Bill C-10: *Criminal Code* Amendments (Mental Disorder)

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section and its Committee on Imprisonment and Release with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) appreciate this opportunity to comment on Bill C-10, *Criminal Code* amendments (Mental Disorder). We urge the Standing Committee on Justice and Human Rights to ensure that all substantive aspects are given thoughtful and detailed consideration, given the importance of the interests at stake.

The mental disorder provisions of the *Criminal Code* were substantially and thoughtfully revised by 1991 amendments that were enacted in 1992.[1] That statute included a five-year review requirement, ultimately conducted by this Committee in 2002.[2] The resulting report made some important recommendations, many of which are reflected in Bill C-10. For example, the Committee's recommendations can be seen in Bill C-10's proposed changes to the powers of the Review Board, as well as those pertaining to people found unfit to stand trial who appear likely to be permanently unfit.[3]

The CBA Section participated in the 2002 review and continues to be very interested in the progress of these issues. In this submission, we will specifically address the contents of Bill C-10 and will also comment briefly about two matters not reflected in the Bill.

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1 *An Act to amend the Criminal Code* (Mental Disorder), S.C. c.43.

2 See House of Commons, 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the *Criminal Code* (Ottawa: November, 2002).

3 The issue of permanent unfitness has been subsequently considered by the Supreme Court of Canada in *R. v. Demers* 2004 SCC 46; (2004),20 C.R. (6th) 241.

II. CHANGES PROPOSED BY BILL C-10

A) Board Ordered Assessments

We support the proposed amendment to section 672.121 set out in clause 3 of Bill C-10 as a valuable addition to Review Boards' powers. During the recent review, the Committee heard evidence that the inability to order assessments was an obstacle to the effective operation of Review Boards. In spite of our general support, we believe the proposal in Bill C-10 is not broad enough. For example, it does not address situations where a party is dissatisfied with the assessment provided by a hospital, and argues that the Board should direct a new assessment by an independent assessor. The party may be concerned that the assessment report filed with the Board only repeats earlier opinions without new assessment procedures. As proposed, section 672.121 would not explicitly give the Board power to entertain a challenge to the adequacy of the hospital's assessment report. In our view, the Board should be able to hear arguments about the adequacy of the report and, if necessary, order a new one prepared by another assessor.

RECOMMENDATION:

The CBA Section recommends that proposed section 672.121 (b)(ii) be amended to read:

> **(ii) no adequate assessment of the mental condition of the accused has been conducted in the last twelve months.**

B) Permanent Unfitness

Not only did this Committee's recent report recommend that legislation be enacted to recognize the situation of someone likely to be permanently unfit to stand trial, but the Supreme Court of Canada has also considered that to be constitutionally required.[4] Currently, such a person faces indefinite confinement or supervision on conditions, without any regard as to whether or not that person poses a risk. People in this position cannot be tried, but neither can they be absolutely discharged.

Bill C-10 proposes an amendment to address the situation where persons are found unfit to stand trial and may never become fit to stand trial. Clause 33 would provide a mechanism for a court to grant a stay of proceedings in cases recommended to the court by a Board. However, in our view, amendments are required for the Bill to conform with the decision of the Supreme Court of Canada in *R. v. Demers,* released June 30, 2004.[5]

In that case, Iacobucci and Bastarache, JJ. writing for an eight judge majority, discussed the concept of over-breadth as a principle of fundamental justice entrenched by section 7 of the *Charter*. They concluded:

> Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat to public safety, makes the law over-broad because the means chosen are not the least restrictive of the unfit person's liberty and are not necessary to achieve the State's objective. Accordingly, these sections of the law restrict the liberty of the permanently unfit accused "for no reason" to use Cory, J.'s words in *Heywood.*[6]

As a result, the court held that *Criminal Code* sections 672.33, 672.54 and 672.81(1) violate the section 7 rights of a permanently unfit accused who does not pose a significant threat to society, and that a "stay should be granted to a permanently unfit accused who does not pose a significant threat to the safety of the public, in order to

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4 *Ibid*.

5 *Ibid*.

prevent their indefinite subjection to criminal proceedings".[7] However, the court suspended the declaration of invalidity for 12 months to permit Parliament to rectify the scheme. Accused persons will have to wait to see if Parliament can cure "the constitutionality of the regime" before applying for a stay.

Clearly, the Supreme Court of Canada based its decision on two factual pre-conditions, permanent unfitness and the absence of a "significant threat to society". Parliament's task is to now amend Part XX.1 of the *Criminal Code* to ensure that people in this category are not indefinitely prisoners of the criminal process. We believe that clause 33 falls short of this objective.

(i) Court and Board Assessments

Section 672.851(1) would allow the Review Board, of its own motion, to recommend that the court hold an inquiry as to whether a stay of proceedings should be ordered where a permanently unfit accused is involved. In our view, the Review Board recommendation should not always require a court to order an assessment to determine the issue. The accused will have been subject to annual comprehensive assessments and ongoing monitoring while under supervision. To make such a recommendation, the Board will have held a disposition review under section 672.81. On the basis of relevant information, including disposition information and an assessment, the Board will have already determined that an accused remains unfit and does not pose a significant threat to public safety. The Board will have made a determination that the accused meets the criteria for an absolute discharge. Given this level of scrutiny, we suggest that the proposal be amended so that a court *may* order another assessment, if it is of the view that a further assessment is required for proper determination of the issue.

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6 *Ibid*. at para. 43.

7 *Ibid*. at para. 64.

RECOMMENDATION:

The CBA Section recommends that section 672.851(5) be amended to read:

If the court holds an inquiry under subsection (3) or (4), it *may* order an assessment of the accused.

(ii) Access to Process

At the Board stage, section 672.851(1) does not allow an accused to apply for a recommendation, but merely states that the Board can inquire "of its own motion". Similarly, there is no provision for an accused to apply directly to a court under section 672.851(4). In our view, the Supreme Court of Canada's ruling requires that all permanently unfit accused who pose no threat have access to a remedy that can free them from the indefinite grasp of the criminal process.

RECOMMENDATION:

The CBA Section recommends that the words "or on application by the accused" be added to these provisions so that, at least at the court stage, an accused could initiate adjudication of the issue of permanent unfitness.

(iii) The Test

Proposed section 672.851(7) says, "the court *may*..." and follows this with three pre-conditions for a stay:

- the accused remains unfit and is not likely to become fit;
- the accused poses no threat to the safety of the public; *and*
- a stay is in the interests of the proper administration of justice.

The Supreme Court of Canada was clear that anyone permanently unfit and posing no significant threat to public safety should be granted a stay. The requirement that a court consider whether "a stay is in the interests of the proper administration of justice" is not imposed when an accused labelled not criminally responsible by reason

of mental disorder (NCRMD) is absolutely discharged. The same requirements should apply for NCRMD accused as those that apply in considering whether permanently unfit accused should be removed from the supervision of the Review Board. In our view, the court's considerations should be whether the accused is unfit, unlikely to become fit and poses no significant threat to the safety of the public. Once the court is satisfied it has the necessary answers to those questions, a stay should be granted in appropriate cases.

The only caveat offered by the Supreme Court of Canada was that a stay should be granted unless the "societal interest in the subjection of the accused to criminal proceedings" outweighed the "affront to fairness and decency" arising from the prospect of indefinite subjection to that process. In other words, the court recognized that there may be societal benefit in bringing an accusation to finality.

However, the proposed list of factors in Bill C-10's section 672.851(8) would go far beyond the public interest identified by the Supreme Court of Canada, using unclear and inordinately broad phrases like "salutary and deleterious" effects and "any effect on public confidence". Surely, concerns about public confidence are addressed by a finding that the accused poses no significant threat. Further, by referring to the time elapsed since the commission of the offence, the section suggests that the brevity of time in confinement or subject to conditions may not satisfy the public interest. The underlying rationale must then be predicated on a concept of punishment that should only legally and morally follow a conviction. To conform with *Demers*, the only proper caveat is where society's interest outweighs the deleterious effects of continued subjection to the process.

RECOMMENDATION:

The CBA Section recommends that the proposed section 672.851(8) be omitted and, either i) the word "may" in section 672.851(7) be replaced by "shall" and the provision end after the

phrase "threat to the safety of the public" thereby omitting the reference to "proper administration of justice", or ii) the provision be re-worded to read:

> **(7) The court *shall*, on completion of an inquiry under this section, order a stay of proceedings if it is satisfied that the accused remains unfit to stand trial, is not likely to become fit to stand trial and does not pose a significant threat to the safety of the public, unless, in the court's opinion, the public interest in finality outweighs the deleterious effects to the accused of continued subjection to the criminal process.**

C) Repeal of Capping Provisions

The capping provisions have raised significant and complex issues at the interface of mental health, criminal responsibility and community protection concerns. While this is an appropriate area for the mental health and criminal justice systems to converge, we are hampered by a lack of real knowledge other than regional anecdotal accounts.

The capping provisions were included in the 1992 reforms but never proclaimed in force. Capping was originally proposed to inject proportionality by placing a maximum limit on the period for which a mentally disordered accused would be detained or kept under supervision by the Review Board. Over the past ten years, court decisions have made important contributions to the debate about the limits of confinement and supervision. Since the Supreme Court of Canada decision in *Winko v. British Columbia (Forensic Psychiatric Institute),*[8] and other recent court rulings,[9] it appears that judicial interpretation has provided safeguards to protect the accused's liberty interests such that only those who present a significant risk to the safety of the public remain under disposition.

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8 [1999] 2 S.C.R. 625.

9 See *R. v. Ta* (2002), 3 C.R. (6th) 100, 164 C.C.C. (3d) 97 (Ont. C.A.) and *Penetanguishene Mental Health Centre* v. Ontario (A.G.) [2004] 1 S.C.R. 498.

Winko requires courts or Review Boards to make the least onerous and restrictive disposition order possible. If the accused poses no significant threat to public safety, an absolute discharge is required. If a significant threat is posed, the court or Review Board can discharge with conditions or detain in a hospital subject to conditions, so long as the order is consistent with the principles set out in *Winko*.

In our earlier submission to this Committee, we expressed concern that in spite of this direction from the Supreme Court of Canada, Review Boards are somewhat inconsistent in the application of the section. More importantly, there has been no comprehensive national evaluation of Review Boards and their decisions.

We continue to recommend that an empirical evaluation be completed to determine how long people remain under the jurisdiction of the Review Board in each form of disposition. This information should be compared to sentences imposed on similarly situated offenders for similar offences within the criminal courts. Cross-jurisdictional data on the length of conditional discharges or detention in hospital for those found NCRMD or unfit is also required. With consistent application of the *dicta* in *Winko*, we would support repeal of the capping provisions.

D) Transfer Provisions

The CBA Section supports proposed amendments to facilitate transfer of persons under Review Board power from one jurisdiction to another, whether or not they are in custody. Review Boards should be able to act on geographic considerations in the best interest of mentally disordered individuals.

E) Right to Counsel

Section 672.5(8) of Bill C-10 appropriately recognizes that all accused before the Review Board should have the right to have counsel assigned if they are

unrepresented. Under the previous legislation, assignment of counsel was only required for unrepresented persons who were first found unfit.

F) Frequency of Reviews

Recent decisions in the area of mental health law[10] have stressed that both courts and Review Boards must always seek to protect the liberty interests of those subject to section 672.54 dispositions. Yet, Bill C-10 proposes:

> 1) to amend section 672.33 to extend the time for the court to hold an inquiry on whether the Crown can make out a *prima facie* case against the accused, and
>
> 2) to add new subsections 672.81(1.1) and (1.2) to extend the time to hold an annual review of the accused's condition for up to 24 months.

While it is rare that annual reviews result in conditions being varied, the CBA Section believes it is important that the Board conduct regular and genuine re-examinations of each person's case to ensure that the least onerous conditions apply.

Recommendation:

The CBA Section recommends that clause 27(2) be omitted and that a Board hearing be conducted annually to ensure that conditions remain the least onerous as is necessary in the circumstances.

G) Publication Ban

We recognize the value of publication bans in appropriate circumstances to protect the identity of vulnerable persons such as victims of sexual offences or child pornography, but we believe that there remains a serious deficiency in this area of the law. Certainly, other vulnerable persons, including the mentally ill, should be able to seek a publication ban to prevent public dissemination of personal psychiatric information. There is no *Criminal Code* provision that allows for a publication ban in

regard to an accused's psychiatric condition when an application is made under section 672.11 or when the Crown seeks a treatment order under section 672.58. In our view, the ban on publication protection proposed under Bill C-10 in section 672.501 to protect the identification of witnesses should also extend to an accused who may be unfit to stand trial.

H) Victim Impact Statement

Clause 16(3) of Bill C-10 would replace section 672.5(16) with a proposal that a victim could attend Review Board hearings and read a victim impact statement or present that statement in any manner the Board considers appropriate, unless the Board or a court thinks this would interfere with the proper administration of justice. Currently, victims can present a statement only after an accused has been found guilty of the offence and prior to sentencing.

A person found to be NCRMD or unfit has *not* been found guilty of the offence. Section 672.35 specifically states that the effect of a verdict of NCRMD is that the accused is found not guilty and is not convicted of the offence. Indeed, at a fitness hearing, the *actus reus* of the offence may not have been proven. Until an offence is shown to have taken place, an alleged victim should not have the same status as a witness or other person shown to have suffered harm or loss, as defined in section 722.4. The current provisions allow victim impact statements to be filed at hearings to assist in issues surrounding significant risk and other factors only to the extent such statements are relevant to consideration of those issues. Inviting participation of victims at Review Board hearings risks altering the primary focus of the proceedings to the victim and the facts of the case, rather than the psychiatric state of accused, the medical prognosis and any risk to public safety. As the accused is not legally guilty of the offence, victim participation should be limited to instances where such participation is relevant to consideration of the issues.

10 See *R. v. Owen*, [2003] 1 S.C.R. 779 and *Penetanguishene Mental Health Centre, supra*, note 9.

l) Police Enforcement of Disposition and Assessment Orders

While we recognize the need to expand options available to police when a person under Review Board power breaches the terms of the disposition, we believe that the proposed amendments are too broad and insufficiently protect accused persons from unnecessary incarceration. Specifically, section 672.92 (3), conditions under which police are not to release an accused, are so expansive that they appear to invite police to detain mentally ill persons, rather than release them on an appearance notice or summons. Further, proposed section 672.92(4) gives police discretion to bring the accused to the place (usually a hospital) specified in the disposition assessment order. The CBA Section's view is that it should be mandatory that police deliver accused to the hospital or place specified in the disposition order. The word "may" deliver should be changed to "shall" to be consistent with recent case law requiring that both courts and Review Boards ensure that the liberty interests of the accused are the major preoccupation when making a disposition. A number of Supreme Court of Canada decisions[11] have established that courts are required to reconcile twin goals of public safety and the fair treatment of individuals who commit offences while suffering from a mental disorder, so as to ensure that conditions imposed taken as a whole are the least restrictive of liberty as is consistent with public safety. In our view, the proposed amendments to section 672.92, providing police with broad discretion to arrest and detain, rather than bring a person to hospital, run contrary to emerging case law in the mental health field.

III. OMISSIONS FROM BILL C-10

The CBA Section has two major concerns flowing from its earlier submission to the 2002 review that are not addressed in Bill C-10. First, the Bill does not adopt the

11 *Penetanguishene Mental Health Centre*, *supra*, note 9 and *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528.

Parliamentary Committee's recommendation that the *Code* be amended to encompass the concept of "fitness to be sentenced". Second, it does not examine the section 16 defence to ensure that it meets the need to keep severely mentally disordered offenders out of prison. Neither Bill C-10 nor the Committee's earlier report address the primary concern highlighted by the CBA Section in the 2002 review, that we imprison too many people suffering from serious mental disorder due to the current limitations in the defence available under section 16. While the Committee considered this issue in its review, its report restricted its consideration to the concept of automatism. More importantly, the report did not address whether section 16 needs to be expanded to include what in other jurisdictions is referred to as a "volitional element". Various international models demonstrate how this can be done. For example, another stream might be added to section 16 that would encompass someone who, by reason of mental disorder, could not act in conformity with the law.

IV. CONCLUSION

We have serious concerns about the plight of mentally disordered persons who come within the grasp of the criminal justice system. These are surely some of the most vulnerable people in our society.

The current provisions were enacted in 1992, the culmination of a lengthy process of research and debate that spanned decades. The issues were addressed by the *Ouimet Report* in 1969 (report of the Canadian Committee on Corrections) and led to the groundbreaking work of the Law Reform Commission of Canada.[12] The detailed amendments contained in S.C. 1991, c.43, now comprising the various elements from sections 672.1 to 672.95 of the *Criminal Code*, were also the subject of years of discussion. In fact, legislators delayed enactment of those sections until the Supreme

12 See Working paper No. 14, The Criminal Process and Mental Disorder, 1975, and the report to Parliament entitled *Mental Disorder and the Criminal Process*, 1976.

Court of Canada decision in *R. v. Swain*,[13] to ensure compliance with that court's application of the *Charter* to the dispositional issues. Section 672 deals with findings of "fitness" or "not guilty by reason of mental disorder", and the dispositional framework that flows from these findings. However, the underlying issues are much broader. While over 2000 people are currently subject to some form of confinement resulting from the application of section 672, it is impossible to estimate the number of mentally disordered persons who actually come before the courts. The past decade has witnessed innovations in the form of diversion and even a specialized court for the mentally disordered. However, new "mega-jails" capable of housing up to 1,500 people are also being built in some provinces, with an emphasis on security rather than programming. We, like others, are concerned that this trend foreshadows a dramatic increase in the proportion of mentally disordered prisoners. More importantly, the inadequacy of treatment services for prisoners, both provincial and federal, has already been the subject of comment by the Supreme Court of Canada.[14]

In its 2002 report, this Committee expressed concern about the lack of "systematically collected reliable data" on the issues before it, and said:

> The Committee agrees with the submission of the Canadian Bar Association both in its brief and in its letter to us that more research is required and more hard data has to be collected.

In our view, the Minister of Justice and the Minister of Public Safety responsible for the Corrections Service of Canada should be asked to collect and provide the necessary data so that the there can be a serious debate about the growing number of seriously ill prisoners and their treatment in our jails.

13 [1991] 1 S.C.R. 933.

14 See *R. v. Knoblauch*, [2000] 2 S.C.R. 780, 37 C.R. (5th) 349, 149 C.C.C. (3d) 1.