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MENTAL DISORDER IN CANADIAN CRIMINAL LAW

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Publisher's Release Note

This publication provides practitioners with a quick and easy reference tool, while keeping them up to date with the latest jurisprudential and legislative developments arising under Part XX.1 of the *Criminal Code*. The reader will be given a thorough analysis of all the issues arising under Part XX.1 including an examination of mental disorders, such as automatism, and the not criminally responsible defence (NCR), assessment orders and fitness to stand trial determinations, disposition hearings, fitness dispositions and their review, review board and appeal processes and procedures, and a discussion of mental disorder in a non-NCR context.

This release features updates to Chapters 6 (Mental disorder in a Non-NCR Context), 7 (Review Boards: Powers, Practice and Procedures), 8 (Disposition Hearings), 9 (Section 672.54: NCR and Unfit Dispositions), and 10 (Appeals). This release also updates Appendix F, "Canadian Designated Psychiatric Hospitals".

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Highlights

- **Mental Disorder in a Non-NCR Context—Introduction—§ 6:1.80 Mental Illness and Anti-Bias Instructions to Jury**—A new section in Chapter 6 beginning with a discussion of the seminal decision of *R. v. Chouhan*, where a majority of the Supreme Court of Canada endorsed the general use of anti-bias instructions to caution jurors of the risk of impermissible reasoning.
- **Review Boards: Powers, Practice and Procedures—The Creation of a Specialized Review Board System—Generally**—A comprehensive framework was established by Chief Justice Tulloch for Review Boards conducting hearings under Part XX.1. This framework requires Boards to actively safeguard *Charter* rights, avoid stereotypes, give weight to the NCR individual’s reasonable preferences, and prioritize individualized assessments over clinical convenience or strict institutional rule compliance: *Ramos, Re*, 2025 ONCA 820.
- **Section 672.54: NCR and Unfit Disposition—IV. Determining the “Necessary and Appropriate” Disposition—§ 9:12.50 What Constitutes a Hospital**—A new section in Chapter 9 outlining the requirements that a hospital detention order requires an accused to be detained at a hospital designated under s. 672.1(1) of the *Criminal Code*.
- **The NCR Defence—The Effect of an NCR Verdict—High Risk Accused Designation—Notice and Timing of Application**—Although there is no formal requirement of notice of an intent by the prosecutor to seek a high risk designation, trial fairness requires such notice and should be given prior to any anticipated “consent” NCRMD finding: *R. v. Gautreau*, 2025 ONCA 873, 2025 CarswellOnt 20716 (Ont. C.A.).
- **The NCR Defence—The Effect of an NCR Verdict—High Risk Accused Designation—The Test and Evidence to Be Considered**—The “substantial likelihood” test applicable under s. 672.64(1)(a) is *not* applicable under s. 672.64(1)(b), which provides for a high-risk designation based on the brutality of the index offence. A lower degree of risk is applicable under s. 672.64(1)(b), to allow for quick intervention to prioritize public safety in circumstances where the evidence may fall short of establishing a high degree of probability of re-offending: *R. v. Gautreau*, 2025 ONCA 873, 2025 CarswellOnt 20716 (Ont. C.A.).

Foreword

In the Supreme Court of Canada's path-breaking decision in *Winko v. British Columbia*, Justice McLachlin began the Court's reasons with these words:

In every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.

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

We are fortunate in Canada to have a number of texts on various aspects of mental disorder and mental health law. What we have lacked is a substantial and comprehensive book on all aspects of the subject. Until now.

Mental Disorder in Canadian Criminal Law by Joan Barrett and Riun Shandler is a thorough and authoritative review of the modern law of mental disorder. And it is a superb book. The authors have taken a difficult topic, in which recently the law has developed very rapidly, and produced a coherent, balanced and readable discussion of the subject. The authors discuss not only the relevant legislation and case law, but give much needed practical advice as well. The book is well organized, well annotated and well written. The loose-leaf format will allow the authors to regularly update with new developments in the field. Judges and lawyers practising in the area, healthcare professionals and indeed, anyone who deals with the impact of the criminal law on those affected by mental disorder will find this book an invaluable reference.

The high quality of the book is attributable to the ability and hard work of its co-authors. Both Joan Barrett and Riun Shandler have argued many appeals before me. Both are first-class advocates with a deep knowledge of the criminal law. Both have a real interest and expertise in mental disorder law.

Since June 1999, Ms. Barrett has been specially designated to act for the Crown on mental health matters. She has appeared as Crown Counsel before the Ontario Review Board and before the Court of Appeal on issues arising under the mental disorder provisions of the *Criminal Code*. As Crown Counsel, Mr. Shandler has specialized in cases raising psychiatric evidence and mental disorders issues. He has appeared as counsel in several of the main Supreme Court of Canada cases: *Winko*, *R. v. Owen* and *Pinet v. A.G. (Ontario)*.

I congratulate Joan and Riun on the publication of this book. All of us who work in the field owe them a debt of gratitude. I have no doubt that in my own work I will consult their text often.

Justice J. I. Laskin
Court of Appeal for Ontario
December 2006

