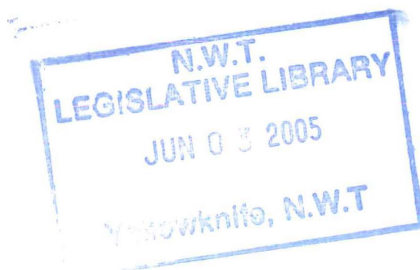




THE NORTHWEST TERRITORIES MENTAL DISORDER REVIEW BOARD

REPORT TO THE HONOURABLE CHARLES DENT
MINISTER OF JUSTICE
GOVERNMENT OF THE NORTHWEST TERRITORIES



Submitted by:

Katherine R. Peterson
Chair, NWT Mental Disorder
Review Board
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PART I BACKGROUND

In 1992 the Parliament of Canada passed Bill C-30 which amended section 16 of the Criminal Code of Canada. This amendment represented a significant change in the intersection of criminal law and persons suffering from mental illnesses. It replaced what was previously procedures associated with questions of fitness to stand trial and what was previously the defence of insanity to a criminal charge. While the substantive law respecting what constituted or would be accepted as a mental disorder did not change, the manner in which such persons were dealt with did.

The law regarding mental disorders or, reducing responsibility for criminal activity, has essentially remained unchanged in Canada since the English decisions regarding James Hadfield (1880) and Daniel M'Naghten (1843). As a result of acquittals by reason of insanity in these cases, the M'Naghten rules were developed, which have been thereafter applied in the Canadian law context for over a century. These rules provided that a person was presumed sane unless it could be clearly proven that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or if he did know, that he did not appreciate that it was wrong. This substantive test continues to be applied in Canada in determining whether penal sanctions should be imposed where there is a question of mental illness of the accused.

Prior to the C-30 changes, a person found to be not criminally responsible was held in custody at the pleasure of the lieutenant governor. This posed obvious conflicts with the Charter of Rights, including but not limited to the indeterminate nature of the disposition and the fact that any process to review it was not public and not subject to the procedural safeguards provided in other criminal law contexts.

While Review Boards were provided for to give advice and assistance to the lieutenant governor, there was no obligation to accept, receive or follow such advice.

The charter infringement aspect of the pre C-30 law was the focus of a 1991 court decision in *The Queen v. Swain*¹. In that decision the Supreme Court of Canada held that the *Criminal Code* provision requiring that an accused "be held in strict custody to await the pleasure of the lieutenant governor" was contrary to sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* and it could not be justified under section 1. The Mental Disorder Review amendments were introduced in 1991. These amendments have significantly changed the procedures surrounding the treatment of persons with mental disorders charged and/or convicted of offences under the *Criminal Code*.

¹ S.C.R. 933 (1991)

PART 2 CONSTITUTION OF THE REVIEW BOARD

The members of a provincial or territorial Review Board are statutorily mandated in the *Criminal Code*:

- s. 672.38 provides that the Review Board shall review dispositions concerning any accused person in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is made. The Review Board must have at least five members.
- s.672.39 states that a Review Board must have at least one member who is entitled to practice psychiatry in that jurisdiction. Where there is only one psychiatrist on the Review Board, there must also be one member who has training or experience in the field of mental health and be entitled to practice medicine or psychology.
- s.672.4 provides that the Chairperson of the Review Board must be a judge of the Federal Court, a superior court, district or county court of that jurisdiction or be a person who is qualified for such an appointment.
- s.672.41 requires that a quorum of the Review Board must be constituted by the Chairperson and the licensed psychiatrist.

In the Northwest Territories the Mental Disorder Review Board has the following members:

Dr. Gordon Mowat (psychiatrist resident in Edmonton who is licensed to and actively practices psychiatry in the Northwest Territories);

Romeo Beatch, resident of Yellowknife and practising psychologist;

Sue Heron Herbert, resident of Yellowknife;

Katherine R. Peterson, Barrister and Solicitor and Board Chair.

There is presently a vacancy on the Board as a result of the resignation of Barb Hoddinott. In addition, Dr. Suzanne Perkins was appointed to deal with a matter which posed a conflict of interest for Dr. Mowat.

PART 3 RESPONSIBILITIES OF THE REVIEW BOARD

The Review Board may have cases before it in two fashions:

1. The Court, after having found an accused not criminally responsible, may refer the matter to the Review Board for disposition;
2. The Court, after having found an accused not criminally responsible and having imposed a disposition, will refer the matter to the Review Board for ongoing review. The first such review must occur within 90 days of the court disposition.

The Court may find a person unfit to stand trial, or find that the acts sufficient to constitute an offence have been made out, but the accused, at the time of the offence was not criminally responsible. The only time a matter will not come before the Review Board when there has been a finding of not criminally responsible is when the court has thereafter ordered, as disposition, a discharge of the accused.

The Board must then consider either what initial disposition is appropriate, or, if a disposition has been made by the court, what ongoing disposition is appropriate.

Because it is the responsibility of the Board to continue to review a disposition, a person may have his or her matter before the Board on a number of successive occasions, until such time as the person is discharged unconditionally. Once a finding has been made by the Court, the Court's involvement in any continuing disposition comes to a close.

The Board is obliged to make dispositions which are the least intrusive to the accused person, having in mind considerations of the safety of the public. There is considerable case law in this area which provides guidance to Boards in their consideration of dispositions.

PART 4 CONDUCT OF HEARINGS

In the normal course, the Board, in considering a particular disposition, will have before it counsel for the accused person, the accused person and a representative from the Crown Attorney's office. While the Board has developed certain procedural rules for its hearings, it endeavours to conduct matters in as flexible and informal way as possible. In this way, the Board is of the view that it is able to focus on the accused, his or her condition and progress, rather than the finer points of procedure. To date, there has been no objections or appeals from this process, and participants appear to find the approach refreshing and non-threatening.

A number of the cases which are presently under review by the Board involve individuals who are presently detained at the Alberta Hospital in Edmonton. For these individuals, the Board attempts at least once a year to conduct its reviews at that facility so that the accused persons can appear personally and speak directly to the Board. In addition, the Board is able to hear from the psychiatric treatment team in the same fashion. For other hearings, the Board has attempted to save costs by conducting hearings by conference call from Yellowknife.

Typically the Board will initially hear from defence counsel and the accused and then the Crown. It usually then adjourns to consider its decision. As Board Chair, I prepare a Record of Proceedings, which details the evidence and submissions heard by the Board, as well as a Record of Decision, which sets out the Board's disposition. If a committal warrant is required, it is also prepared and signed by the Board Chair.

PART 5 CASES DEALT WITH BY THE BOARD

The Board has considered five cases since it became active in the summer of 2002. Of those cases, three individuals remain committed at the Alberta Hospital, one individual was absolutely discharged after several hearings, and one individual is conditionally discharged residing in Yellowknife and subject to further review.

The Alberta Hospital detainees will be reviewed by the Board the end of February at the Alberta Hospital. The individual conditionally discharged is scheduled to be reviewed further in June 2005.

It is anticipated that the Board will have approximately eight (8) hearings during the course of the 2005 calendar year, if no further cases are referred to it during the course of the year.

PART 6 RECOMMENDATIONS FOR CONSIDERATION BY THE MINISTER

The Board has had a relatively short period of activity and Board Members have had a steep learning curve to become acquainted with their responsibilities. Board members have worked well together and various areas of expertise have complemented one another to assist in providing well rounded decisions.

Each Board member has his or her own financial arrangements with the Department of Justice for compensation, and this has not posed any difficulties from the perspective of the Board. There have at times been unacceptable delays in Board members receiving payment. The reasons for such delays are not clear and may be the result of internal communication within the Department.

Administrative support for the Board has largely been provided by the Chair's office staff. This support includes arranging meetings, conference calls, preparing the text of documents on instructions from the Chair and similar responsibilities. This support may not always be available, particularly if there are any changes in the appointment of Board Chair. For this reason, it may be advisable for Department of Justice personnel to be familiar with these tasks.

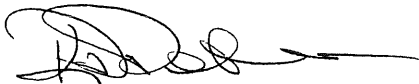
The present complement of appointments to the Board, although adequate, could conceivably cause problems if schedules do not coincide or conflicts occur. It would therefore be advisable for at least one further appointment to be made, in addition to filling the vacancy which currently exists.

There are texts available regarding the *Criminal Code* sections dealing with Mental Disorder Review Boards. It would be of assistance if all Board Members could be provided with this material. In particular, Board Members should be provided with a small but helpful volume, the *2005 Annotated Tremear's Criminal Code Part XX.1* (Canada Review Boards Edition). It is published annually by Thomson Carswell.

Meeting with members of other Review Boards from across the country would be of assistance to our Board. A national meeting is held once per year and at least one of our Board Members should be supported in attending these meetings. Our Board could benefit from the experience of other Boards.

If it would be of assistance to meet with the Board or any Member, please so advise.

The support of your Department in the work of the Board is appreciated.



Katherine R. Peterson, Q.C.
Chair