stage is likely more promising than for an adult in the same position, there are still places for improvement within our youth system. First, though, we turn to the intersection of mental health and our criminal justice system from the lens of the adult accused person.

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<sup>168</sup> Hy Bloom & Richard D. Schneider, *Mental Disorder and the Law*, (Toronto: Irwin Law, 2017) at 153.



## Part 3

### **The Problem: Adult Accused and Mental Health Assessment Options**

“Criminalization is another facet of the narrative of mental health and criminal justice. Testimony before the Hyde Inquiry from front-line police officers and other witnesses illuminated the fact that people having problems with their mental health in the community often find themselves ‘drawn into the justice system.’ Witnesses to the Inquiry made a direct link between the inadequacy of mental health services in the community and through the health care system and the criminalization of persons with mental illness.”<sup>169</sup>

-Justice Anne Derrick

This discussion is not the first to consider the overlap of mental health and criminal justice, and it certainly will not be the last. The relationship between the two is so long and storied, that like the laws on bail, properly documenting its history is likely an impossible task. Instead, this discussion will consider a brief overview of the history, only to the extent necessary to have a nuanced understanding of the current options available to mentally ill accused persons. We will then look at those options, limited as they are – including the “not criminally responsible for reason of mental disorder” and “fitness” assessments, the impact on *mens rea* considerations, mental health courts, and the potential application of the *Mental Health Act*.<sup>170</sup>

### **3.1 A Brief History of Mental Health and Criminal Justice**

#### *3.1.i The Lieutenant-Governor System*

To understand this intersection, we again begin in England. In the 19<sup>th</sup> century, following a murder attempt on King George III, James Hadfield was tried by a jury. Mr. Hadfield had incurred a brain injury during battle, causing him to suffer from

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<sup>169</sup> Anne Derrick, “‘We Shall not Cease from Exploration’: Narratives from the Hyde Inquiry about Mental Health and Criminal Justice” (2010) 33 Dalhousie Law Journal 35 at 7.

<sup>170</sup> *Mental Health Act*, RSO 1990, c. M.7 [the “*Mental Health Act*”]

delusions and fits of rage. With only the options of “guilty” or “not guilty”, the jury acquitted him with the additional note “...he being under the influence of insanity at the time the act was committed.”<sup>171</sup> Dissatisfied with the prospect of returning Mr. Hadfield into the community, the court instead ordered him to be returned to prison for the ongoing risk of danger he posed to public safety. This decision prompted the *Criminal Lunatics Act*<sup>172</sup> in Britain. This act added a third option to the potential verdicts allowable in an effort to avoid Mr. Hadfield’s situation from happening again – the verdict of “not guilty by reason of insanity”<sup>173</sup> (hereinafter referred to as “NGRI”). If this verdict was given to an accused person, they would be placed in an asylum instead of in jail.

In Canada, a similar approach was taken. Until 1992, section 542(2) of the *Criminal Code*<sup>174</sup> allowed for a “lieutenant-governor” warrant for those found NGRI, while section 543(7)<sup>175</sup> allowed for the accused to be detained if they were unfit to stand trial on account of their insanity. The name for these warrants was such because the person was to be kept in custody “until the pleasure of the lieutenant governor of the province is known”.<sup>176</sup> These provisions gave absolute discretion to the lieutenant-governor. The choices open to them included the ability to discharge the person “if satisfied it was in the accused’s best interests and not contrary to the public interest”,<sup>177</sup> or to keep them at the asylum. If a discharge was to be granted, it could be done with conditions, or absolutely.

In addition to the absolute discretion given to the lieutenant-general, a number of other criticisms of the system emerged. Timing was an issue, as there were no time

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<sup>171</sup> *R. v Hadfield* (1800), 27 State Tr. 1281 (UK HL).

<sup>172</sup> *Criminal Lunatics Act*, SC 1892, c 29.

<sup>173</sup> Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law*, (Toronto: Thomson Carswell, 2006) at 1-1.

<sup>174</sup> *Supra*, note 5 s. 542(2) (since replaced by section 614(2), and further still, repealed in 1991).

<sup>175</sup> *Ibid*, s. 543(7) (since replaced by section 615(7), and further still, repealed in 1991).

<sup>176</sup> *Supra*, note 173 at 1-2.

<sup>177</sup> *Ibid*.

limits to make the order, or to review the order made.<sup>178</sup> Once a finding of NGRI or unfitness was made, detention of the accused was automatic without any procedural rights to make submissions or adduce evidence of their current mental health.<sup>179</sup> Additionally, there were no appeal right from these warrants.<sup>180</sup> The focus of this regime was on custody, and not treatment, leaving accused persons exposed to intrusive and unwanted medical treatments. This fact, and the potentially never-ending detention in an asylum, meant the defence was rarely raised by defendants.<sup>181</sup>

In 1969, Provincial Review Boards were added to the *Criminal Code* to consider the cases of those held in custody pursuant to the NGRI and fitness provisions.<sup>182</sup> Despite this new mechanism, the problems persisted as the lieutenant-governor was not bound by the Board's recommendation.<sup>183</sup> In 1976, a commission was chartered to analyze the regime, ultimately making 42 recommendations.<sup>184</sup> This led to the Department of Justice carrying out additional studies and consultations, which resulted in the Mental Disorder Project in 1982.<sup>185</sup> Following 2 years of research, and the simultaneous release of the *Charter*, the project released its draft report in 1984 to identify several shortcomings in the legislation. They recommended changes to bring the law in compliance with the *Charter*, where arguments were already being raised under sections 7 - the right to life, liberty and security of the person, 9 - the right not to be arbitrarily detained, 12 - the right not to be subjected to cruel and unusual treatment, and 15(1) - the right to equal protection under the law.<sup>186</sup> The first major call for change related to the indefinite confinement of the

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<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*, at 1-3.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> Currently found in *supra*, note 5 s. 672.38.

<sup>183</sup> *Supra*, note 173 at 1-4.

<sup>184</sup> Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: 1976).

<sup>185</sup> *Supra*, note 173 at 1-5,

<sup>186</sup> *Ibid* at 1-4 – 1-5.

unfit accused without a requirement for the Crown to establish a *prima facie* case.<sup>187</sup> The second recommendation was to stop the automatic detention of those found NGRI without evidence that they pose a risk of danger to the public.<sup>188</sup> Legislation to address these issues was drafted in 1986, but came to a halt due to the controversy surrounding cost implications for the new processes.<sup>189</sup> It was not until *R. v Swain*<sup>190</sup> in 1991 that the government was forced to make it a top priority. While Swain assisted with some of the issues of the lieutenant-governor system, many issues continue.

### *3.1.ii Swain and the Criminal Code Amendments*

*Swain* brought to the forefront the issues with the NGRI system. In 1983, Mr. Swain had committed a bizarre attack on his wife and two infant children, resulting in charges for assault and aggravated assault. He was initially detained at the Penetanguishene Mental Health Centre where he was given medications which improved his health. He was released on bail and remained out until May 1985. At trial, the evidence showed that at the time of the attacks, Mr. Swain appeared to be fighting with the air and talking about spirits. He testified at trial that he believed he was acting to protect his family from devils by carrying out certain acts.<sup>191</sup> The Crown raised NGRI as a result of this evidence, and Mr. Swain was found to be NGRI on all counts. Because of the automatic detention provisions of the NGRI process, Mr. Swain was immediately detained, despite having been on bail until that point, and despite his filing of a constitutional challenge to the validity of the section. Mr. Swain appealed this decision all the way to the Supreme Court, where section 542(2) was found to be unconstitutional for violating both section 7 and section 9 of the *Charter*, neither of which could be saved by section 1 of the *Charter*. Chief Justice Lamer, for the majority, wrote that under the current legislative scheme, he “could

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<sup>187</sup> *Ibid* at 1-5.

<sup>188</sup> *Ibid*.

<sup>189</sup> *Ibid*.

<sup>190</sup> *Swain*, *supra* note 2.

<sup>191</sup> *Ibid* at 954-955.

not imagine a detention more arbitrary” because the detention was “automatic, without any rational standard for determining which individual insanity acquittees should be detained and which should be released”.<sup>192</sup> The Court acknowledged that some detention following a verdict of NGRI may be necessary, but it was essential to limit this to no longer than necessary to determine the ongoing dangerousness of the accused.<sup>193</sup>

The government was given six months to respond to the striking down of section 542(2) of the *Criminal Code*, by way of a transitional period. This resulted in Bill C-30,<sup>194</sup> which overhauled the entire regime. The 1992 amendments gave way to Part XX.1 of the *Criminal Code*,<sup>195</sup> which included 95 sections to create a complete set of laws dealing with the issues of NCR and fitness. While the substantive test for criminal responsibility was not changed, it did expand the availability of the defence to summary offences.<sup>196</sup> The procedural changes included the presumption that the accused’s release or detention status prior to the verdict would continue, pending a disposition hearing. A right to a disposition hearing, followed by yearly hearings to continue assessing the accused’s situation if an absolute discharge was not granted, were also introduced. Most importantly, the amendments attempted to provide a more rational and humane method of dealing with mentally ill persons, with a focus on treatment while still protecting public safety.<sup>197</sup> The former lieutenant-governor system was abolished, and instead, new “not criminally responsible for reason of mental disorder” and “fitness” provisions were introduced.

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<sup>192</sup> *Ibid* at 1012.

<sup>193</sup> *Ibid* at 1018.

<sup>194</sup> *An Act to Amend the Criminal Code and to Amend the National Defence Act and the Young Offenders Act*, SC 1991, c 43.

<sup>195</sup> *Supra*, note 5 Part XX.I.

<sup>196</sup> *Supra*, note 173 at 1-11.

<sup>197</sup> *Ibid* at 1-9.

Of particular interest to this discussion, the new provisions allowed an assessment for NCR or fitness to be ordered at any stage of the proceedings.<sup>198</sup> There no longer needed to be reasonable grounds deriving from medical evidence, which often meant that in the pre-1992 system, the issue was only coming up at the trial stage. Instead, this now allowed an accused's assessment to be ordered as early as their first appearance post-charge. It provided an opportunity to have an accused assessed as early as possible where there was concern that they did not have the requisite *mens rea* to commit the offence on account of their mental disorder.

The 1992 amendments also codified the test for fitness, which had been previously undefined. Section 2 now defines unfit as:

“unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

(a) understand the nature or object of the proceedings,

(b) understand the possible consequences of the proceedings, or

(c) communicate with counsel.”<sup>199</sup>

The new fitness provisions provided a limited power to the court to order involuntary treatment, including medication, for the purposes of getting the accused back to a state of fitness. This could be done on an in-patient or out-patient basis. This is a unique provision, as it is the only time a criminal court can compel a person to take medication under the *Criminal Code*.<sup>200</sup> This authority does not even exist for those found NCR.<sup>201</sup> In the NCR context, if the accused consents, only then may such treatment be provided during the course of the assessment.

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<sup>198</sup> *Ibid* at 1-12.

<sup>199</sup> *Supra*, note 5 s. 2.

<sup>200</sup> *Supra*, note 173 at 2-11.

<sup>201</sup> *Ibid* at 1-12 and 2-8; see also *supra*, note 5 s. 672.19.

Since Part XX.1 was introduced, the federal and provincial levels of government have continued discussions related to provisions that had not originally been proclaimed in 1992 due to time constraints and controversy.<sup>202</sup> There was also an acknowledgment that there were other areas in need of reform.<sup>203</sup> To this end, the courts continue to play an important role in the dialogue. For example, the 1992 case of *R. v Parks*<sup>204</sup> saw the case of an accused who was acquitted of murdering his mother-in-law, and the attempted murder of his father-in-law. He was found to have been in a state of non-insane automatism while sleepwalking, which was not considered a “disease of the mind”. As a result, he was acquitted outright, causing controversy across the country. The Supreme Court of Canada agreed with the trial judge’s decision to only put to the jury the defence of automatism, finding that no policy reason prevented non-insane automatism from being a full defence.<sup>205</sup> The court, did however, suggest legislative reform to deal with the defence. Such legislation was drafted and tabled the following year, but a change in government ultimately resulted in the amendments not being pursued.<sup>206</sup>

The new regime was also tested by the Supreme Court of Canada in the 1999 case of *Winko v Forensic Psychiatric Institute*.<sup>207</sup> The court found that Parliament had regard to the twin goals of protecting public safety and treating the offender fairly, meaning they were to be treated with the “utmost dignity and afforded the utmost liberty compatible with his or her situation.”<sup>208</sup> *Winko* was an important decision for Parliament, as it confirmed their new provisions were passing constitutional muster. What *Winko* did change, though, was a recasting of the test for an absolute discharge in positive terms. Now, there must be a finding that the accused *is* a

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<sup>202</sup> *Ibid* at 1-16.

<sup>203</sup> *Ibid*.

<sup>204</sup> *R. v Parks*, [1992] 2 SCR 871 [*Parks*].

<sup>205</sup> *Ibid*.

<sup>206</sup> *Supra*, note 173 at 1-16.

<sup>207</sup> *Winko*, *supra* note 1.

<sup>208</sup> *Ibid* ¶ 42.

significant threat to the safety of the public, otherwise an absolute discharge must be granted.<sup>209</sup>

In 2002, Parliament designated a committee to undertake a review of Part XX.1.<sup>210</sup> This committee made a number of recommendations, which the government mostly endorsed in their response. In response to *Parks*, they agreed that no changes needed to be made to the mental disorder definition, and that there was no need to codify automatism.<sup>211</sup> These consultations resulted in Bill C-10, introduced in 2004. One of the amendments addressed the concern of the Supreme Court of Canada in *R. v Demers*,<sup>212</sup> by permitting a stay of proceedings for an accused person found to be permanently unfit. It also expanded the powers of Review Boards to allow the ordering of psychiatric assessment, adjourn hearings, and extend the time to review an accused's disposition.<sup>213</sup>

The result of Part XX.1 was to also provide guidance with respect to the order of assessments and bail hearings, with the former taking precedence over the latter. By way of section 672.17 of the *Criminal Code*,<sup>214</sup> the Court is prohibited from determining bail during the period that the assessment order is in place.<sup>215</sup> Interestingly, section 672.16 also provides a statutory presumption against the assessment being conducted while the accused is detained in custody. The accused's custody to complete the assessment only circumvents the presumption if:

(a) the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;

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<sup>209</sup> *Supra*, note 173 at 1-17.

<sup>210</sup> Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code* (Ottawa: June 2002).

<sup>211</sup> *Supra*, note 173 at 1-19.

<sup>212</sup> *R. v Demers*, [2004] 2 SCR 489.

<sup>213</sup> *Supra*, note 173 at 1-20.

<sup>214</sup> *Supra*, note 5 at s. 672.17.

<sup>215</sup> See also *R. v Laidley* (2001), 302 AR 275 (Alta QB), confirming that if an assessment is conducted pre-bail, the issue of bail should be determined following its completion.



(b) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or

(c) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in subsection 515(10).<sup>216</sup>

In the situation of a reverse-onus offence, the onus moves to the accused to show cause why his detention is not necessary during the assessment.<sup>217</sup> Despite the presumption, it seems to be the practice that most assessments ordered before a bail hearing result in the accused being kept in custody during the period of their assessment.<sup>218</sup> This is confirmed by researchers, who have found that over 95% of these assessments are conducted in custody.<sup>219</sup> The presumption seems to only benefit those who have already been given bail prior to the assessment being ordered.

For those accused who are being remanded in custody, one benefit to an NCR assessment appeared to be the ability to be confined in a therapeutic setting, as opposed to a custodial setting. Most people see the wisdom in a mentally ill person being confined in a hospital, rather than a jail cell, if they are to be confined at all. However, the reality of our system, and certainly that of the Ontario example, is that our hospitals are under-funded and under-resourced. The result has been a number of accused persons being detained in custody at detention centers, rather than hospitals, while they have waited for a bed to open up at the hospital. This issue has come up time and time again since the 1992 amendments came into force.

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<sup>216</sup> *Supra*, note 5 at s. 672.16.

<sup>217</sup> *Supra*, note 173 at 2-19.

<sup>218</sup> A few examples of this exist in my private practice. See: *R. v Toth* (26 July 2017), London 17-48825 and 17-8443 (Ont Prov Ct) [*Toth*]; and *R. v Farrugia* (26 September, 2018), London 18-6884, 18-8138 and 18-8328 (Ont Prov Ct) [*Farrugia*].

<sup>219</sup> *Supra*, note 173 at 2-19; and J.D. Gray, "Protected Statements' and Credibility under Section 672.21(3)(f) of the Criminal Code", [2000] 44 CLQ 71 at 72.

In *R. v Hussein*,<sup>220</sup> two different accused were ordered to be assessed. They had waited 23 days and 29 days respectively in a detention facility prior to being transferred to the hospital, and so they applied for *habeus corpus*. This application is made when a person believes they are being unlawfully detained. If successful, the court will order their release from unlawful detention. In *Hussein*, the court agreed that the effect of the holds in the detention centers, without assurances that the assessments would happen within the 30-day time frames allowable, was to arbitrarily detain them. The court took issue with the fact that the accused were being detained while *waiting* to be assessed, as opposed to detention to actually *be* assessed. In keeping with this finding, their detentions were held to violate sections 7 and 9 of the *Charter*.

To remedy the issue, the Ontario government made promises in 2006 for more forensic hospital beds.<sup>221</sup> Despite this, there has been an ongoing saga since *Hussein* of bed shortages. In 2007, in *R. v Rosete*,<sup>222</sup> Justice Schneider referred to the Centre for Addiction and Mental Health in Toronto's evidence that their center runs at 103 – 105% of its capacity, with wait times as high as six weeks. This is because their forensic psychiatric beds have a multiplicity of uses, including in-custody assessments pursuant to the *Mental Health Act*, treatment orders in respect of unfit accused, hospital assessment orders under the fitness and NCR provisions, and some other narrow forensic assessment options.<sup>223</sup> The last decade has seen little improvement to the situation, with psychiatric beds continuing to be in high demand, while being underfunded.<sup>224</sup> In recent years, transfer of accused to hospitals for these assessments has seemingly ceased to be the norm. Now, the assessments are often completed via a video link at the jail with the psychiatrist or

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<sup>220</sup> *R. v Hussein* (2004), 191 CCC (3d) 113 (Ont SCJ) [*Hussein*].

<sup>221</sup> *Supra*, note 173 at 2-22.

<sup>222</sup> *R. v Rosete*, 2006 CarswellOnt 2428 (Ont CJ), appealed to Ontario Court of Appeal *R v. Rosete*, [2007] OJ No 3273.

<sup>223</sup> *Supra*, note 173 at 2-23.

<sup>224</sup> Office of the Auditor General of Canada, *2016 Annual Report of the Office of the Auditor General of Ontario*, ch 3 (Ottawa: OAG 2016).

assessor from the hospital. This resource issue will be discussed again later, as it plays a predominant consideration in any calls for reform of the system.

To this point, much of our discussion thus far has focused on fitness and NCR. This is due to their long history as defined concepts within the criminal justice system. But to be sure, mental health and the criminal justice system collide more often than just the times that fitness or NCR issues are present. The times they are *not* at play is often when the courts stumble around the issue the most, as there is little guidance otherwise provided by the *Criminal Code*. As we have already seen in *Parks*, issues regarding the *mens rea* element of an offence can come up, such that the person has a complete defence to the charge. Other times, the combination of factors will simply be a feature to consider for sentencing. In the following section, we will first review what situations are expressly provided for in the *Criminal Code*. We will also look to some other options potentially open to accused, like the mental health courts and the *Mental Health Act*. Understanding what is covered will assist our discussion, such that we can then focus on what is *not* accounted for and where there is room for improvement.

### 3.2 What Is (and Is Not) Provided in the Legislation

“Many officers come to understand that the *Criminal Code* is the *Mental Health Act* of last resort, but unlike the *Mental Health Act*, it has enough teeth to hold onto the patient for long enough to offer the prospect of some meaningful intervention. They consequently charge the patient in the hope that he will get trapped in the filter of the criminal justice system. Clinicians see many police synopses of arrests of likely mentally disordered accused conclude with words to the effect ‘this accused should be held for a psychiatric evaluation.’ (emphasis is mine)<sup>225</sup>

If we know that some police officers charge those they believe to be suffering from a mental illness in the purposeful hope of “trapping them” in the criminal justice filter, then we need to be vigilant about offering services to those accused persons to achieve the intended effect of helping them. While this approach by police and the

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<sup>225</sup> *Supra*, note 168 at 161.

courts should be avoided entirely, it is incumbent on our justice system to balance the harm done by such arrests by at least providing the help to the accused person the police officer was looking for. Unfortunately, it is probably not a far stretch to argue that those making decisions on bail also sometimes detain accused persons with mental health issues as a means of “assisting” them. Therefore, we need to start seriously considering what options we have to truly help these persons.

### 3.2.i Section 672.11 of the *Criminal Code*

To answer the question of “what can the criminal justice system offer mentally-ill accused persons?” we can begin with what we know for sure thus far: accused can be assessed under section 672.11 of the *Criminal Code* for questions of fitness and NCR. As we have come to learn, fitness assessments answer the question of whether an accused is able to conduct a defence.<sup>226</sup> An implicit requirement, then, is that the accused be presenting *at the time of their court appearance*, as unfit.

NCR assessments are interested in diseases of the mind,<sup>227</sup> *occurring at the time of the commission of the offence*, that may exempt a person from criminal responsibility.<sup>228</sup> Section 16(1) provides that a person is not criminally responsible for otherwise criminal behavior if their mental disorder rendered them “incapable of appreciating the nature and quality of the act or omission, or of knowing that it was wrong”.<sup>229</sup> Courts have been asked to define “disease of the mind”, with one court explaining “...in a legal sense “disease of the mind” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion”.<sup>230</sup>

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<sup>226</sup> *Supra*, note 5 s. 2.

<sup>227</sup> *Ibid*, s. 2 “mental disorder”.

<sup>228</sup> *Ibid* s. 672.11(b).

<sup>229</sup> *Ibid* s. 16(1).

<sup>230</sup> *R. v Cooper*, [1980] 1 S.C.R. 1149.

Also provided for in section 672.11 is the ability to assess a female person charged with the death of her newly-born child, to determine if there was a disturbance of the balance of her mind,<sup>231</sup> and another option to determine whether a finding of “high-risk” should be revoked against an accused.<sup>232</sup> Two further assessment options are add-ons to the NCR and fitness regimes, allowing for assessments to either determine the appropriate disposition for an accused following an NCR or “unfit” finding,<sup>233</sup> or to assess whether matters should be stayed against an accused following a verdict of unfit to stand trial.<sup>234</sup>

The assessments under section 672.11 have been litigated such that we now know the section to provide an exhaustive list of the circumstances under which an accused can be assessed for their mental health under the *Criminal Code*.<sup>235</sup> Courts have specifically held that the section does not allow an order for assessment to determine whether the accused suffers from a specific mental disorder.<sup>236</sup> Another court has allowed the assessor to make a diagnosis *during* a section 672.11 assessment, so long as the original *purpose* of the assessment fits one of the enumerated provisions.<sup>237</sup> These cases clearly demonstrate the courts inability to read into the *Criminal Code* an option for the accused to be assessed for issues not directly raised by section 672.11.

Common sense, and a single day observing at a local court house, tells us though that mental health issues are prevalent a lot more often than those enumerated times. As Dr. Bloom and Judge Schneider have pointed out, “there are other

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<sup>231</sup> *Supra*, note 5 s. 672.11(c).

<sup>232</sup> *Ibid* s. 672.11(d.1).

<sup>233</sup> *Ibid* s. 672.11(d).

<sup>234</sup> *Ibid* s. 672.11(e).

<sup>235</sup> *R. v Snow* (1992), 76 CCC (3d) 43 (Ont. Gen. Div.)

<sup>236</sup> *R. v Gray* (2002), 169 CCC (3d) 194 (BSSC).

<sup>237</sup> *R. v Bernardo [Psychiatric Assessment Ruling]* (1994), 50 CRR (2d) 332 (Ont. Gen. Div.) ¶ 13 [*Bernardo*].

junctures at which it can be most important”.<sup>238</sup> So what about the rest of our mentally ill accused persons? What options are there for them?

### 3.2.ii *Mens Rea Considerations*

First, we can consider whether the person’s mental illness might impact the Crown’s ability to prove the *mens rea* of the offence. While individuals are presumed to intend the consequences of their actions,<sup>239</sup> mental illness can be relevant to an accused’s mental intentions, even if it does not negate their intentions such that NCR is available to them. It has been written that “criminal responsibility is not an all or nothing matter”.<sup>240</sup> In a 1963 case of *R. v More*, the Supreme Court of Canada was willing to recognize that evidence of a mental illness was relevant to the issue of whether the accused had the capacity to formulate the requisite intent for the offence charged.<sup>241</sup> In *More*, the issue became relevant in determining whether the accused had committed capital, or deliberate, murder.<sup>242</sup> The court held that evidence of his depressive psychosis should have been left with the jury with a stronger emphasis from the trial judge, such that it may have left them open to believe the shooting of his wife was impulsive rather than planned. This was significant because lack of planning or deliberation meant that he would have instead only been found guilty of non-capital murder.<sup>243</sup> This distinction would have allowed for more liberal parole rights for Mr. More.

Similarly, in *R. v Jacquard*,<sup>244</sup> the Supreme Court of Canada confirmed the ability of a person’s mental disorder to negate the *mens rea* needed for first degree murder.

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<sup>238</sup> *Supra*, note 168 at 153.

<sup>239</sup> *Supra*, note 173 at 6-1.

<sup>240</sup> *Ibid* at 6-2.

<sup>241</sup> *R. v More*, [1963] 3 CCC 289 (SCC) [*More*].

<sup>242</sup> In today’s *Criminal Code*, capital murder is first degree murder. See section 231(2).

<sup>243</sup> In today’s *Criminal Code*, non-capital murder is second degree murder. See section 231(1).

<sup>244</sup> *R. v Jacquard*, [1997] 1 S.C.R. 314.

Too, in *McMartin v the Queen*,<sup>245</sup> the courts confirmed the impact of mental disorders on questions of *mens rea*. Negation of the *mens rea*, and even sometimes the *actus reus*, has been confirmed to be possible for a myriad of offences, and not just the most serious like murder.<sup>246</sup> This is important because it means a lower level of culpability should attach to the accused person. It also means that they are more likely to receive a sentence that is in keeping with their specific circumstances, namely having a mental illness.

While it is welcomed news that a person would not be held responsible for a crime for which they did not have the requisite *mens rea*, this does little to address the underlying mental illness that allowed for them to be found not guilty, or at least only guilty of a less serious crime. It is anticipated that some may say it is not the role of the criminal justice system to provide this help. Those persons would argue that the role is to establish guilt and punish those who are found to be guilty. However, this narrow approach to the system needs to be re-imagined if we are interested in truly reducing crime and being a just society. These missed opportunities to help mentally ill persons who find themselves intertwined in the criminal system means that we are implicitly, and hopefully unintentionally, allowing for further crime. Only finding someone guilty for a lesser-included offence, without further assisting them with the root cause of their problem continues to be problematic. Sentencing judges, like those who decide bail, are also lacking in options to help those mentally ill persons they found to be guilty.

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<sup>245</sup> *McMartin v The Queen*, [1964] SCR 484.

<sup>246</sup> *R v Sesay*, 2018 MBPC 39 (CanLII), speaking about offences generally. See also *R v Hayden*, 1990 CanLII 7307 (NB QB), which left open the potential for mental disorder to negate *mens rea* for attempted murder, but on the specific facts of this case, it did not.

### 3.2.iii Sentencing Considerations

Another time that mental health considerations play a part is during sentencing considerations.<sup>247</sup> Not only do they get considered for the judge in coming to an appropriate sentence, but they can also drive the recommendations made during that sentence. For example, if the court believes that an offender's mental health played a part in their offending behavior, probation with terms for counseling will likely be ordered. A court may also be more inclined to avoid a custodial sentence, or to grant an otherwise more lenient sentence, if they believe the offender can be rehabilitated on account of the impact their mental health played at the time of the offence, rather than the underlying reason for the criminality being non-medical.

While sentencing judges have more power to order offenders into counseling as *part* of their sentence, courts have confirmed several times that there is no jurisdiction to order a psychiatric assessment for the *purposes* of sentencing.<sup>248</sup> The downfall to this, of course, is that if psychiatric evidence does not already exist at the time of sentencing, the court will be forced to try and craft a sentence that is not fully informed, and based on speculation.

The ability of a court to order counseling and assessments through their sentences is certainly a start to helping those mentally ill persons who are found guilty of committing criminal offences. This does nothing, though, to help those same guilty people at the earliest possible opportunity upon entry into the criminal justice system. The time between a charge being laid, and resolution of that charge either by guilty plea or finding of guilt at trial can be months, sometimes years. Indeed, the Supreme Court of Canada has held that up to 18 months at the provincial court level,

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<sup>247</sup> *Supra*, not 173 at 6-21.

<sup>248</sup> See *R. v Lenart* (1998) 123 CCC (3d) 353 (Ont. C.A) at 363-64 [*Lenart*]; *R. v Simanek*, [2000] OJ No 5594 (Ont. SCJ), affirmed, [2001] OJ No 4187 (Ont CA), leave to appeal refused, [2001] SCCA No 627 (SCC); and *R. v Snow* (1992) 76 CCC (3d) 43 (Ont. Gen. Div.) at 51.



and 30 months at the Superior Court level is presumably appropriate.<sup>249</sup> These types of time lapses, for an diagnosed or untreated mentally ill offender, can have negative and dire consequences. While we may hope that the accused has good counsel to assist them with getting the help they need independently of the criminal justice system, this ignores the fact that many Canadians continue to go unrepresented each year in our justice system. It also ignores the inability for many accused to afford the type of counseling or treatment they need, which often is unable to be mitigated by the mere fact that they do have counsel. When courts do order counseling as part of their sentence, the assistance ordered may be misguided if the court does not have information otherwise available to them about the offender's mental health. Further in the process, the Probation Officer given carriage of a mentally ill person's file may also be ill informed on how to better assist them as it relates to setting them up with the proper counselling. Further, we miss the opportunity to help those who are struggling with undiagnosed or untreated mental health issues who may never be found guilty of an offence, either because they are innocent, there is a lack of evidence for conviction, or because their charges were otherwise diverted or withdrawn. These missed opportunities will play a prevalent role in this discussion as we continue on.

### *3.2.iv Mental Health Courts*

Another option to explore is mental health courts. They are a relatively new feature of our justice system. In 1994, there were no mental health courts in existence in North America. However, by 2004, more than 100 of these specialized courts were in existence.<sup>250</sup> This number is likely higher by now.<sup>251</sup>

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<sup>249</sup> *R. v Jordan*, [2016] 1 SCR 631.

<sup>250</sup> Mark Heerema, "An Introduction to the Mental Health Court Movement and Its Status in Canada", [2005] 50 CLQ 255.

<sup>251</sup> For example, London, Ontario only had their mental health court begin in 2006.

Mental health courts were a response to the deinstitutionalization of a number of mentally ill persons in the 1980's and 1990's.<sup>252</sup> Movement away from in-patient hospitals for the mentally ill placed a burden on the criminal justice system resulting from the over-criminalization of those who would have otherwise been in hospital.<sup>253</sup> The attempt being made by mental health courts, then, is to “redirect the misplaced responsibility [on the courts] for the provision of mental healthcare services back to the mental health-care system, where it belongs”.<sup>254</sup>

Mental health courts have a number of commendable objectives. They aim to divert those who have been charged with minor to moderate offences by offering an alternative option like counselling. Diversion of mentally disordered accused persons has been a formal option since at least 1994 in Ontario.<sup>255</sup> They also attempt to expedite the pre-trial process of assessing an accused's fitness to stand trial. Mental health courts can often provide some treatment for the operating mental health disorder underlying the criminal behavior. In doing these things, these courts are trying to slow the “revolving door” that often begins when an accused's mental health is the driving force behind their criminality.<sup>256</sup> It should be noted that because there is no playbook for how each mental health court is to operate,<sup>257</sup> these objectives, and the ability to carry out those objectives, often varies from mental health court to mental health court.

The move towards therapeutic justice was a welcomed one. It reflected the realization that “the traditional response to aberrant behavior, where it is substantially the product of mental disorder, is both ineffective and

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<sup>252</sup> Richard D. Schneider et al., *Mental Health Courts: Decriminalizing the Mentally Ill*, (Toronto: Irwin Law, 2007) at 2 and 42.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> Ontario Ministry of the Attorney General, “Diversion of Mentally Disordered Accused”, *Crown Policy Manual* (Toronto: Ministry of the Attorney General, 1993) loose-leaf.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid* at 6.

inappropriate”.<sup>258</sup> This shift allowed the focus of the courts to move towards problem-solving,<sup>259</sup> all in an effort to avoid the recidivism rates that were rising as a result of the non-therapeutic model. The issues that mental health courts are able to assist with, in addition to addressing the mental health concerns of the accused, included often-accompanying issues like homelessness, substance addictions, and joblessness.<sup>260</sup> The therapeutic nature of these courts also recognizes that accused and their victims are regularly tangled in familial relationships, and so their victim is still likely to want their loved one dealt with in a compassionate way, with dignity and respect.<sup>261</sup>

Treatment of the accused through these courts includes a number of options, including psychological therapy, skills training, access to social services, and medication where that option is being consented to by the accused.<sup>262</sup> In offering these options, the court recognizes the common sense premise that the reduced recidivism linked to rehabilitation of mentally ill persons makes our communities safer.<sup>263</sup> The courts are also recognizing that in many cases involving mentally ill accused, the person would not be engaging in criminal activity but-for their mental illness.<sup>264</sup> They recognize that not all crime is the result of rational choice. These courts are signals to the government that the “tired mantra of ‘getting tough on crime’ voiced in the last half-century has been an ineffective and superficial solution to the issues or problems that were causing individuals, like the mentally ill, to come into contact with the criminal justice system”.<sup>265</sup>

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<sup>258</sup> *Ibid* at 3.

<sup>259</sup> *Ibid* at 4.

<sup>260</sup> *Ibid*.

<sup>261</sup> *Ibid*.

<sup>262</sup> *Ibid* at 6.

<sup>263</sup> *Ibid* at 7.

<sup>264</sup> *Ibid*.

<sup>265</sup> *Ibid* at 40.

Mental health courts have confirmed that the law has therapeutic qualities, which if administered properly, could help improve the lives of mentally ill accused.<sup>266</sup> The problem, though, is that even with the introduction of these specialty courts, it may be that the law is still not being administered properly. This argument follows, as some significant criticisms of these courts do exist.

First, there is a major disparity in the services offered to mentally ill accused persons simply by virtue of their geographical location. While some larger cities have these mental health courts, like London and Toronto, a staggering number of jurisdictions do not. This includes other large cities and small jurisdictions alike. Thus, if no mental health court exists in the jurisdiction that the accused is charged in, they are unlikely to benefit from the same therapeutic model that their counterpart in a different city could. This disparity could potentially be the source of *Charter* litigation in the future, although that analysis is outside of the scope of this discussion.

Another criticism is that these courts are not run daily, sometimes only operating once a week.<sup>267</sup> So while the court is available to assist the accused person as their case progresses through the system, they are not necessarily running on the day a particular accused is arrested and first found interacting with the system. In the context of bail, this leaves accused without access to the therapeutic team – often comprised of psychiatrists, nurses, and social workers – that could otherwise help them put together a care plan, including appointments for assessments and counselling, sufficient to convince a bail court of their ability to be released.

These courts also suffer from issues relating to Crown discretion. Each jurisdiction that does have one of these courts will have its own procedure, sometimes formal,

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<sup>266</sup> *Ibid* at 43. See also: David B. Wexler & Bruce J. Winick, “Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research” (1991) 45(5) U. Miami L. Rev. at 983.

<sup>267</sup> In London, they run once weekly on Wednesdays.

about who can appear before the court. In this way, disparity can exist even between the jurisdictions that do offer this option. Eligibility for the court is often a two-factor consideration, determined by the Crown assigned to the court.

The first factor asks: does the accused have the right *kind* of mental illness?<sup>268</sup> For example, “serious mental disorder” has included “anxiety not otherwise specified” in some cases, while this same diagnosis has been denied entry to the court in others.<sup>269</sup> Personality disorders are often determined not to be eligible for the court.<sup>270</sup> And perhaps most frustratingly, even though concurrent mental disorder and substance abuse disorders appear to qualify for the court, accused with this diagnosis are still often prevented entry to the court. This occurs when the mental health court team of experts, often just on review of medical documentation without ever assessing the individual in person, believes that the substance abuse disorder prevails over the concurrent mental disorder, thus making them ineligible for the court.<sup>271</sup>

The second factor then asks whether the type of offence is eligible for the court. Offences of a domestic nature are often precluded<sup>272</sup> – even though mental health is known to play an active role in the criminality of those who perpetrate domestic violence. This exception is particularly unfortunate, given our knowledge that domestic abusers engage in a cycle of violence, meaning they are likely to re-offend.

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<sup>268</sup> Attached to this thesis as Appendix “A” is a sample Application to the “Adult Therapeutic Court” (otherwise known as a mental health court) in London. It shows that an accused can only qualify for the court if they are suffering from a serious mental disorder, developmental disabilities, a dual diagnosis described as mental illness and a co-occurring developmental disability, concurrent disorders of mental illness and a co-occurring substance abuse disorder, acquired brain injury, dementia, and fetal alcohol spectrum disorders.

<sup>269</sup> For an example, see *R. v Rougoor*, (August 1, 2018), London 17-50789 (Ont Prov Ct).

<sup>270</sup> For an example, see *R. v Davis*, (August 22, 2018), London 18-8005 (Ont Prov Ct).

<sup>271</sup> *R. v Byrnes* (September 6, 2018), London 18-8192, 18-8193, 18-7642, and 18-7611 (Ont Prov Ct); and *R. v Robinson* (October 19, 2018), London 18-8886 & 18-9575 (Ont Prov Ct).

<sup>272</sup> I know this based on my own dealings with the therapeutic court in London.

Offences that are seen as “too serious”, like assault with a weapon, have also been deemed ineligible before. The problem with this condition of entry is that mentally ill persons commit crimes of varying degrees, and those committing the more serious crimes are sometimes most in need of the therapeutic attributes of the mental health court. It is important to note that a distinction exists between divertible offences in the mental health courts – rightfully reserved for more minor offences where public safety is less in issue<sup>273</sup> – and use of the mental health courts for guilty pleas of more serious charges. It is the latter which our mental health courts may want to consider loosening the eligibility requirements, although this may not prove to be overly helpful to the accused person. While the judge in the mental health court will likely be better versed in mental health issues and the criminal law, the mental health court judges are still bound by the same limits as all other sentencing judges. The people who use these courts for guilty pleas, unlike those who are diverted, are not assessed and connected in the same way. Often times, no additional treatment is offered at all. Therefore, mental health courts may sometimes be seen as only paying lip-service to the issues of mental health and crime.

Another important note is that mental health courts are only open to those who are willing to accept responsibility for the offence with which they are charged. If they do, either diversion is offered, or a guilty plea can be conducted in the mental health court – both of which aim to then mitigate the impact on the accused’s outcome by accounting for their mental health issues. However, those who do not accept responsibility for the offence, perhaps because they are innocent, or because they are too ill to see their own criminality, are not eligible. This means that where a trial is being set, accused persons continue to go without the supports of the therapeutic model, simply because they wish to put the Crown to their onus of proving the offence beyond a reasonable doubt. This is problematic. Unintentionally, mental health courts are providing a disincentive to an accused who chooses to go to trial. It

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<sup>273</sup> *Supra*, note 168 at 158.

leaves an entire group of accused persons, some of whom will not actually be guilty of anything, without recourse for treatment options when interacting with our criminal justice system anyways.

Some might argue that this is not the goal of the justice system. But when we know that mentally ill persons seem to be “drawn into the criminal justice system”,<sup>274</sup> it seems negligent for us to not acknowledge the fact that legally innocent persons who are also mentally ill will interact with our system. In this way, we are missing opportunities to assist these persons. The question that might arise as a result of this suggestion is whether accused persons should be forced to accept the offers of help, were they made available by the courts. This is a complex and controversial topic that likely extends outside the reach of this discussion. For our purposes, it is being suggested that the assessment and treatment be entered into voluntarily, as it is more likely to be successful under those conditions.

### *3.2.v The Mental Health Act*

The final place one might turn to if they are mentally ill and find themselves in our justice system is the applicable provincial mental health legislation. In Ontario, this is the *Mental Health Act*.<sup>275</sup> In fact, this legislation may very well seem like the answer to many of the issues discussed thus far. In section 21(1), the court is given the power to order an assessment, as it reads:

21 (1) Where a judge has reason to believe that a person who appears before him or her charged with or convicted of an offence suffers from mental disorder, the judge may order the person to attend a psychiatric facility for examination.<sup>276</sup>

Section 22(1) is also promising, as it allows for admission to a psychiatric hospital for up to two months, as follows:

22 (1) Where a judge has reason to believe that a person in custody who appears before him or her charged with an offence suffers from mental

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<sup>274</sup> *Supra*, note 168.

<sup>275</sup> *Supra*, note 170.

<sup>276</sup> *Ibid* s. 21(1).

disorder, the judge may, by order, remand that person for admission as a patient to a psychiatric facility for a period of not more than two months.<sup>277</sup>

However, a few problems quickly surface, proving that the promissory qualities of this legislation are not yet the answer. First, we must consider section 23. It requires the judge considering section 21 or 22 not to make such order until they have "...ascertain[ed] from the senior physician of a psychiatric facility that the services of the psychiatric facility are available...".<sup>278</sup> As we have already discussed briefly, a major problem with the assessment options under the NCR and fitness legislation is the lack of available beds in forensic psychiatric hospitals. Availability of services is likely an issue, then, under the *Mental Health Act* provisions as well.

A second issue relates to the fact that mental health legislation is not consistent or uniform from province to province. While this opportunity may make itself available in Ontario, it is not necessarily available in other provinces. It has been pointed out that this issue needs to be litigated in the Supreme Court of Canada, so that all provinces may be subjected to the same rules.<sup>279</sup> The other answer, as we will discuss more in depth in Part 5 of our discussion below, is for the federal government to make amendments to the *Criminal Code*, which could provide consistency nation-wide.

Leaving these assessment options to the provincial government has also led to conflicting case law about whether provincial legislation can be invoked in criminal proceedings.<sup>280</sup> In Ontario, inclusion of the words "charged with or convicted of an offence" seems to clearly signal that this legislation is meant to apply in the criminal context. Yet, not all courts agree on this. On the one hand, we see cases like *Lenart*,<sup>281</sup> where the Ontario Court of Appeal allowed for the *Mental Health Act*

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<sup>277</sup> *Ibid* s. 22(1).

<sup>278</sup> *Ibid* s. 23.

<sup>279</sup> *Supra*, note 173 at 2-5.

<sup>280</sup> *Ibid*.

<sup>281</sup> *Supra*, note 248.



assessment provisions to operate such that a thirty-day remand in a psychiatric facility for the purposes of an assessment was allowed. This was notable because it was over the objections of defence counsel that this was ordered. The report that resulted from Mr. Lenart's assessment was also allowed to be used at the sentencing stage. Similarly in *R. v Neverson*,<sup>282</sup> an Ontario provincial court relied on the *Mental Health Act* to remand an accused to a psychiatric facility for two months in a bail review application. On the other hand, *R. v Lawrie*<sup>283</sup> had a provincial court find that the *Mental Health Act* did not confer any authority to compel an accused to submit to an assessment for bail considerations. The concern of the court in *Lawrie* seemed to be the coerced nature of such an order where the accused did not consent. *Lawrie* was endorsed by Justice Trotter in his book, *The Law of Bail in Canada*. He writes:

“While the literal wording of some mental health Acts may ostensibly permit an assessment for the purposes of augmenting the bail process, this is undesirable. First, it creates a situation whereby the powers of judges acting under the *Criminal Code* are determined by the application of differing provincial legislation. Secondly, it runs counter to the spirit of Part XX.1 of the *Code*. This part of the *Code* is extremely comprehensive and fails to authorize the power to order a psychiatric remand *for bail purposes*. This exclusion must be taken as deliberate.”<sup>284</sup>

Joan Barrett and Riun Shandler also agree with this reasoning, arguing that because the *Youth Criminal Justice Act* confers powers to the youth courts to order assessments for the purposes of bail and sentencing, it must be that the lack of this specific power under the *Criminal Code* is intentional.<sup>285</sup> They also point out that some courts may allow the *Mental Health Act* to be used for assessments relating to sentencing, as opposed to those for the purposes of bail, because it is merely facilitating information gathering permitted under the *Criminal Code*,<sup>286</sup> while no

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<sup>282</sup> *R. v Neverson* (1975) 33 CCC (2d) 457 (Ont Co Ct).

<sup>283</sup> *R. v Lawrie* (1996), 17 OTC 384 (Ont Gen Div).

<sup>284</sup> *Supra*, note 36 at 203-4.

<sup>285</sup> *Supra*, note 173 at 2-7.

<sup>286</sup> See *R. v Quintal*, 2003 ABPC 79 (Alta Prov Ct), which held that there was power under s. 721 of the *Criminal Code* to direct a forensic psychiatric assessment where this will be of assistance in determining a fit sentence.

such power exists for the purposes of bail.<sup>287</sup> In *R. v Knoblauch*, the Supreme Court of Canada upheld the ability for a sentencing judge to direct an accused, at his request, to serve a conditional sentence in a mental health facility. Barrett and Shandler argue that if this kind of term is permissible, sentencing courts must have the power to obtain information on the accused's mental condition to craft the right sentence.<sup>288</sup>

### **3.3 The Shortcomings of the Current Options**

Some of the shortcomings of the options currently available to mentally ill adult accused have already been touched on. However, other shortcomings also exist that require discussion. Despite an attempt to move towards rehabilitation and a therapeutic model of justice, the research shows that we still have a growing number of mentally ill accused persons in the prison system.<sup>289</sup> This means that the efforts we have made thus far are not adequate. A goal of this discussion is to consider what other options the government should consider in order to reduce this statistic. One such option, the section 34 assessment option available to youth accused under the *Youth Criminal Justice Act* will be discussed in the next section.

#### *3.3.i Lack of Resources and Funding*

An ongoing issue with the current options is the lack of resource and bed space available in psychiatric hospitals. This is problematic because even the most attractive option available under the *Mental Health Act*, allowing for assessments where fitness and NCR issues are not present, disallows a court from making the order unless a bed is available. If facilities are already operating over capacity, there is little likelihood of a bed becoming available without a court moving straight to the ordering of that bed being made available. It seems that even where courts *are* ordering persons to attend for assessments for NCR and fitness purposes, hospitals are breaching such orders on account of the lack of available beds. A detailed

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<sup>287</sup> *Ibid.*

<sup>288</sup> *R. v Knoblauch*, [2000] 2 SCR 780 SCC.

<sup>289</sup> *Supra*, note 173 at 1-27.

discussion of this issue was carried out by Janet Lieper, who has since been appointed to the bench. She points to the need for counsel to bring *habeus corpus* applications more and more frequently in order to force hospitals to make room for their clients.<sup>290</sup> In response, these applications are criticized by the hospitals: they see this tactic as unethical on account of the “jumping of the queue” that results for that client.<sup>291</sup> As we have moved farther away from the *Hussein* case, the more we are seeing section 672.11 assessments not being done in forensic hospitals at all. Instead, accused are being detained at detention centers where assessments are often then occurring via video link.<sup>292</sup> This practice completely removes the little therapeutic benefit that was previously derived from an assessment under section 672.11. The situation is not likely to improve during the current regime of provincial government in Ontario, as recently an announcement was made that will cut \$330 million for mental health care funding.<sup>293</sup>

### *3.3.ii The Non-Confidentiality of the Current Court Ordered Assessments*

Problems also arise from the potential use that a Crown may make of an assessment report for the purposes of bail,<sup>294</sup> where that assessment was either done against the wishes of the accused, or where the accused does not consent to the contents of the report being shared. The assessments ordered under section 672.11 can be done over the wishes of an accused person, and where the assessment is ordered before bail has been considered, the information contained in the report may be relevant to their suitability for bail and potential terms of bail. Any statements made by the accused during the process are given a qualified privilege, meaning they are not automatically admissible. However, these statutory exclusions under section

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<sup>290</sup> *Supra*, note 16.

<sup>291</sup> *Ibid* at 18.

<sup>292</sup> *Toth and Farrugia, supra*, note 218.

<sup>293</sup> Ontario Health Coalition, *Release: Doug Ford cuts hospital beds and funding – calls it an increase* (3 October 2018), online: Ontario Health Coalition <<http://www.ontariohealthcoalition.ca/index.php/release-doug-ford-cuts-hospital-beds-and-funding-calls-it-an-increase/>>.

<sup>294</sup> *Supra*, note 173 at 2-8.

672.21(2) of the *Criminal Code* do not include bail.<sup>295</sup> In support of the inadmissibility of statements made during psychiatric assessments, it has been said that “the Canadian judicial system is based on the adversarial, not the inquisitorial, model. Fairness to the accused requires that the Crown produce independent evidence of the *actus reus*. The psychiatric assessment must not become an adjunct to the investigatory arm of the prosecution”.<sup>296</sup> This approach respects the accused’s right against self-incrimination, and the ongoing need of the Crown to prove the charge.

In response to the public nature of these reports, the answer often given is for the accused to seek a private assessment outside of the court-ordered options. Such a report is confidential and covered by rules of privilege when commissioned by the defence. If a report comes back with unfavorable comments, the defence can choose to never disclose it, or disclose it with redactions.<sup>297</sup> The problem with this suggestion is the fact that accused persons, especially those who are mentally ill, are not always able to afford private assessments and reports. Those accused who retain counsel using Legal Aid Ontario will likely still struggle to accomplish this, as such assessments are not always authorized under the current Legal Aid certificate program, like in summary cases.<sup>298</sup> Where authorization is not automatic, counsel can ask for authorization for a special disbursement to cover this option. Discretion remains with Legal Aid Ontario as to whether they will grant the disbursement, which is not often promising given the constraints on Legal Aid Ontario’s budget. Some scholars have also pointed to the fact that 95% of such assessments are completed in custody, creating yet another barrier from them exercising the right to a private assessment and report.<sup>299</sup>

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<sup>295</sup> *Supra*, note 5 s. 672.21(2).

<sup>296</sup> S. A. Tacon, “A Question of Privilege: Valid Protection or Obstruction of Justice?” (1979) 17.2 *Osgoode Hall Law Journal* 332-354.

<sup>297</sup> *Supra*, note 173 at 2-29.

<sup>298</sup> Legal Aid Ontario, *Disbursements Handbook*, online: Legal Aid Ontario <<https://www.legalaid.on.ca/en/info/manuals/disbursements%20handbook.pdf>>.

<sup>299</sup> *Supra*, note 173 at 2-29.

The other answer to this problem is the accused's right to remain silent.<sup>300</sup> Part XX.1 encourages, but does not require, the person to participate in the process.<sup>301</sup> This may be short-sighted, though. There will be times when an accused wants to make use of the opportunity to be assessed by a psychiatrist and have recommendations made as to how to better their mental health. They may be concerned about making admissions during that assessment, though, that will hurt their court case. If they instead opt to remain silent and not participate in the assessment, they are also missing the opportunity of seeing a professional who might otherwise not be available to them to assist them with their underlying disorder.

A final option has been carved out by the court in *R. v Bernardo*,<sup>302</sup> where they accepted that under the section 672.11 provisions, the psychiatrist may be directed to not create a report to be disclosed to the court, and thus the Crown. Instead, the psychiatrist was directed to report back to the defence.

### *3.3.iii The Need for Capping Provisions in the NCR Regime*

A major concern of the current XX.1 provisions contained in the *Criminal Code* is the fact that an NCR accused could be detained indefinitely. Those who are not offered an absolute or conditional discharge are at the mercy of the Review Board overseeing their case. Only once the Review Board determines them not to be a significant risk of serious physical or psychological harm to members of the public, may they be released. At times, privileges can be granted to those who are ordered detained by the Review Board that allows for community living, however, the Review Board retains jurisdiction over the accused in such situations. These types of orders also allow for renewed detention at the hospital, should the NCR patient breach the conditions placed on them.

The major criticism of this system is that an NCR accused may in fact be detained

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<sup>300</sup> *R. v Saameh*, [2006] OJ No 646 (ON CA).

<sup>301</sup> *Supra*, note 173 at 2-28.

<sup>302</sup> *Bernardo*, *supra* note 237.

against his will longer than if he had been found guilty of the offence and served a criminal sentence. This is seen as such an issue, that prominent defence lawyers have written about the need to avoid NCR assessments as often as possible.<sup>303</sup>

Parliament had, in fact, turned their mind to this issue when they were first considering the 1992 amendments that resulted in Part XX.1. “Capping” provisions had been drafted, which were designed to guard against the NCR accused being detained for periods longer than if they had been criminally sentenced.<sup>304</sup> The result of the NCR provisions being extended to summary offences heightened the risk of disparities between the potential periods of detention.<sup>305</sup> Bill C-30 would have capped the detention available in-hospital for NCR accused to the maximum sentence available for the index offence. There were three capping categories drafted. The first, for murder and other life imprisonment offences, also held the cap at life. Indictable “designated offences” would have hospital detention capped at the shorter of either 10 years or the maximum period of imprisonment for the offence. Finally, the residual category of “all other circumstances” would have allowed for capping at either 2 years or the maximum period of imprisonment available, whichever was shorter.<sup>306</sup> These caps would still likely have caused disparity, as most offenders do not receive the maximum available sentence available under the *Criminal Code*. However, this provision would have been more fair than the current regime which has no such capping requirement.

These provisions were the source of considerable controversy when the 1992 amendments were being considered. The most obvious problem with capping, advanced mostly by mental health professionals and law enforcement officers, was the potential of having an accused released into the public where they still pose a significant threat. Civil libertarians argued that involuntary certification provisions

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<sup>303</sup> *Supra*, note 12.

<sup>304</sup> *Supra*, note 173 at 1-14.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

within provincial mental health legislation could guard against such risks.<sup>307</sup> In the end, the capping provisions were not proclaimed, and our system has been left with the current system of indeterminate detention following an NCR finding.

### *3.3.iv Lack of Assistance for Other Mentally Ill Accused*

The remaining criticisms of the current system consider the cracks caused by the checkered options that are available to mentally ill accused. As we have already noted, the nation-wide application of the *Criminal Code* does not address those mentally ill accused persons whose illness falls short of the NCR or fitness provisions. There is also the problem with these provisions of timing, in that even if an accused is severely mentally ill, they may not present as such either at the time of the commission of the offence in the case of NCR considerations, or when they appear before the court in the case of fitness considerations.

The mental health courts, as admirable as they are, have their own set of worries. Perhaps most concerning is the fact that they are not available across the country in every jurisdiction where an accused person might find themselves charged. Uniformity, along with the expansion of eligibility requirements, is needed to ensure that the greatest number of accused persons can be assisted. There is also a lack of clear guidelines as to who can use the court. This sometimes leads to accused persons avoiding the court all together, because of the run-around they face to gain access to the court. The more difficult it is to get into these courts, the more likely an accused is to become disheartened by the process. This potentially causes them to turn to a non-therapeutic option that is quicker, like a guilty plea in the regular courts. Eligibility requirements are likely the result of limited resources. Limited resources mean a need to use resources wisely. By imposing eligibility requirements, the courts are reducing the number of people who may access the court.

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<sup>307</sup> *Ibid.*

However, for the reasons we have already explored, some of these eligibility requirements either appear arbitrary or are applied arbitrarily, or they actually seem counter-intuitive like in the cases of domestic offences or serious offences. In the example of a domestic abuser who is assaulting his wife because of his own mental health issues, it would seem such a person could greatly benefit from the assistance of this specialty court. Another criticism lies in the fact that these courts do not have the ability to help accused persons who wish to fight their charges, as the court offers no services unless an accused person accepts some form of responsibility. The therapeutic court system is also limited, just like any other criminal court, in the type of assessments or therapy it can send an accused for under the *Criminal Code*. Like the other courts, they can only send an accused for an assessment under the existing legislation. No special legislation or assessment opportunities are available to these courts, simply on the basis of their specialty. This means that availability of services to accused persons working with the mental health court is still dependent on the resources being available generally.

We then have the potential of the *Mental Health Act* in Ontario. Despite its promise, we face the reality that this Ontario-specific legislation will not assist those in other provinces. If other provinces do not have mental health legislation that specifically account for the option of assessments in the criminal context, then a person charged there is still without this option. Even in Ontario, where the provisions seem to explicitly consider application of an assessment option in a criminal context, we continue to see a lack of reliance on the *Mental Health Act*. This is because the conflicting case law has likely caused practitioners to move away from reliance on this legislation, and because of the difficulty busy practitioners encounter trying to secure a bed.

Speaking to Justice Derrick in the Hyde Inquiry in 2001, the then-Executive Director of the Canadian Mental Health Association in Toronto had this to say about our justice system's interaction with mental health:

“We have failed in this country to provide an adequate array of mental



health services that will both keep people out of the justice system and, when they get involved with the justice system, will respond adequately to their needs ...and that will take a number of things. It will take increased funding, it will take a wider array of services and supports being available, and it will take... increased collaboration between the justice system and the mental health system to improve outcomes for people who are living with mental illness.”<sup>308</sup>

So, the question that is left for our discussion is this: how do we possibly solve this problem? A problem that has existed in modern-day Canada for at least 17 years since *Swain*. A problem that seems to be so caught up in the usual political issues of limited resources. A problem that is so obvious to those actors within the criminal justice system, that our lack of attention to the issue seems abhorrent.

The humble suggestion of this author is that we look for inspiration to section 34 of the *Youth Criminal Justice Act*.<sup>309</sup> Accordingly, the *YCJA* will be our next area of review.

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<sup>308</sup> *Supra*, note 173 at 8.

<sup>309</sup> *Supra*, note 7.

## Part 4

### The Solution: Youth Accused and Mental Health Assessment Options

“It is significant that the *YCJA* states clearly that the youth criminal justice system must emphasize rehabilitation and reintegration whereas, in the *Criminal Code*, s. 718 states only that assisting in rehabilitation is one of the objectives of sentencing... It is questionable if this is enlightened sentencing policy for Canada in the 21<sup>st</sup> century, given that, arguably, the best way to ensure our long term protection is to focus on rehabilitation of all persons who commit crimes, recognizing that, in some cases, it may not be possible. A consideration of rehabilitation should be routinely canvassed during all sentencing hearings because only a small percentage of offenders will remain in in prison for the rest of their lives. Developing and implementing programming that has proven effective in reducing criminality is unquestionable in Canada’s long-term public interest.”<sup>310</sup>

To be sure, Parliament has long made its intentions known that youth crime legislation is to purposefully focus on rehabilitation more so than the comparable adult legislation, given the belief that young persons are more amenable to rehabilitation.<sup>311</sup> The introduction of the *Youth Criminal Justice Act*<sup>312</sup> signaled this renewed emphasis on rehabilitation for young persons, as it was less predominant in the earlier days of the *Young Offenders Act*,<sup>313</sup> and the *Juvenile Delinquents Act*<sup>314</sup> before that. Rehabilitation, as an explicit objective for young persons, has also been affirmed by the Supreme Court of Canada.<sup>315</sup>

Before comparing the youth situation to the adult situation, it is important to note that bail rules are also statutorily different for youth. We will first explore these differences.

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<sup>310</sup> Sherri Davis-Barron, *Canadian Youth & the Criminal Law*, (Markham: LexisNexis Canada Inc., 2009) at 154-155.

<sup>311</sup> Department of Justice, *A Strategy for the Renewal of Youth Justice* (Ottawa: Ministry of Supply and Services, 1998).

<sup>312</sup> *Supra*, note 7.

<sup>313</sup> *Young Offenders Act*, RSC 1985 c Y-1.

<sup>314</sup> *Juvenile Delinquents Act*, SC 1908 c 40.

<sup>315</sup> *R. v D.B.*, [2008] SCJ No 25 (SCC).

## 4.1 Youth Bail Principles

The *YCJA* tells us that the bail provisions in the *Criminal Code* apply to young persons, “except to the extent that these provisions are inconsistent or excluded by the *YCJA*”.<sup>316</sup> Sections 29 through 31 then go on to make it more difficult to detain a young person at the pre-trial stage, compared to an adult accused.<sup>317</sup>

For example, section 29(1) denies the ability of a court to detain a young person in pre-trial as a substitute for child protection, mental health, or social measures. Given our review of the general bail laws, and the need for the Crown to show cause for detention on the primary, secondary, or tertiary grounds, this might seem like an obvious proposition. However, it was likely required as a reaction to the Supreme Court of Canada ruling in *R. v J.J.M.*<sup>318</sup> in 1993, where the majority held that it was appropriate to order a young person to two years of open custody for three property offences and a breach of probation. They agreed this was appropriate, in part, because the young person’s home life was intolerable, and they were in need of guidance. While section 39(5)<sup>319</sup> was introduced after this ruling for the sentencing context, 29(1) addresses this potential issue in the bail context.

Sections 31(1) and (2) put a further obligation on the court to inquire as to the availability of a responsible person who can take care of, and exercise control over, the young person. The young person has to be willing to be placed in that person’s care.<sup>320</sup> An ethical problem with section 29 then arises, because some communities lack the social supports and stable housing needed for young persons who are unable or unwilling to go home.<sup>321</sup> The result is that courts are unable to detain the young person, but they are also short of options for referrals to keep them safe. For

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<sup>316</sup> *Supra*, note 7 s. 28.

<sup>317</sup> *Supra*, note 310 at 184.

<sup>318</sup> *R. v J.J.M.*, [1993] SCJ No 14 (SCC).

<sup>319</sup> *Supra*, note 7 s. 39(5).

<sup>320</sup> *Supra*, note 7 s. 31(1)-(2).

<sup>321</sup> *Supra*, note 310 at 186.

this reason, it has been argued that perhaps the *YCJA* should permit for temporary detention of young persons at the pre-trial stage, where it would be in their best interests.<sup>322</sup> Examples of “best interests” include using such a measure during a harsh winter, or where they appear to pose a safety risk to themselves.<sup>323</sup>

What makes the youth bail regime significantly different than the adult counter-part is the presumption contained in section 29(2). It requires the court to presume detention is not necessary on the secondary ground unless the “gateway to custody” has been opened.<sup>324</sup> This can be proven by the Crown if they can show that, upon a future finding of guilt for the charges laid, the young person would be open to a custodial sentence. This gateway is opened when they have committed a violent offence,<sup>325</sup> have failed to comply with multiple non-custodial sentences,<sup>326</sup> or because the offence charged is indictable with a sentence of two years or more *and* they have a pattern of extrajudicial sanctions or findings of guilt.<sup>327</sup> We must keep in mind that these presumptions are rebuttable.<sup>328</sup>

Another difference under the youth regime is the ability for a bail decision made by a Justice of the Peace to be automatically reviewable by a Youth Court Justice with

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<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*, s. 39(1)(a)-(c).

<sup>325</sup> See *R. v C.D.*; *R. v C.D.K.*, [2005] SCJ No 79, where the Supreme Court defined violent offence to mean an offence in which the young person causes, attempts to cause, or threatens to cause bodily harm; bodily harm includes physical or psychological harm.

<sup>326</sup> See *R. v C.C.* (29 June 2018), Chatham 18-Y84 (Ont Prov Ct), where the court confirmed section 39(2)(b) requires the young person to have breached more than one non-custodial youth sentence. See also *R. v A.M.*, [2007] NJ No 76 at paras 31 and 33 (NL Prov. Court.) and *R. v J.S.*, [2004] OJ No 754 (Ont CJ) for the proposition that it needs to be breaches of two different non-custodial sentences to lose the presumption.

<sup>327</sup> These findings can be from the *YCJA* regime, or the *YOA* regime. *Supra*, note 306 at 186. See also *R. v S.A.C.*, [2008] SCJ No 48 (SCC), which required the findings to be ones that were entered prior to the commission of the offence for which the young person is being sentenced.

<sup>328</sup> *Supra*, note 310 at 186.

two days' notice, or consent of the other party.<sup>329</sup> In this way, the *YCJA* supersedes the bail review provisions otherwise provided in the *Criminal Code*. The youth court Justice is not required to consider a review of the Justice of the Peace's decision, like a bail review would require. Instead, they are able to hold a bail review *de novo*. The youth court Justice's decision can then be reviewed by a higher court per the usual bail review provisions of section 520.<sup>330</sup> Also notable is the right to automatic review of bail refusal every 30 days for summary offences, or every 90 days for hybrid and pure indictable offences, except for murder.<sup>331</sup>

Returning to the theme of rehabilitation, it is worth mentioning that the *YCJA* was successful in limiting sentenced custody since its inception. However, the effect it had on pre-trial detention was not as positive. This was an important criticism of the legislation, as Nicholas Bala pointed out that “[t]he sudden and unplanned removal of youth from their community and family that results from remand makes this a highly disruptive experience for the youth and may increase their likelihood of re-offending by exposing them to negative peer influences and possible gang recruitment”.<sup>332</sup> This criticism was one of the reasons for amendments that happened in 2012, which were intended to restrict the use of pre-trial detention. The amendments appear to be having the desired effect of reducing the numbers of youth detained on remand.<sup>333</sup>

The extra protections provided for youth accused in the *YCJA* paint a clear picture of a statute that is trying to balance the right of accused persons in Canada, the goal of protecting our young people, and the equally important goal of holding our young persons responsible for their offending behavior. The legislation still struggles with

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<sup>329</sup> *Supra*, note 7 at 33 (1) - (3).

<sup>330</sup> *Ibid*, s. 33(5) - (9).

<sup>331</sup> *Supra*, note 310 at 191.

<sup>332</sup> Nicholas Bala, “Changing Professional Culture and Reducing Use of Courts and Custody for Youth: The Youth Criminal Justice Act and Bill C-10” (2015) 78 *Saskatchewan Law Review* 127 - 180.

<sup>333</sup> *Ibid*.

the availability of resources, like our adult system. As a safe-guard, it includes sections like 29(1) to prevent persons from “impoverished backgrounds or severely dysfunctional families, or who are suffering from mental illnesses... end[ing] up in custody simply because they are homeless and there is nowhere in the community for them to go”.<sup>334</sup> To fill this gap, we often see many more state actors come into play at youth bail hearings, like child protection workers – but this, too, is dependent on available resources.

Given the explicitly different intentions between the youth and adult criminal legislations, both in the stated purpose of the *YCJA* and the bail provisions under the *YCJA*, it may seem like a fruitless exercise to compare the assessment options available to these two categories of accused. This is not the case: as so many scholars, judges, and practitioners alike have pointed out, rehabilitation of an offender – regardless of age – should be a top priority if we wish to reduce recidivism.<sup>335</sup> Because most offenders find themselves returning back to their community while on bail, or after they have finished serving a custodial sentence, we are doing ourselves a disservice if we do not ensure that person has the best chance for a successful reintegration.

As my argument will unfold in the following chapter, providing these opportunities to all accused, and not just those who are actually sentenced, will help to avoid future offending as well. We continuously miss opportunities to help mentally ill accused persons, with the result in many instances being that persons return to the system with new charges, often times while still out on bail. Sometimes, these charges become increasingly serious. If recidivism is our shared goal, then we need to focus our efforts on the processes that have been statistically proven as

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<sup>334</sup> *Ibid*, at 291.

<sup>335</sup> M. W. Lipsey & D. B. Wilson, “The Efficacy of Psychological, Educational, and Behavioural Treatment: Confirmation from Meta-Analysis” (1993) *American Psychologist* 48 at 1181-1209.

successful, like rehabilitation. The earlier we start these initiatives, the better for all involved.

So, what can the *YCJA* offer us in terms of best practices? As we will now explore, section 34 of this Act is informative.

## **4.2 Assessment Options for Mentally Disordered Young Persons**

Like their adult counter-parts, young accused persons have the ability to rely on section 672.11 of the *Criminal Code* for assessments relating to fitness, NCR and the other enumerated grounds. Like adult accused, the Crown must prove the requisite *mens rea* for all offences charged, which may not be possible on account of the young person's mental health. Youth accused, too, have the options of specialized mental health courts,<sup>336</sup> and the provisions of the *Mental Health Act*, to the extent that each are applicable.

Yet, despite these options, Parliament still saw the wisdom in section 34, which reads as follows:

**34 (1)** A youth justice court may, at any stage of proceedings against a young person, by order require that the young person be assessed by a qualified person who is required to report the results in writing to the court,

**(a)** with the consent of the young person and the prosecutor; or

**(b)** on its own motion or on application of the young person or the prosecutor, if the court believes a medical, psychological or psychiatric report in respect of the young person is necessary for a purpose mentioned in paragraphs (2)(a) to (g) and

**(i)** the court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability,

**(ii)** the young person's history indicates a pattern of repeated

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<sup>336</sup> Some jurisdictions have a specialized mental health court for youth. In London, it is called the Youth Therapeutic Court.

findings of guilt under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or

**(iii)** the young person is alleged to have committed a serious violent offence.

As we can see, this provision allows for assessments relating to mental health concerns. It can be ordered with or without the young person's consent, allowing for assessments in situations where the court has reason to be concerned about the young person's mental stability. What is particularly noteworthy is the inclusion of the wording "at any stage of proceedings against a young person". This means that the order can be made as early as the arraignment date when the accused is first brought before the court, and can assist with issues directly relating to bail. Either the Crown and the accused can jointly make the request, or the court on the application of either party can make the order if they believe it will assist in determining issues of release from custody, pursuant to section 34(2)(a).<sup>337</sup>

Unlike the assessment options provided for in the *Criminal Code*, young persons are explicitly protected in the *YCJA* relating to any comments made during the assessment process. Section 147(1) creates a general presumption that statements made during assessment are inadmissible absent the consent of the young person, with few exceptions contained in section 147(2).<sup>338</sup>

While the presumption of the *YCJA* is for these assessments to be completed while out of custody,<sup>339</sup> there is an ability for the person to be detained for up to 30 days under section 34(3). The wording allows for remand to "any custody that [the court] directs", which likely means hospitalized custody or custody in a traditional youth

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<sup>337</sup> *Supra*, note 7 s. 34(2)(a). This section discusses release or detention decisions made under section 33 by a youth justice following a s. 515 *Criminal Code* bail decision made by a non-youth justice. In this way, the ability for a section 34 order to be ordered where only one party consents is likely limited to situations of second bail hearings before Judges, and not Justices of the Peace.

<sup>338</sup> *Ibid*, s. 147(1) – (2).

<sup>339</sup> *Ibid*, s. 34(4).



detention center. Criminal defence lawyers and scholars alike point out the often futile, and sometimes oppressive, nature of involuntary treatment and hospitalization.<sup>340</sup> This is one of the main criticisms of the current NCR and fitness regimes. It is arguably even more concerning where an accused person might be ordered to be hospitalized under a section 34 order without having consented to it. This may happen in cases where the mental health issues do not rise to the level of NCR or fitness considerations. The wording of section 34 is also broad enough that a person who is less ill than what the provincial mental health legislation requires for involuntary hospitalization may become hospitalized. In this way, the section 34 order is not ideal, and should include a requirement for the accused person to consent to the assessment.

In the adult context, any guidance to be gleaned from section 34 orders should consider the provisions that only allow for treatment with an accused person's consent. While the system should allow for opportunities for people to get help for their mental health issues, it should not be able to force them to do so. Criminal legislation that captures accused persons, as well as those found guilty, should not have more power to order involuntary hospitalization than the provincial regulations given explicit power over this issue. The federal legislatures might consider revising the *YCJA* to also align with this philosophy.

Section 34 orders come with a significant monetary cost. Discussions with the current youth court Justice in London, Justice Harris-Bentley, unveils that these assessments are pegged at roughly \$5000.00 each. No doubt, this is a hefty price tag, requiring the accused, Crowns, and the court alike to consider thoroughly when to request or make such an order.

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<sup>340</sup> *Supra*, note 12.

The advantages of such an option are also clear.<sup>341</sup> Section 34 orders allow the court actors to have a more complete and more nuanced understanding of the issues facing the young person in question. Not only do these reports consider the mental health components of the young person's make-up, many also delve into other issues, including learning disabilities, familial status, homelessness, truancy in school, skills, social networks, and addiction issues. The greatest benefit to be gleaned from these reports is the introduction of a care plan, or a plan of action. Any community resources that would be helpful are suggested at the conclusion of these reports. There is a clear effort made to connect the young person with the needed supports to make rehabilitation likely. They suggest answers to real problems. This includes giving them a diagnosis, spelling out the appropriate course of treatment, advising where the young person is best placed for living arrangements, and, what other services are available to the young person that have not yet been considered or accessed.

For criminal practitioners, a significant hurdle is simply understanding what kind of mental disorder the accused person has. An assessment that answers this question and suggests the appropriate treatment is therefore invaluable, at least insofar as one of the goals of the criminal justice system is to facilitate rehabilitation. In many cases, the connections made through these assessments can then be used for ongoing treatment. The continuity that this provides to a young person facing mental health challenges is particularly helpful, as so many times, the person's mental health has deteriorated to the point it has because of a lack of consistent treatment providers. In other words, the person has "fallen through the cracks".

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<sup>341</sup> The comments that follow are the result of personal observations of section 34 reports, during my work as a criminal defence lawyer working with youth clients in cases like *R. v T.G.B.* [31 July 2017], London 16-Y1600, 16-Y1646, 16-Y1651 and 16-Y1658 (Ont Prov Ct) and *R. v K.J.* [28 August, 2017], London 17-Y1399, 17-Y1516, and 17-Y1337 (Ont Prov Ct).

Because adult accused are continuing to fall through the cracks, our discussion will turn next to arguments relating to the introduction of better assessment options for these persons.

## PART 5

### **A Comparative Analysis and Thoughts for *Criminal Code* Reform**

“In 2004/2005, there were on average 9,600 people detained in pre-trial custody awaiting trial. This meant that *half* of the inmates in provincial institutions were un-sentenced remand prisoners whereas in 1995-1996, such un-sentenced prisoners constituted only 28 per cent of inmates in provincial institutions.”<sup>342</sup> (emphasis is mine)

If we tie together the various themes explored thus far, a clear picture should be emerging. Starting with bail, we see a current system that is likely better than it was in years past - but is still in need of further reform. Since our provincial jails are housing up to fifty percent of people who have not yet been found guilty of anything, we need to reassess our use of pre-trial detention. Even for those who are convicted, it has been said that “[p]risons have failed to reduce crime, don’t hold offenders accountable to repay their victims, and do nothing to give communities confidence in their criminal justice system”.<sup>343</sup> Remand detention is even less promising, with an explicit acknowledgement from the Supreme Court of Canada that conditions are worse for inmates in pre-trial detention, resulting in enhanced credit for sentencing being accounted for such time.<sup>344</sup> While the efficacy of prisons is beyond the scope of this discussion, this point is highlighted to show the need for more consideration of those who have to spend time there on a remand basis.

Turning next to how we can assist our mentally ill accused persons, we see a lack of options. Too often, we are detaining mentally ill persons simply because we do not know what else to do with them.<sup>345</sup> If fifty percent of the provincial jail population

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<sup>342</sup> Kent Roach, “A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?” (2008) 40 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference*.

<sup>343</sup> See the quotation of Mennonite Central Committee, 1997:11 in Curt T. Griffiths, *Canadian Corrections*, (Toronto: Thomson Nelson, 2004) at 81.

<sup>344</sup> See *supra*, note 5 section 719(3.1), and *R. v Summers*, [2014] 1 SCR 575 ¶ 70.

<sup>345</sup> World Health Organization, *Mental Health and Prisons* (Geneva, Switzerland: WHO, 2017) at 1, online: World Health Organization <[https://www.who.int/mental\\_health/policy/mh\\_in\\_prison.pdf](https://www.who.int/mental_health/policy/mh_in_prison.pdf)>.

are people on remand in pre-trial detention, we must inquire how many of those people are also struggling with mental health issues. These persons are likely to spend time in segregation on account of their mental health. Segregation is not therapeutic,<sup>346</sup> and has been deemed torture when it is indefinite and not subject to due process.<sup>347</sup> Even if the practice is not officially considered torture, with a mental illness it may very well be experienced as such. As has already been pointed out in the opening paragraph of this section, the conditions for remand detention are harsher than sentenced detention. Less programming is available, including therapeutic programs and access to doctors. As Debra Parkes has argued, most prisoners come from disadvantaged backgrounds, with high levels of depression and attempted suicide.<sup>348</sup> This makes lack of programming especially problematic for our mentally ill population who will struggle with their health every day they spend in custody.

Introducing better options for treatment of our mentally ill accused will have a positive effect on our ability to safely and more consistently offer bail, thus adhering to the presumption of innocence and allowing us to remove mentally ill persons from remand custody more often. An assessment that helps diagnose a person and offers treatment options can go a long way in the bail considerations the court will be making on the primary, secondary, and even tertiary grounds. The assessment and ensuing rehabilitative efforts can help to reduce crime, which thus reduces the length of one's criminal record to be later used against them for bail considerations,

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<sup>346</sup> Sean Gibson and Christopher Sewrattan, "Gender Roles, Charter Holes and Societal Goals: Mentally Ill Female Prisoners in Canada" (2012) 32 *Review of Legal and Social Issues*.

<sup>347</sup> *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 (CanLII) and *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 (CanLII).

<sup>348</sup> Debra Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedom" (2007) 40:2 *UBC Law Review* 629, quoting from Canadian Centre for Justice Statistics, *A One-Day Snapshot of Inmates in Canada's Adult Correctional Facilities* by David Robinson et al., vol. 18:8 (Ottawa: Canadian Centre for Justice Statistics, 1998) at 5.

and in sentencing for that matter. It allows for the person to create ties to their community, improving their candidacy for release on the primary grounds. Most significantly, it can stabilize the person such that they no longer pose a concern under any of the three grounds of detention. Ensuring bail is granted as often as possible also helps level the playing field for accused persons, such that they are less likely to be convicted of a charge or be sentenced to jail for that charge. This helps address the valid concerns of Professor Friedland when he wrote about this phenomenon, as we discussed in section 2.1.ii above.

The lives of many accused persons who make contact with our justice system can be impacted in a real way by catching instances of untreated mentally ill persons and offering treatment. It can reduce the behavior that might otherwise lead to more crime. Following this argument through to its conclusion, then, it is highly likely that treatment of these persons will reduce our costs outside of the prison setting as well, including policing, court services, prosecution and legal aid.

It has been already said that:

“...for most of the mentally disordered accused who come through the courthouse doors, the most efficacious and appropriate course is to divert accused back into the civil mental health system from which they have somehow become disconnected or insufficiently well-connected.”<sup>349</sup>

This is a different way of saying that our system is inadequately equipped to assist these people, for a number of reasons. As mentioned already, our legislated assessment options under the *Code* are only being accessed by those who are severely ill such that they are potentially NCR or unfit. These options are also unpalatable in their current format, as they could lead to indeterminate detention for the accused person. Our mental health courts are also not an adequate response, either because accused do not have uniform access to a mental health court, or because even those courts have their limitations. Stepping in to help, assuming that help is wanted and accepted, allows our justice system to redirect accused persons

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<sup>349</sup> *Supra*, note 168.

to the civil mental health stream. If we know police are laying charges through the justice system in an effort to get them help,<sup>350</sup> and we know further that the government has not funded the medical side adequately to provide this assistance without the justice system's intervention, then we have an ethical and moral obligation to provide that help.

Our discussion continued by moving to the *YCJA*. A review of the youth legislation signals some promise that we are beginning to take rehabilitative efforts seriously. While the focus on rehabilitative and restorative justice efforts largely depends on the political party in power, even our previous Conservative federal government was able to understand the basic math. Nicholas Bala, compared the Conservative governments "tough on crime approach" for adults, causing their prison populations to drive upwards, with the youth approach to custody. He reasoned that "it seems clear that the federal government does not want Canada to return to its high rates of use of courts and custody for youth criminal justice, if only for financial reasons".<sup>351</sup>

The most promising, and transferable, feature of the *YCJA* is the section 34 assessment option. It has the power to drive real rehabilitation. The diagnostic opportunities that it affords, as well as the ability to create treatment plans and put supports in place, is truly remarkable. While this provision is not perfect in its operation, for example, allowing for youth to be forced into these assessments where they do not consent, it is certainly a promising example for us to look to for the adult legislation.

The obvious argument that such a proposition will encounter is the ever-present issue of funding. One might argue that if the courts have had such a difficult time successfully getting psychiatric beds ordered for NCR and fitness assessments, where will these resources come from for the new patients that a section 34 styled assessment will create? There is also the argument that these assessments are

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<sup>350</sup> *Supra*, note 168.

<sup>351</sup> Nicholas Bala, "Changing Professional Culture and Reducing Use of Courts and Custody for Youth: The Youth Criminal Justice Act and Bill C-10" (2015) 78 *Saskatchewan Law Review* 127 – 180.

costly, given our estimate that they cost roughly \$5000.00 based on anecdotal evidence. Where would this money come from? Candidly, this is a significant challenge, and one that has no easy fix. Unfortunately, the research is lacking to determine the costs later saved by our community following section 34 assessments. This is an area that requires further empirical study, which is beyond the purview of this paper, but does open up a promising area of research for this author in the future.

What we can deduce from broader research that has studied rehabilitation and its effect on recidivism is that the two are positively connected. Custody has been proven time and time again to be expensive and unsuccessful, while rehabilitation and restorative efforts do work and have long-term savings.<sup>352</sup> While money may have to be injected in these efforts at the outset, they give us a return in the end. This is a better alternative to “tough on crime” legislation, which has been explained as follows:

“...tougher sentences hardly deter crime, and that while imprisoning people temporarily stops them from committing crime outside prison walls, it also tends to increase their criminality *after* release. As a result, “tough-on-crime” initiatives can reduce crime in the short run but cause offsetting harm in the long run.”<sup>353</sup>

To put these comments into a quantifiable context, research has shown that most federal and provincial/territorial governments spend over 80 percent of their budgets on custodial expenses, even though less than 5 percent of sentenced offenders are sent to prison.<sup>354</sup> The 2016-2017 numbers show that the average

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<sup>352</sup> *Supra*, note 332; William J. Chambliss, *Corrections*, (Thousand Oaks, CA: Sage Publications, 2011) at 237; and Curt T. Griffiths, *Canadian Corrections*, (Toronto: Thomson Nelson, 2004) at 106.

<sup>353</sup> David Roodman, *The Impacts of Incarceration on Crime*, Open Philanthropy Project  
<[https://www.openphilanthropy.org/files/Focus\\_Areas/Criminal\\_Justice\\_Reform/The\\_impacts\\_of\\_incarceration\\_on\\_crime\\_10.pdf](https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf)> at 130.

<sup>354</sup> Curt T. Griffiths, *Canadian Corrections*, (Toronto: Thomson Nelson, 2004) at 86.



annual cost to house a federal inmate was \$114,587.00.<sup>355</sup> The most recent data available for Ontario provincial jails, where accused are often held on remand, was \$65,393.00 per year in 2013.<sup>356</sup> This cost is often higher for female inmates,<sup>357</sup> and higher still for segregated inmates.<sup>358</sup> The cost to the public for a homeless person who does not use a shelter after just one year post-incarceration is almost \$400,000.00.<sup>359</sup> These numbers are grim, especially when we consider that in 2000 – 2010, annual public spending per capita went up by 23 percent for corrections, despite the fact that crime went down 25 percent.<sup>360</sup> In comparison, it only cost the Correctional Service of Canada \$18,058.00 annually to supervise an offender in the community.<sup>361</sup>

Looking to the other side of the equation, being the suggestion to address mental illness as soon as practicable, there is a lack of accessible data to tell us how much it costs to instead treat these mentally ill persons, such that a calculation of cost savings can be done when we compare criminal justice system costs with this suggestion. The data that is available, which has otherwise been highlighted earlier in this discussion, does lend support to the conclusion that treating mentally ill persons before they become entangled in the criminal justice system leads to an overall savings for society. However, this is an area that is ripe for empirical research to confirm, on a more nuanced basis, that this claim is true.

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<sup>355</sup> Office of the Parliamentary Budget Officer, *Update on Costs of Incarceration*, (Ottawa: PBO, 2018) at 1.

<sup>356</sup> Public Safety Canada, *The Monetary Costs of Criminal Trajectories for an Ontario Sample of Offenders*, (Ottawa: PSC 2015) at 18.

<sup>357</sup> *Ibid*, at 1.

<sup>358</sup> *Ibid*.

<sup>359</sup> Open Policy and Chronicle Analytics, *Making Toronto Safer: A Costs-Benefit Analysis of Transitional Housing Supports for Men Leaving Incarcerations*, online: The John Howard Society of Toronto < [http://johnhoward.on.ca/toronto/wp-content/uploads/sites/5/2014/09/JHS-Toronto\\_Making-Toronto-Safer.pdf](http://johnhoward.on.ca/toronto/wp-content/uploads/sites/5/2014/09/JHS-Toronto_Making-Toronto-Safer.pdf)>.

<sup>360</sup> John Howard Society of Canada, Media Release, “Financial Facts on Canadian Prisons” (23 August 2018) online: <http://johnhoward.ca/blog/financial-facts-canadian-prisons/>>.

<sup>361</sup> *Ibid* at 4.

The numbers we do know support the contention that the less interaction one has with our police, courts, and prison systems resulting from improved mental health, the better off our community is – in terms of both economic and social costs. While more empirical research is needed to fully understand a comparison of the costs of arrest, prosecution and detention versus diagnosis and treatment of mentally ill accused, there is both logic and an ethical argument to be made, even with preliminary data. Since we know our police are arresting people who have fallen through the cracks of the civil mental health legislation and services, we have a responsibility to not only consider our other options from a fiscal standpoint, but also to afford human dignity to our mentally ill accused and offer real opportunity for change.

As Kent Roach has taught us:

“Parliament deserves much of the credit or blame for the state of our justice system. Indeed, even in those areas where the courts have been most active, most of this activism can be explained by the failure of Parliament to revise and modernize the *Criminal Code*. Although the Court has emerged as a stronger player, Parliament still plays the dominant role in our criminal justice system.”<sup>362</sup>

The Courts have made it clear that their powers only extend so far, and while many Judges would like to be able to order resources to become available, this is not something they are able to do. In a different context, in *Newfoundland (Treasury Board) v NAPE*,<sup>363</sup> the Court accepted that there was a section 15(1) *Charter* infringement for female nurses affected by the cutting of a pay equity policy. They saved the contravening act under the section 1 of the *Charter's Oakes* test, however, because the government was facing a budgetary crisis, and the cuts were necessary. It is possible that the Supreme Court would rule differently today in a case about

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<sup>362</sup> Kent Roach, “A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?” (2008) 40 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*.

<sup>363</sup> *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 (CanLII) [*Nape*].

resources for mentally ill accused persons. Indeed, Janet Leiper (as she then was, she has since been appointed to the Bench) has argued that while litigation is subject to limits, it can still be an effective mechanism to create a domino effect of change for normally powerless groups of litigants.<sup>364</sup> She went on to quote Heather Barr, the plaintiff counsel for prisoners with psychiatric issues, who said:

“I am no cheerleader for litigation. There are, however, few groups of Americans less popular and holding less political power than people with psychiatric disabilities in jails and prisons . . . As we learned from the civil rights movement, the courts are sometimes the only place where people without political power can have any hope of protection.<sup>365</sup>”

We have seen litigation cause change in the Canadian context. As we have explored, Part XX.1 of the *Criminal Code* is in existence because of the very real power of the courts over Parliament following *Swain*. But we must remember it took sixteen years from the time the lieutenant-governor provisions began being assessed in 1976 until we saw the overhaul of the NGRI system, making way for the 1992 amendments.

Some might question why *Charter* litigation is not the focus of this discussion. It is true that some sections of the *Charter* seem apt for such arguments. Section 7 guarantees the right to life, liberty and security of the person; Section 9 guarantees the right against arbitrary detention; Section 11(e), discussed above already, promises the right not to be unreasonably denied bail; Section 12 protects from cruel and unusual punishment; and finally section 15 offers equality despite mental disability. Certainly one may consider bringing a *Charter* application under each of these grounds, and arguing that because section 34 assessments are available for young persons under the *YCJA* regime, it is discriminatory and unreasonable to not have them made available to adult persons.

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<sup>364</sup> *Supra*, note 16 at 18.

<sup>365</sup> *Ibid.*

If there was a practitioner considering bringing a *Charter* application to try and get help for their mentally ill client, it is in this context that I would suggest bringing it. The existence of an option available to some – but not all – accused is likely the most persuasive way of arguing that there is a positive obligation on the government to offer the same assistance to adult accused. This is certainly a stronger argument than simply saying the court ought to order an undefined form of assistance, as the Court’s natural question would otherwise be “with what authority?” If, instead, the court has something palpable and tangible to compare and contrast, like the existing section 34 assessment option, then a *Charter* application instead would ask the questions: under section 15, is it inequitable to have such assessment and treatment options for young persons but not adults? Under section 12, is it cruel and unusual punishment to keep someone in custody on remand who might otherwise be granted bail if they had a proper treatment plan? Is section 12 then impugned because a young person who gets such treatment may not be held in custody, yet an adult person would be, thus making it cruel and unusual? Is section 11(e) violated because “reasonable bail” can be met with the introduction of government-funded mental illness assistance where the accused is under 18 years old, but the adult accused is not given the same opportunity? Does section 9 get breached because the detention is otherwise arbitrary, since mental illness has been acknowledged by the government as deserving of treatment before the imposition of a sentence for young persons, but the same has not been acknowledged for adults? Finally, is section 7 in issue given that the rights, liberty and security of an adult person are at risk due to the absence of government assistance to address mental health concerns, and therefore any potential bail concerns, again as we compare the assistance given to youths but not to adults?

As the above questions highlight, there is certainly an opportunity for litigation of these *Charter* issues. The emphasis of this discussion, however, is that litigation within the current legislative regime is both an unattractive and difficult option. First, the premise of all of these *Charter* argument must assume that the government does owe a duty to adult accused simply because they have legislated the same duty

under section 34 of the *YCJA* for young persons. It is quite plausible that a court would find youth are deserving of more protections by the government, for the very reasons outlined by the preamble of the *YCJA*, and thus, an absence of these same options for adults is not necessarily deserving of *Charter* critique. These arguments would certainly be unchartered territory, and knowing whether a Court would agree with that premise is an impossible task.

Further, finding the appropriate “test case”, despite the frequency with which mental health issues present themselves in the system, will be difficult. Litigation of these types of issues is complex – often months-long, if not years. Most accused are charged with offences that make their time in custody just short enough that litigation of such issues becomes moot. Even if charged with something warranting significant incarceration, the lawyer then needs permission from the accused to make their case the example. Litigation can be draining and difficult to comprehend for those who are mentally well; much less those who are ill.

A promising decision from the provincial level of court – for example in Ontario, either the Ontario Court of Justice or the Superior Court of Justice – also has its limits. It usually only applies to the case at bar, and can then be used with some persuasion for other cases. However, it is unlikely to be “binding” on other courts of lateral jurisdiction. If several lateral courts hear similar arguments, there may even become inconsistency in the rulings that result. This has the potential to lend more confusion to the issue, rather than resolving it. To avoid contradictory rulings, the answer then is to get such a “test case” to an appellate level, so that it may set a significant enough precedent for system-wide change. However, this option is even more costly, and delayed. Arguing something at an appellate level often takes years. Finally, the uncertainty for success that such a novel argument would bring, due to issues as plain as “budgetary constraints” as seen in *Nape*, means that such a path may be futile even if the Court is otherwise sympathetic to the issue.

If it took sixteen years for Parliament to make the changes necessary to the mental health legislation in the criminal context the last time, what practitioners know is we cannot afford to wait this long again. In a system that has been said to be “strained to the limit” by the 2002 Standing Committee on Justice and Human Rights reviewing Part XX.1, even they “could do no more than to call on federal, provincial and territorial ministers responsible for justice to review the resource issue”.<sup>366</sup>

In the same spirit, it is the humble but urgent call of this author that we ask Parliament and the provincial levels of government to work together to address this issue. We first need Parliament to amend the *Criminal Code* such that a provision similar to the *YCJA*'s section 34 is included. A starting point for the potential wording of such legislation is included as an appendix to this discussion.<sup>367</sup> This suggested provision has taken into account the numerous critiques of the current provisions under sections 672.11 of the *Criminal Code* and section 34 of the *YCJA*, such that the goal of rehabilitation is the primary focus, with an attempt to reduce the prejudice such an assessment might cause the accused person. Notably, the sample provision also calls on a judge, as opposed to a justice, to order the report. This is intentional, as an effort to curb overreliance on these reports by practitioners absent a convincing dialogue with the court. In this way, it is the attempt of this author to defeat any argument that such legislation would have a far-reaching and unsubstantiated impact on the public purse.

This draft legislation will have no teeth, though without the provinces and territories recognizing the integral role they play in achieving safer, healthier communities. Our provincial governments, together with increased funding from the federal governments, must invest in more beds, more counselling, and better treatment options if we have any hope of curbing the increasing number of mentally ill persons finding their way into our system. These changes will reduce the long-term costs associated with continuously dealing with accused persons in our justice

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<sup>366</sup> *Ibid.*

<sup>367</sup> See Appendix B.

system, but it will also reduce the financial and social cost of crime on our communities.<sup>368</sup>

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<sup>368</sup> *Supra*, note 351.

## Part 6

### Conclusion

“Therapeutic jurisprudence explicitly recognizes that an accused enters and leaves the criminal justice system an affected person. For mentally disordered accused, time spent entangled in the criminal justice system has typically produced anti-therapeutic results. From being the subject of abuse, experiencing a lack of meaningful treatment, and being subject to higher rates of incarceration, mentally disordered accused typically do not fare well. It is now a generally accepted assertion that the criminal justice system has failed the mentally ill.”<sup>369</sup>

In an effort to repair our relationship between the criminal justice system and the mentally ill, this discussion started with a doctrinal review of the laws on bail. It highlighted some areas for reform, and considered bail in the context of mentally ill accused persons. We then looked at the current intersection of our criminal justice system and mental health, through the lens of an adult accused person. What we discovered is that the mentally ill are not being properly accounted for in our attempts to reduce recidivism by addressing the larger societal issue of untreated mental health disorders. A review of the promising provision afforded to youth, found in section 34 of the *YCJA*, gave us an example to look to for reform of our *Criminal Code* and how we deal with adult accused.

We ended our discussion with an analysis showing how these changes would be beneficial to both our economic health, but also our public safety. By looking at the financial and social costs to be saved when we assist our mentally ill persons, we can make a persuasive argument that our *Criminal Code* should employ a new provision for broader psychological assessments. It is the hope of this author that our society can continue to shift towards the restorative approach to crime that rehabilitation offers, especially as we deal with our mentally ill. Expanding on our promise of nearly 20 years ago in *Winko*,<sup>370</sup> to treat accused with mental disorders

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<sup>369</sup> Richard D. Schneider et al., *Mental Health Courts: Decriminalizing the Mentally Ill*, (Toronto: Irwin Law, 2007) at 44.

<sup>370</sup> *Winko*, *supra* note 1.



with the dignity and respect they deserve, is the ethical and reformative move we can no longer afford to ignore.

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# Appendix A

## Adult Therapeutic Court Application Form in London, Ontario

### Request for Mental Health Diversion Service

Approving Crown ..... or Mental Health Worker/Nurse.....  
(signature) (signature)

Please indicate the reason for Adult Therapeutic Court consideration:  
(Please attach supporting documents)

- Serious mental disorders (SMI)
- Developmental disabilities
- Dual diagnosis (mental illness *and* a co-occurring developmental disability)
- Concurrent disorders (mental illness *and* a co-occurring substance abuse problem)
- Acquired brain injury (ABI)
- Dementia
- Fetal alcohol spectrum disorders (FASD)

Person is seeking:

- Mental Health Diversion
- Guilty Plea

Do you have a Mental Health Worker?

- Yes  No

If yes, please provide:

Name.....

Phone #.....

Is this a Domestic Matter?

- Yes  No

#### Part 1

Name.....  
Last First Middle

Address.....

Postal Code.....Phone.....

I hereby request that I be considered for a Diversion Service in relation to the following offence(s) or I wish to plead guilty to the following offences(s):

(1).....(2).....

(3).....(4).....

Next court appearance.....Court.....

Police Department.....Investigating Officer.....

I.....DOB.....

(Print full name of person) (dd,mm,yy)

hereby consent to be assessed by the Elgin/Middlesex Court Diversion Service personnel. I understand that the Elgin/Middlesex Court Diversion Service personnel may be obtaining and exchanging information concerning me with other sources to assist in the completion of the assessment. I hereby consent to any disclosure, transmittal, examination or exchange of such information between these interested parties. I understand and consent that anything I say and any information obtained about me in the course of preparation of the assessment may be shared with the Crown Attorney, Defence Counsel and Duty Counsel.

Dated the.....day of.....20.....

(signature)

(Witness/Defence Counsel)

Please print name.....

#### Part 2

##### Acknowledgment and Recommendation by Crown Attorney's Office

Based on the Crown Brief prepared at today's date:

- 1) In my opinion, sufficient admissible evidence exists to conclude that there is a reasonable prospect of conviction in respect of, and that it is in the public interest to proceed with, the prosecution of each of the offences in respect of which this request for Diversion is made:
- 2) I recommend...../do not recommend..... that the Elgin/Middlesex Court Diversion inquire into the treatment, rehabilitation, and/or support needs of the above noted accused person, determine the suitability of the accused person for a Diversion Service and complete an assessment of the accused person concerning Diversion Service for presentation upon completion to the Crown.

(Date)

(Assistant Crown Attorney)

## Appendix B

### Suggested Wording for Medical and Psychological Assessment Provisions to be Added to the *Criminal Code*

#### s. X Psychological Assessment

**(1)** A judge may, at any stage of proceedings against an accused person, by order require that the accused be assessed by a qualified person who may report the results in writing to the court,

**(a)** with the consent of the accused person and the prosecutor, on an application setting out the reasons the report is being sought, including, but not limited to, the concern that the accused person may be suffering from a mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability; or

**(b)** on its own motion with the consent of the accused person, or on application of the accused person, if the court believes a psychological or psychiatric report in respect of the accused person is necessary for a purpose mentioned in paragraphs (2)(a) to (g) and

**(i)** the court has reasonable grounds to believe that the accused person may be suffering from a mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability, or

**(ii)** the accused person is alleged to have committed a serious violent offence.

#### **Purpose of assessment**

**(2)** A judge may make an order under subsection (1) in respect of an accused person for the purpose of

**(a)** show cause considerations under section 515;

**(b)** bail review considerations under section 520; or

**(c)** sentencing considerations where the Crown is requesting a sentencing option that would result in a conviction.

#### **Custody for assessment**

**(3)** Subject to subsections (4) and (6), for the purpose of an assessment under this section, a judge may remand an accused person to any custody that it directs for a period not exceeding thirty days.



### **Presumption against custodial remand**

**(4)** An accused person shall not be remanded in custody in accordance with an order made under subsection (1) unless:

**(a)** the judge is satisfied that

**i)** on the evidence custody is necessary to conduct an assessment of the accused person, or

**(ii)** on the evidence of a qualified person detention of the accused person in custody is desirable to conduct the assessment of the accused person, and the accused person consents to custody; or

**(b)** the accused person is required to be detained in custody in respect of any other matter or by virtue of any provision of the *Criminal Code*.

### **Report of qualified person in writing**

**(5)** For the purposes of paragraph (4)(a), if the prosecutor and the accused person agree, evidence of a qualified person may be received in the form of a report in writing.

### **Application to vary assessment order if circumstances change**

**(6)** A judge may, at any time while an order made under subsection (1) is in force, on cause being shown, vary the terms and conditions specified in the order in any manner that the court considers appropriate in the circumstances.

### **Disclosure of report**

**(7)** When a judge receives a report made in respect of an accused person under subsection (1),

**(a)** the court shall, subject to subsection (9), cause a copy of the report to be given to

**(i)** the accused person,

**(ii)** any counsel representing the accused person, and

**(iv)** the prosecutor; and

**(b)** the court may cause a copy of the report to be given to

**(i)** the provincial director, or the director of the provincial

correctional facility for adults or the penitentiary at which the accused person is serving a sentence, if, in the opinion of the court, withholding the report would jeopardize the safety of any person.

**Cross-examination**

**(8)** When a report is made in respect of a accused person under subsection (1), the accused person, his or her counsel and the prosecutor shall, subject to subsection (9), on application to the judge, be given an opportunity to cross-examine the person who made the report.

**Non-disclosure in certain cases**

**(9)** A judge shall withhold all or part of a report made in respect of an accused person under subsection (1) from a private prosecutor, if disclosure of the report or part, in the opinion of the court, is not necessary for the prosecution of the case and might be prejudicial to the accused person.

**Report to be part of record**

**(12)** A report made under subsection (1) forms part of the record of the case in respect of which it was requested, unless the accused person asks for an order sealing the report which the court may order.

**Disclosure by qualified person**

**(13)** Despite any other provision of this Act, a qualified person who is of the opinion that an accused person held in detention or committed to custody is likely to endanger his or her own life or safety or to endanger the life of, or cause bodily harm to, another person may immediately so advise any person who has the care and custody of the accused person whether or not the same information is contained in a report made under subsection (1).

**Definition of *qualified person***

**(14)** In this section, ***qualified person*** means a person duly qualified by provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, if no such law exists, a person who is, in the opinion of the judge, so qualified, and includes a person or a member of a class of persons designated by the lieu-tenant governor in council of a province or his or her delegate.

**Statements not admissible against accused**

**(15)** Subject to subsection (2), if an accused person is assessed in accordance with an order made under x(1) (psychological assessment), no statement or reference to a statement made by the accused person during the course and for the purposes of the assessment to the person who conducts the assessment or to anyone acting under that person's direction is admissible in evidence, without the consent of the young person, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production

of evidence.

**Exceptions**

**(2)** A statement referred to in subsection (1) is admissible in evidence for the purposes of

- (a)** determining whether the accused person is unfit to stand trial;
- (b)** determining whether the balance of the mind of the accused person was disturbed at the time of commission of the alleged offence, if the accused person is a female person charged with an offence arising out of the death of her newly-born child;
- (c)** determining whether the young person was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code*, if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
- (d)** challenging the credibility of an accused person in any proceeding if the testimony of the accused person is inconsistent in a material way, particular with a statement referred to in subsection (1) that the young person made previously; or
- (e)** establishing the perjury of an accused person who is charged with perjury in respect of a statement made in any proceeding.

## CASSANDRA DEMELO

### *Curriculum Vitae*

#### EDUCATION AND PROFESSIONAL DEVELOPMENT

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- September 2019 - 2023\*      **Western Law, University of Western Ontario**  
*PhD in Law*
- Dissertation will focus on the decriminalization of the simple possession of drugs, with a comparative analysis of Portugal
- 2017 – 2019\*      **Western Law, University of Western Ontario**  
*LLM (Masters of Law)*
- Thesis: Extending Our Promise - Providing Help to Mentally Ill Accused as Soon as Practicable
- June 24, 2013  
2009 – 2012      **Call to the Bar – Law Society of Upper Canada**  
**Western Law, University of Western Ontario**  
*Juris Doctor*
- 2012 Fasken Martineau Award in Administrative Law
- 2005-2009      **Ryerson University**  
*Faculty of Arts, Criminal Justice & Psychology*
- 2008 & 2009 Dean's Honor List
- (\*Anticipated)

#### EMPLOYMENT EXPERIENCE

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- 2014 – Present      **DeMelo Law Professional Corporation**  
*Owner and Criminal Defence Lawyer*
- Carriage of all files and client management from intake through to conclusion of their charges
  - Responsible for the day-to-day responsibilities of running a business
  - Manager and mentor three full-time employees – an Associate, Articling Student and Office Manager, and several part-time employees (Law students, Paralegal students, Undergraduate students as administrative assistants)
- 2016 - Present  
2014 – 2016      **Ryerson University LPP – Assessor for LPP Program**  
**Community Legal Services at Western Law**  
*Review Counsel (Contracted under DeMelo Law Professional Corporation)*
- Review Counsel for criminal files, working alongside Professor Voss
  - Responsible for mentoring clinic students; ensuring their files were correctly completed in order to ensure clients adequately represented
  - Assisted with client intakes to ensure criminal file numbers stabilized
  - Took part in staff meetings to assist with smooth running of the

- clinics overarching practice
  - Assisted with planning CLS events, such as the Criminal Law Symposium and Stakeholders' Meetings
- 2013 –2014 **Ron Ellis Law Professional Corporation**  
*Associate Defence Lawyer*
  - Carriage of all files during the preliminary “work-up” stages, including attendance at First Appearance Court & Video Court, Crown Resolution Meetings, Judicial Pre-Trials and Client Meetings
  - Responsible for constant communication with clients to ensure they are up-to-date with progress made on their files
  - Reporting to Ron Ellis as required on the status of all files
  - Representation of Clients on Guilty Pleas and Peace Bonds
  - Defending clients through the use of Preliminary Hearings and Trials
  - Responsible for research tasks, Charter Applications, legal documents
  - Delegation of tasks as appropriate to our law students/legal assistants
- 2011 & 2012-2013 **Lerners LLP**  
*Summer Student & Student-at-Law*
  - Carriage of client files in Small Claims Court and Landlord and Tenant Board proceedings
  - Worked with Michael Lerner and Faisal Joseph on criminal files; appeared on guilty pleas, peace bonds, bail variations, “A” Court appearances and POA matters; shadowed preliminary inquiries and trials
  - Assist lawyers with their files by preparing memorandums of law, opinion letters, demand letters, factums, and motions materials
  - Attend motions and other appearances at the Superior Court of Justice, the Ontario Court of Justice, the Provincial Offences Court and the Landlord and Tenant Board
- 2008 – 2012 **TD Canada Trust**  
*Customer Service Representative*
  - Secure Desk Operator – responsible for opening and closing procedures, ensuring branch supplies are maintained, and balancing
- 2009 – 2011 **Community Legal Services at Western Law**  
*Student Supervisor/Caseworker*
  - Manage client files by conducting intakes, preparing memorandums of law, opinion letters and demand letters, and by providing representation throughout the litigation process

- Represented clients at Small Claims Court, the Landlord and Tenant Board & the Ontario Court of Justice
  - Supervise fellow students on file management
- 2010 – 2011      **University of Western Ontario – Faculty of Law**  
*Teaching Assistant for Professor Adetoun Ilumoka*
- Assist Professor Ilumoka by answering students’ questions, grading assignments and teaching Constitutional Law in her absence
- 2010              **University of Western Ontario – Faculty of Law**  
*Research Assistant for Professor Chris Sherrin*
- Assist Professor Sherrin by researching and translating Portuguese and Spanish legal research to aid in his research on wrongful convictions

**REPORTED CASES**

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- R. v. Fast*, [2018] O.J. No. 2520  
*Toth (Re)*, [2018] O.R.B.D. No. 2449  
*R. v. Coutts*, [2018] O.J. No. 680  
*R. v. Brezden*, [2017] O.J. No. 5876  
*R. v. J.C.J.*, [2017] O.J. No. 5764  
*Toth (Re)*, [2017] O.R.B.D. No. 2423  
*R. v. Fast*, [2016] O.J. No. 5265  
*R. v. Oliveros-Callejas*, [2016] O.J. No. 88  
*R. v. Jackson*, [2016] O.J. No. 5968

**LAW RELATED VOLUNTEER EXPERIENCE, RECOGNITION AND COMMITTEES**

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|----------------|--|
| 2019           | <b>Criminal Lawyers’ Association</b> – Women in Law Conference - Chair                         |
| 2018 & 2019    | <b>Criminal Lawyers’ Association</b> – Mental Health Conference – Co-Chair                     |
| 2018           | <b>Western Law Panel Chair/Organizer</b> – “The Career-Long Goal - Mental Health and Practice” |
| 2017 – Present | <b>Western Law Wellness Committee</b>  |
| 2017 – Present | <b>Criminal Lawyers’ Association</b> – Women’s Director  |
| 2017 – Present | <b>Criminal Lawyers’ Association</b> – Mental Health Subcommittee Member                       |

2016 – Present	<b>“Carding in London”</b> – Volunteer and activist against the police use of “carding” as an investigatory tool
2017	<b>Osgoode Professional Development</b> – Faculty for CPD Presentation on Charter issues
2016, 2017, & 2019	<b>Women in Criminal Law Conference</b> – Platinum Sponsor
2015 – Present	<b>Criminal Lawyers Association (Ontario)</b> - Member
2013 – Present	<b>Criminal Lawyers Association (London Chapter)</b> – Member
2013 – Present	<b>Middlesex Law Association</b> – Member
2012 – 2013	<b>London Lawyers Feed the Hungry</b> - Volunteer
2012	<b>Lerners Cup UWO Judge</b>
	▪ Judged 2L and 3L students during Lerners mooting competition
2012	<b>Cherniak Cup UWO Judge</b>
	▪ Judged 1L students during Cherniak advocacy competition
2012	<b>Recipient of the 2012 Fasken Martineau Award in Administrative Law</b>
2011 – 2012	<b>Dispute Resolution Centre – Certificate in Mediation</b>
2011 – 2013	<b>Juvenile Diabetes Ride for the Cure</b> – Participant through Lerners LLP
2010 – 2011	<b>Ontario Bar Association</b> – Western Law Ambassador
2009 – 2011	<b>Western Law Student Ambassador Program</b>
2010 – 2011	<b>Public Legal Education</b>
	▪ <i>Youth Opportunities Unlimited</i> – Present criminal law and employment law modules to at-risk youth
2010	<b>Orientation Week Committee</b> – Chair
2010	<b>Lerners First Year Mooting Competition</b>
2009 – 2010	<b>Pro Bono Students Canada</b>
2009 & 2010	<b>B.L.G. Client Counseling Competition</b> - 2009 Finalist

#### **PROFESSIONAL AND CONTINUING EDUCATION TRAINING**

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2019	<b>Criminal Lawyers’ Association – Women in Law Conference</b>
	• Speaker on Mental Health in the profession
2018	<b>FIUMLAW Academic Conference</b> – Presenter on Mental Health Panel; Academic Poster Presented regarding Masters Thesis
2018 & 2019	<b>Criminal Lawyers’ Association – Mental Health Conference</b>
	• Speaker on “Mental Health and Bail” in 2018
	• Speaker on NCR and impairment since <i>R. v Bouchard-Lebraun</i>
2014 – 2017	<b>Public Defender’s Retreat – Las Vegas</b> (Yearly Retreat)
2015 – 2017	<b>Women in Criminal Law – Criminal Lawyers Association</b>
	▪ Attended in 2015 & 2016
	▪ Speaker at the 2017 March Conference – “Top 5 Cases by Top 5 Women” – Presented the case of <i>R. v Bingley</i> , [2017] SCJ No 17
2016 – 2017	<b>Criminal Lawyers Association Fall CLE Conference</b>
2014	<b>Women in Criminal Law CLE Session</b>

- 2014
  - “Work-Life Balance”
- 2014 **Criminal Lawyers Association CPD Session**
  - Drug Treatment Court
- 2014 **Criminal Lawyers Association CLE Spring Session**
  - Various Topics including Dawson Applications & Identification Issues
- 2013 **2013 Mentoring Dinner**
  - “What you Didn’t Learn in Law School about the Judiciary”
- 2012 – 2013 **Various In-House Training Sessions at Lerner’s LLP**
  - Session topics included criminal law, Provincial Offences Act, conflicts, interviewing clients, file management, and appeals

**OTHER VOLUNTEER EXPERIENCE**

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- 2018 **St. Joseph’s Hospice** – Air 2018 Volunteer
  - 2017 – Present **St. Joseph’s Hospice** – Handbags for Hospice Committee Member
  - 2016 – 2017 **MCC 126** – Volunteer Director on the Board of Directors
  - 2015 – 2017 **Power of the Purse – A One Day Women’s Conference** - Sponsor

**LANGUAGES SPOKEN**

English, Portuguese, intermediary Spanish