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REVIEW OF THE MENTAL DISORDER PROVISIONS OF THE *CRIMINAL CODE*

Report of the Standing Committee on Justice and Human Rights

Honourable Andy Scott, M.P.
Chair

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CHAIR'S FOREWORD

In February of this year, the Standing Committee on Justice and Human Rights received an Order of Reference from the House of Commons designating it as the proper body to undertake a statutory review of the mental disorder provisions of the *Criminal Code*. Accordingly, the Committee sought the input of non-governmental organizations, provincial and territorial officials, boards of review and members of the public on the provisions and operation of the mental disorder measures adopted by Parliament in 1991. We are pleased to report on the result of our hearings.

A review of this complexity could not have been completed without the collaboration of a great many dedicated and capable people who agreed to contribute to the Committee's work. On behalf of all members, I wish to thank all those who appeared before the Committee or submitted briefs; we are most grateful for the insightful comments and recommendations provided to us. A particular thanks must go to Ms. Catherine Kane, Mr. Doug Hoover and Grey Yost of the Department of Justice who provided the Committee with a detailed briefing as it prepared to undertake this study.

I wish to extend a special thanks to the Honourable Justice Edward Ormston who generously welcomed members to observe his court in Toronto. I also wish to thank the Honourable Justice Richard Schneider, Mr. Joe Wright, Ms. Anita Barnes, Dr. Derrick Palawdyi, Mr. Alan Trudeau and Ms. Joanne Dunlap for their comments and direction during the Committee's visit to the court.

Finally, a note of thanks to Committee staff: our research team, composed of Philip Rosen and Marilyn Pilon, contributed their expertise and writing skills to the task. Our Committee clerks, Marie Danielle Vachon and Jean-Francois Pagé are to be thanked for their efficiency in ensuring that our work was conducted in a productive manner. We are also very grateful for the assistance and support provided by the Committee's Administrative Assistant, Adèle Levergneux. To be warmly thanked as well are the interpreters, particularly Carole Savard and Hélène Regimbald, the editors, translators, console operators and others, and the staff of Publications Service, without whom our work could not have been accomplished.

Finally, I would also like to thank the members of the Committee from all parties who worked diligently on this report while attending to other important work of the Committee as well as their parliamentary duties.

The Honourable Andy Scott, P.C., M.P.
Chair

THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

has the honour to present its

FOURTEENTH REPORT

Pursuant to the Order of Reference of the House of February 26, 2002, the Standing Committee on Justice and Human Rights has undertaken its statutory review of the mental disorder provisions of the *Criminal Code*.

TABLE OF CONTENTS

REVIEW OF THE MENTAL DISORDER PROVISIONS OF THE *CRIMINAL CODE*

INTRODUCTION

Canada's *Criminal Code* has always exempted individuals from criminal liability for actions taken when, because of a mental disorder or "disease of the mind," they were "incapable of appreciating" the nature and quality of the act and knowing that it was wrong. The policy reflected by that legislation rests on "the basic principle of Canadian criminal law that to be convicted of a crime, the state must prove not only a wrongful act, but also a guilty mind."[1] That principle, in turn, is rooted in the common law defence of "insanity" as formulated in the *M'Naghten* case, decided by the British House of Lords in 1843.[2]

History of Insanity Defence

The *Criminal Code, 1892* applied the "insanity" defence to persons who, because of a "natural imbecility, or disease of the mind," were "incapable of appreciating the nature and quality of the act or omission," and of knowing that it was wrong. The law also included a legal presumption of sanity and persons acquitted on account of such a plea would not go free. Instead, he or she would be held "in strict custody" at the pleasure of the Lieutenant-Governor of the province. Persons whose mental state rendered them "unfit" to stand trial were also held under warrant of the Lieutenant-Governor. The original insanity provisions remained largely unchanged until the 1991 amendments that are the subject of this review.[3]

Origins of the Mental Disorder Provisions (Bill C-30[4])

In 1975, the Law Reform Commission of Canada released a study of the treatment of mentally disordered accused that found considerable confusion in the practical application of the law, partly because of a "lack of clear social policy towards the mentally

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1 Department of Justice, *Mental Disorder Amendments to the Criminal Code*, Information Paper, September 1991, p. 4.

2 Edwin A. Tollefson and Bernard Starkman, *Mental Disorder in Criminal Proceedings*, Carswell, Canada, 1993, p. 15.

3 Ibid., p. 1.

4 An Act to amend the *Criminal Code* (mental disorder) and to amend the *National Defence Act* and the *Young Offenders Act* in consequence thereof, S.C. 1991. C. 43.

ill."[5] In a report released a year later, the Commission questioned a system that focused on custody rather than treatment and resulted in many mentally disordered accused serving longer periods of time than they would have if convicted.[6] The Commission also criticized the Lieutenant-Governor Warrant scheme that gave control over mentally disordered acquittees to the provincial Attorney General or Cabinet, especially since neither had a legal obligation to follow a recommendation of the Review Board in those jurisdictions that had one. Citing concerns about the possibility of release decisions being made on political grounds and the lack of an appeal process, the Commission recommended abolishing the Lieutenant-Governor Warrant scheme, arguing that "dispositions should be made openly, according to known criteria, be reviewable and of determinate length."[7]

In October 1979, federal and provincial ministers responsible for the criminal justice system in Canada agreed to co-operate in a comprehensive review of Canada's criminal law and procedure, from the perspective of underlying policy considerations.[8] As part of that national Criminal Law Review, the Department of Justice initiated the Mental Disorder Project in 1982. A Department of Justice Discussion Paper released a year later described the mental disorder provisions of the *Criminal Code* as "fraught with ambiguities, inconsistencies, omissions, arbitrariness, and often a general lack of clarity, guidance or direction."[9] The paper also raised the question of compliance with the *Canadian Charter of Rights and Freedoms* and echoed the Law Reform Commission's concerns about the automatic detention of mentally disordered accused, as well as the unfairness of allowing "unfit" accused to be detained indefinitely, without requiring the Crown to establish a *prima facie* case.

The final report of the Department of Justice Mental Disorder Project was released in 1985.[10] Many of the recommendations contained in the final report were incorporated into the draft bill that was tabled by the Justice Minister on June 25, 1986. In addition to changing the name of the defence to "mental disorder" and specifying criteria for determining whether an accused is unfit to stand trial, the bill proposed limits on the length of time for which a mentally disordered person could be held. In effect, their detention would be "capped" at life, ten years or less, or two years or less, depending upon the maximum penalty available upon conviction and the nature of the offence charged. In addition, the courts would be empowered to order up to 60 days' detention in a treatment facility as part of a convicted offender's term of imprisonment. The latter two

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5 Law Reform Commission of Canada, *The Criminal Process and Mental Disorder*: Working Paper 14, 1975, p. 11.

6 Law Reform Commission of Canada, *Mental Disorder in the Criminal Process*, March 1976.

7 Ibid., p. 38.

8 Government of Canada, *The Criminal Law in Canadian Society*, Ottawa, August 1982, p. 10.

9 Department of Justice, *Mental Disorder Project, Discussion Paper*, September 1983, p. 3.

10 Department of Justice, *Mental Disorder Project Criminal Law Review,* Final Report, September 1985.

proposals proved controversial among provincial attorneys general who were concerned that capping could lead to the mandatory release of dangerous persons, while the "hospital orders" provisions could impose a significant financial burden on some provinces.[11]

Although consultations on the draft bill continued through the 1988 general election, the final impetus for legislative reform came from the 1991 decision of the Supreme Court of Canada in *R .v. Swain,* that struck down legislation and common law practices then governing the defence of insanity.[12] In particular, the Supreme Court ruled that mandatory automatic detention for persons found not guilty by reason of insanity was a violation of sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. In order to avoid the release of all persons then held under lieutenant-governors' warrants and the resulting danger that could pose, the Court granted a six-month temporary period of validity which was later extended, in order to give Parliament sufficient time to pass remedial legislation.

Amendments Contained in Bill C-30

Tabled on September 16, 1991, Bill C-30 replaced references to "natural imbecility" and "disease of the mind" with the term "mental disorder" and extended its application to cover summary conviction as well as indictable offences.[13] Instead of being found not guilty by reason of insanity, an accused may now be held "not criminally responsible on account of mental disorder." Such a finding no longer automatically results in custody. Rather, the court can choose an appropriate disposition or defer the decision to a review board. Even when the court makes a disposition, the Review Board must hold its own hearing to review any court disposition other than an absolute discharge, no later than 90 days afterward. Furthermore, courts and review boards are obliged to impose the least restrictive disposition necessary, having regard to public safety, the mental condition of the accused, and the goal of his or her reintegration into society. In addition, any review board disposition other than an absolute discharge, must be reviewed annually. As a result, lieutenant-governors in council no longer have any role in criminal proceedings involving an unfit or mentally disordered accused.

Bill C-30 also gave the courts new criteria for determining whether an accused person is unfit to stand trial, while giving the courts limited powers to order involuntary treatment for the purposes of rendering an unfit accused fit. In addition, the courts must review the case of an unfit accused every two years to determine whether sufficient evidence exists to bring the individual to trial. If not, the accused is entitled to an acquittal. Bill C-30 came into force in February 1992. However, proclamation was delayed for three

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11 Tollefson and Starkman (1993), p. 6.

12 *R. v. Swain*, [1991] 1 S.C.R. 933.

13 Prior to 1991, the defence of "insanity" could be raised only for indictable offences.

major initiatives including: the “capping” provisions; the “dangerous mentally disordered accused” provisions that would allow the courts to extend the cap to a life term; and the “hospital orders” provisions for convicted offenders who, at the time of sentencing, are in need of treatment for a mental disorder “in an acute phase.”

Committee Process

When Parliament adopted the legislation adding Part XX.I to the *Criminal Code*, it included a clause requiring a comprehensive review by a parliamentary committee of the provisions and operation of that legislative scheme. Pursuant to an Order of Reference from the House of Commons on February 26, 2002, this Committee was designated as the committee to undertake that review.

The Committee began this review by adopting and distributing widely an Issues Paper in which it provided background information and formulated a number of questions to assist those making submissions to it to focus their expressions of opinion on the issues most important to the Committee. (The Committee’s Issues Paper can be found at Appendix A.) Officials from the Department of Justice provided the Committee with a useful comprehensive briefing on this complex part of the *Criminal Code*. Based upon the submissions received from groups and individuals, the Committee held a number of public hearings during which they made presentations and responded to members’ questions. (A list of witnesses can be found at Appendix B and a list of briefs received can be found at Appendix C.)

The findings and recommendations contained in the rest of this report are based upon the submissions received by the Committee from the groups and individuals participating in this process. All options and opinions presented to the Committee were seriously considered. However, the report only deals with those proposals upon which the Committee has a view to express or a recommendation to make.

DEFINITIONS

Mental Disorder

Bill C-30 modernized the insanity test by removing from subsection 16(1) of the *Criminal Code* the phrases “in a state of natural imbecility” and “disease of the mind”, and substituting “mental disorder.” At the same time, “mental disorder” was defined in section 2 of the *Criminal Code* as a “disease of the mind,” thereby preserving the common law rules governing the application of the defence previously known as “insanity.” Subsections 16(2) and (3) make clear that an accused is presumed not to suffer from a mental disorder that would exempt him or her from criminal responsibility and that the burden of establishing the contrary rests with the party that raises the issue.

In its 1977 decision in *R. v. Schwartz*, the Supreme Court of Canada held that capacity to know that an act is wrong meant simply the capacity to know that what one is doing is against the law.[14] The Supreme Court revised that interpretation in its 1990 decision in *R.v. Chaulk*, when a 6-3 majority held that the question for the jury is whether the accused was incapable of knowing that his acts were morally wrong as opposed to merely legally wrong.[15] In so doing, the court pointed out that "morally wrong" was not to be judged by the personal standards of the offender but by his or her awareness that society regards the act as wrong. A 1994 decision of the Supreme Court, in *R. v. Oommen*, further refined the application of the law by establishing that, in order to be held criminally responsible for his or her actions, "[t]he accused must possess the intellectual ability to know right from wrong in an abstract sense. But he or she must also possess the ability to apply that knowledge in a rational way to the alleged criminal act."[16] The Supreme Court's 1980 decision in *R. v. Cooper* specifically limited the scope of the mental disorder defence by holding that the definition of disease of the mind does not extend to self-induced states caused by alcohol or drugs or transitory mental states like hysteria and concussion.[17]

In the years since the new mental disorder provisions were proclaimed, there has been an increase in the number of accused found not criminally responsible (NCR), and at least one highly publicized case where an accused, previously found not criminally responsible, was charged with murder a second time. Not surprisingly, the question has been raised whether the courts' interpretation of mental disorder has operated to excuse too many people from criminal liability.

In reply to questions posed in the Issues Paper circulated in anticipation of this review, the Committee was told that the inclusion of summary conviction offences, and the more transparent and standardized treatment of offenders have both contributed to the increased number of NCR pleas. Furthermore, a majority of participants said that the mental disorder defence is generally applied in a fair and consistent manner by the courts. For example, l'Institut Philippe Pinel saw no reason to attempt to limit or expand the application of the defence since the current application of section 16 by the courts "provides society with sufficient protection," while it "practically never" results in injustice for an accused.[18] For their part, the Mental Disorder Advisory Committee to the Attorney General of Ontario suggested that any problem with the definition "lies in the application of the test, as opposed to the test itself."[19] The Committee agrees with those submissions

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14 *R. v. Schwartz*, [1977] 1 S.C.R. 673.

15 *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

16 *R. v. Oommen*, [1994] 2 S.C.R. 507, at p. 516.

17 *R. v. Cooper*, [1980] 1 S.C.R. 1149.

18 Submission to the Committee, January 2002, p. 3.

19 Submission to the Committee, April 2002, p. 3.

and, consequently, sees no reason to amend the test or definition of "mental disorder" at this time.

RECOMMENDATION 1

The Committee recommends that the defence of "mental disorder" in section 16 and the definition in section 2 of the *Criminal Code* be retained in their present form.

Automatism

Automatism is a common law defence that involves "a state in which the accused can be said to have lost control over his or her conduct because of a mental disorder, a physical illness or condition, a blow to the head, or a psychological shock."[20] Where a "disease of the mind" is the cause of automatism, the "mental disorder" provisions apply. Where a court finds so-called "non-insane" automatism, meaning there is no disease of the mind, the accused is entitled to a complete acquittal. The Supreme Court of Canada made such a finding in a highly publicized 1992 decision, wherein one justice raised the issue of future dangerousness and noted that "the possibility of supervisory orders in this situation may be a matter which Parliament would wish to consider in the near future."[21]

In February 1993, a sub-committee of the Standing Committee on Justice and the Solicitor General recommended that the defence of automatism be recognized in a recodified General Part of the *Criminal Code*, by providing that no one should be liable for conduct that is involuntary, whether the conduct is conscious or unconscious.[22] In June 1993, draft *Criminal Code* amendments that would have defined automatism were circulated by the government; they allowed for a verdict of not criminally responsible on the basis of such a defence, and provided the same range of dispositions now available for mentally disordered accused. The government changed following the 1993 election and the proposals were never introduced in the House of Commons.

In 1999, the Supreme Court of Canada once again considered the defence of automatism and held that a defence of non-mental disorder automatism caused by a psychological blow would require evidence of a trigger that a normal person would find extremely shocking. At the same time, a conclusion that an accused presents a recurring danger to the public would favour a finding of disease of the mind. More than one legal

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[20] Standing Committee on Justice and the Solicitor General, *First Principles: Recodifying the General Part of the Criminal Code of Canada*, First Report, 3rd Session, 34th Parliament, February 1993, p. 39.

[21] *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 914.

[22] *First Principles: Recodifying the General Part of the Criminal Code of Canada*, Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code, February 1993, at p. 43.

commentator has suggested that the defence of non-insane automatism has been significantly restricted, if not eliminated, as a result of the decision in *R*. *v*. *Stone*.[23]

The Committee found a decided lack of consensus in response to questions about automatism raised in the Issues Paper that was circulated prior to the review process. Among the minority of participants who argued that automatism should be defined in the *Criminal Code*, there was no agreement as to the desired outcome. For example, the Canadian Resource Centre for Victims of Crime wanted automatism defined so as to enable courts to impose supervisory orders. The Mental Health Law Program of the B.C. Community Legal Assistance Society, on the other hand, would define automatism to retain the possibility of a complete acquittal. In the end, a majority of participants either rejected codification outright or, like the Canadian Bar Association, expressed reservations based on the complexity of the legal and psychiatric questions that should be resolved beforehand.

Although the Committee has no data on how often the defence of automatism is raised, it does appear to be given a relatively narrow application by the courts. Given that the Committee heard little support for codification and saw no agreement among participants as to the kinds of mental states that should be included in any definition, or the consequences that should flow from a finding of automatism, we are not prepared to recommend codification at this time.

RECOMMENDATION 2

The Committee recommends that the definition and application of the law relating to "automatism," both sane and insane, be left to the courts.

Fitness

Until Bill C-30 provided a new definition and criteria for "fitness" to stand trial in section 2 of the *Criminal Code,* the concept had not previously been spelled out in legislation. Section 672.58 also gave courts the power to order involuntary treatment of a mentally disordered accused, for the purpose of rendering him or her fit to stand trial. Furthermore, section 672.33 requires the court to conduct a biennial review of the case of an accused found to be "unfit," to ensure that sufficient evidence exists to bring them to trial. If not, the accused is entitled to an acquittal.

Section 2 of the *Criminal Code* defines "unfit to stand trial" as being, on account of mental disorder, unable to conduct a defence or instruct counsel because of an inability to understand the nature or object of the proceedings or their possible consequences, or to

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[23] *R*. *v*. *Stone* [1999] 2 S.C.R. 290.

communicate with counsel. The Ontario Court of Appeal decision in *R. v. Taylor* set the standard for fitness by holding that an accused needs only a "limited cognitive capacity" to understand the process and communicate with counsel.[24] Although the Supreme Court of Canada affirmed that test in *R. v. Whittle*,[25] it has been argued that an accused needs "analytical capacity" in order to ensure the ability to act in his or her best interests. In recognition of the controversy, the question of the appropriateness of the *Criminal Code* fitness test was referred to the Federal-Provincial-Territorial Working Group on Mental Disorder. In 1999, the Working Group tabled a paper at the Uniform Law Conference of Canada that expressed the view that the existing *Criminal Code* test and definition provided adequate protection for unfit persons and adequate guidance to the courts.

During the course of this review, the Committee heard conflicting opinions as to the adequacy of the present test for fitness to stand trial. For example, Malcolm Jeffcock of Nova Scotia Legal Aid argued that an accused should be able to demonstrate an awareness of the consequences of decisions he or she must make, in order to be considered fit. Similarly, the Canadian Bar Association took the position that the integrity of the justice system requires that an accused be able to communicate effectively and provide reasonable instructions to counsel. The Canadian Psychiatric Association and l'Institut Phillipe Pinel, for their part, expressed the view that a higher level of functioning should be required of persons attempting to defend themselves. In contrast, the Mental Health Law Program of the B.C. Community Legal Assistance Society recommended simplifying the test, arguing that some accused who are developmentally delayed, or have organic brain injuries or fetal alcohol syndrome could remain unfit indefinitely under the current criteria.

Although a more rigorous test for fitness could expand the class of individuals whose "unfit" status is not amenable to treatment, we are of the view that the problem of permanent "unfitness" should be dealt with by providing expanded powers to the courts, as set out elsewhere in this report. Concerning the threshold test for "unfit to stand trial," we are aware of the merits of a test that allows for a speedy resolution of criminal charges for as many accused as possible. However, in light of concerns expressed that the existing common law test could result in an unfair process for some, the Committee would ask the Minister of Justice to consider an amendment to section 2 of the Code that an accused at least possess the capacity to make rational decisions or act in his or her best interests, notwithstanding a refusal to do so.

RECOMMENDATION 3

The Committee recommends that the federal Minister of Justice review the definition of "unfit to stand trial" in section 2 of the *Criminal Code* to consider any additional requirements to determine effectively an

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[24] *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.).

[25] *R. v. Whittle*, [1994] 2 S.C.R. 914.

accussed's fitness to stand trial, including a test of real or effective ability to communicate and provide reasonable instructions to counsel.

COURT/REVIEW BOARD POWERS

Fitness to be Sentenced

The test for "fitness to stand trial" is dealt with in great detail elsewhere in this report. A gap in the definition has been brought to the Committee's attention by several of those participating in its review process, including the British Columbia Civil Liberties Association, the Mental Disorder Advisory Committee to the Attorney General of Ontario, and the Association of Canadian Review Board Chairs.

The definition of unfitness to stand trial found at section 2 of the *Criminal Code* in its present form covers the criminal proceedings at any stage up to the rendering of the verdict. The Code does not provide for the accused who is fit at the time of conviction, but becomes unfit between that date and the imposition of the sentence by the court having jurisdiction. The court cannot order a fitness assessment under section 672.11 of the Code and the Review Board cannot assume jurisdiction over the convicted accused at this stage of the proceedings under section 672.38 of the Code.

In such a situation, the unfit convicted person cannot participate meaningfully in the pre-sentence process and is unlikely to be able to properly instruct counsel. As the Committee was told by some of those sitting in our courts and having direct experience with these types of situations, the law in its present form leaves judges with the prospect either of sentencing unfit convicted persons or distorting the law to avoid doing so. This puts sentencing judges into an untenable situation.

The Committee believes that this gap in the present law must be filled. This can be easily done. The section 2 definition of " unfit to stand trial" should have the words "and to be sentenced" added to the title, and the words "or sentence imposed" added to the definition itself after the words "verdict is rendered." This change in the definition of fitness to stand trial will have to be accompanied by amendments to section 672.11(*a*) of the Code, allowing the court to order an assessment of a convicted accused after conviction and before sentencing, and subsection 672.38(1) of the Code, providing the Review Board with jurisdiction over such a person declared unfit before sentencing.

RECOMMENDATION 4

The Committee recommends that the definition of "unfit to stand trial" in section 2 of the *Criminal Code* be amended by adding the words "and to be sentenced" to the title and the words "or sentence imposed" after the words "verdict is rendered" in the definition itself.

As well, section 672.11(*a*) of the Code should be amended to allow the court to order an assessment in such cases. Finally, subsection 672.38(1) of the Code should be amended to give the Review Board jurisdiction in such cases.

Permanently Unfit Accused

A number of those making submissions to us expressed serious concerns about the treatment under Part XX.I of the *Criminal Code* accorded to unfit accused persons with little or no prospect of becoming fit and being sent to trial. These concerns were expressed with respect to those suffering from Fetal Alcohol Syndrome/Effect, organic brain damage, intellectual disability, or developmental delay. These conditions are not easily amenable to treatment or cure — and the consequence is that those suffering from them are unlikely to be capable of becoming fit enough to face trial. Many of these people do not represent a risk to the community.

Once a person has been found unfit to stand trial, section 672.33 of the *Criminal Code* requires the court to review the case every two years thereafter until the person has been determined to be fit to go to trial or the court has acquitted the accused because the Crown is no longer able to make a *prima facie* case of the accused`s guilt. As well, the unfit accused can at any time have the court review the case for the same reasons. The burden of proof at any of these hearings is on the Crown to establish that it can still make a *prima facie* case of the unfit accused's guilt.

Section 672.54 of the *Criminal Code* sets out the dispositions available to the court and the Review Board with respect to the unfit accused and those found not criminally responsible because of mental disorder. In cases of unfit accused and those found not criminally responsible because of mental disorder, the court or Review Board may order that the person be detained or discharged subject to appropriate conditions. A court or review board can only order the absolute discharge without conditions of those found not criminally responsible because of mental disorder — such a disposition is not available with respect to unfit accused persons.

This provision of the Code requires the court or Review Board making these dispositions to take into account the need to protect the public from dangerous people, the mental condition of the accused, the reintegration of the accused into the community, and the other needs of the accused person.

These provisions, and others, of the Code largely accord the same legal treatment to both unfit accused and those found not criminally responsible because of mental disorder. The obvious exception to this equivalency of treatment is the unavailability of absolute discharges to those found unfit to stand trial. The unfit accused has not yet been adjudged criminally liable for the alleged offences and yet has a lesser level of access to

a variety of dispositions than a person whose guilt has been adjudged, but has been found to be not criminally responsible for the imputed actions.

As well, this reduced array of dispositions has the effect of adversely affecting those whose fitness to stand trial has little or no likelihood of being attained. This would result in them being subject to court or Review Board dispositions for the rest of their lives unless the Crown stays the charges or the court acquits the unfit accused because the Crown is unable to continue to make a *prima facie* case of the accused's likely guilt. Neither of these latter eventualities necessarily takes into account the nature of the unfit accused's condition or disability.

The current state of the available dispositions assumes that an accused's unfit condition is a temporary one that can be addressed through treatment or medication, thus enabling the accused to become fit and face trial.

Many of those making submissions to us have addressed this issue. The Criminal Lawyers Association, the Canadian Association for Community Living, the Mental Health Law Program of the B.C. Community Legal Assistance Society, Malcolm Jeffcock of Nova Scotia Legal Aid, the Mood Disorder Society of Canada, the Empowerment Council, the Association of Canadian Review Board Chairs, and the British Columbia Civil Liberties Association all recommended the review boards have the power to absolutely discharge unfit accused persons.

The Committee agrees that the difference in the dispositions available to unfit and not criminally responsible accused persons must be addressed. This issue takes on even greater importance in light of the recommendation made by the Committee elsewhere in this report that the unproclaimed capping provisions contained in the *Criminal Code* should be repealed. Steps must be taken to ensure that the same array of dispositions available to not criminally responsible accused persons is also available to unfit accused persons suffering from conditions or disabilities that are not amenable to medication or treatment to make them fit to stand trial.

The Committee does not agree with those who propose that review boards alone, or both courts and review boards, should be given the power to absolutely discharge unfit accused unlikely to ever be rendered fit to stand trial.

This disposition should be available to the courts alone, allowing the review boards to make relevant recommendations only to the court having this jurisdiction. This would allow the court to assess not only whether the unfit accused constitutes a risk to the community, one of the major factors to be taken into account by the Review Board in making its dispositions, but also the general public interest and the impact upon victims of any such absolute discharge of an unfit accused person unlikely to be made fit for trial. This would allow the court to take into account any recommendations or clinical observations the Review Board may want to make, and permit the Crown to bring forward any information or evidence not available to the Board.

This proposal would allow the court to absolutely discharge an unfit accused in cases where the Crown is still able to make a *prima facie* case of the accused's likely guilt but the public interest requires an absolute discharge. Subsection 673.33(6) of the Code at the present time only allows the court to acquit the unfit accused if the Crown is no longer able to make a p*rima facie* case — the nature of the accused's condition is not a factor in this determination.

RECOMMENDATION 5

The Committee recommends that section 672.54 of the *Criminal Code* be amended to allow the courts to absolutely discharge a permanently unfit accused either on its own volition or following the recommendation of a review board.

Victim Participation

There have been many changes since the late 1980's in the rights and entitlements accorded at the federal and provincial levels to the victims of crime. The first amendments to the *Criminal Code* were adopted by Parliament in 1989, with the most recent, including additions to Part XX.I, being in 1999. Since its adoption in 1992, the *Corrections and Conditional Release Act* has provided for victims' rights of access to offender information and other entitlements. A predecessor to this Committee reported comprehensively in 1998 on victims' issues, as did a sub-committee of this Committee which, in May 2000, reported on its review of the provisions and operation of the *Corrections and Conditional Release Act*.

The mental disorder provisions of the *Criminal Code* have only a limited number of provisions dealing with the interests of victims. Subsection 672.5(14) of the Code allows the victim of an offence to prepare and file with the court or Review Board a written Victim Impact Statement that describes the harm done or the loss suffered as a result of the offence. Section 672.541 requires the court or Review Board at a disposition hearing in the case of an accused found not criminally responsible because of mental disorder to take into consideration a Victim Impact Statement filed with it.

For victims to exercise the right to file a Victim Impact Statement, they must know that a dispositional hearing is to be held by the court or Review Board. Subsection 672.5(5) of the Code requires that the parties and the Attorney General be given notice of a dispositional hearing — no one else is mentioned explicitly in this provision.

The *Corrections and Conditional Release Act* allows for victims who so choose to be provided with offender information, including the dates of hearings where offender access to various forms of conditional release is to be considered. This provision enables victims to determine whether they wish to provide the releasing authority with information as to the impact of the offence on them and any concerns about the release they may

have. It also enables victims to decide if they want to attend the conditional release hearings as observers.

The Committee believes that a similar provision should be added to the mental disorder provisions of the Code. This would allow the victim of an offender found not criminally responsible because of mental disorder to follow the case in which he or she is involved and determine the degree of his or her participation in it. The availability of such a right to victims is illusory if they are not aware of such an entitlement. It is therefore essential that courts, review boards, and victims services programs be required to advise victims of this right.

RECOMMENDATION 6

The Committee recommends that subsection 672.5(5) of the *Criminal Code* be amended to require a court or Review Board conducting a hearing to so notify a victim, if an interest in being notified is given by that person. As well, the Code should be amended to require that victims be notified of their rights and entitlements.

Court and Review Board dispositional hearings consider a wide variety of information, some of it personal and sensitive in nature. It may deal both with the condition and treatment of the mentally disordered offender, and with the circumstances of the offence. As well, the contents of the Victim Impact Statement are also to be considered. The Association of Canadian Review Board Chairs told the Committee in its brief that there are a number of third party privacy interests belonging to victims, children, family members, and others that are not adequately protected by the law in its current state.

Subsection 672.51(11) of the Code prohibits the publication in the media of information which has been withheld from the accused or which would damage the interests of the accused. The Committee believes this provision does not protect all interests that have to be safeguarded.

RECOMMENDATION 7

The Committee recommends that subsection 672.51(7) and (11) of the *Criminal Code* be amended to allow the court or Review Board conducting a disposition hearing to issue a publication ban for the benefit of third parties.

The Committee heard *in camera* testimony from a witness who was seriously injured by an accused later declared to be not criminally responsible by reason of mental disorder. After a number of years of difficult recovery, this victim attended Review Board disposition hearings. This person, who had with great courage built a new life, urged the

Committee to recommend that victims be permitted to present their Victim Impact Statements orally to review boards.

As has been set out earlier in this report, victims can file Victim Impact Statements, and courts and review boards are required to consider them in making disposition determinations. It is instructive to compare this situation with what prevails in the sentencing and conditional release contexts.

Since 1999, subsection 722(2.1) of the *Criminal Code* requires the sentencing judge to allow a victim so requesting it to read or deliver in some other fashion the Victim Impact Statement filed with the court. Since July 2001, victims have been able to give their Victim Impact Statements orally at National Parole Board hearings.

The Committee believes this entitlement should be extended to the mental disorder process context. Because of the unique role, however, with respect to mentally disordered accused played by the courts and review boards, a small number of adaptations have to be made to allow victims to present their Victim Impact Statements orally.

At this stage of the criminal justice process, the accused has been determined to be not criminally responsible by reason of mental disorder. The concern of the court or the Review Board is the risk posed by the accused, should there be an absolute or conditional discharge. The oral statement to be made by the victim should therefore be limited to this issue. The victim should be able to set out any personal safety concerns he or she may have and any release conditions that may be required to address them. Finally, the majority of the Committee felt that not every victim filing a Victim Impact Statement should be able to present it orally — they believe the court or Review Board should have discretion to determine the circumstances in which victims will be allowed to address them orally. Any amendments to the Code should set out criteria for determining the circumstances in which oral statements by victims will be permissible.

RECOMMENDATION 8

The Committee recommends that section 672.541 of the *Criminal Code* be amended to allow for the oral or other form of presentation of Victim Impact Statements at disposition hearings held by the court or Review Board.

Enforcement of Dispositions

Section 672.85 of the *Criminal Code* deals with the bringing of an accused before the Review Board for a disposition hearing. Where the accused is in custody, the institution where that person is found can be ordered by the Review Board chairperson to bring him or her to the hearing at the time or place for it. If the accused is not in custody, a

summons or warrant can be issued by the chairperson of the Review Board to compel his or her attendance at the time and place set for the hearing.

The Association of Canadian Review Board Chairs has identified a serious problem with this provision with respect to accused persons not in custody. It does not allow for detention of the accused prior to and until the date the hearing is held. In effect, the law in its present state only allows for the police to detain the accused on the date of the hearing and to deliver him or her on that date.

Section 672.91 of the Code allows a police officer to arrest without warrant an accused reasonably believed to have contravened or failed to comply with a disposition or condition thereof. This type of situation could arise where the accused has not attended counselling or treatment programs, or has failed to take medication — not uncommon components of a conditional discharge.

The Association of Canadian Review Board Chairs has also identified a problem with this provision. Police forces are reluctant to use this warrantless process because it does not provide for detention of the accused until their appearance before a justice. As well, detention centres and hospitals are also reluctant to accept such accused for the same reason.

During his appearance before us, Ontario Judge Ted Ormston described graphically the daily experience in his court in dealing with mentally disordered offenders. He expressed particular frustration in the non-existence of sanctions in the Code applicable to those in breach of any dispositions he might prescribe. There are, however, sanctions for breach of a probation order.

The Committee agrees with these submissions and believes the adoption of the following recommendation will close obvious gaps in the mental disorder provisions of the *Criminal Code*.

Although we believe these gaps in the law should be filled, we would like to make a cautionary comment. Concerns have been expressed about the need to make these amendments in a manner consistent with the *Canadian Charter of Rights and Freedoms*. The Committee expects the amendments it recommends in this part of the report to be narrowly drafted and Charter compliant.

RECOMMENDATION 9

The Committee recommends that sections 672.85 and 672.91 of the *Criminal Code* be amended to allow for interim temporary detention until appearance before a disposition hearing or a justice as the case may be. The Committee further recommends that the *Criminal Code* be

amended to establish an offence of failing to comply with a disposition order made by a court or Review Board.

COURT/REVIEW BOARD PROCEDURE

Qualifications for Fitness Assessments

Sections 672.11 and 672.12 of the *Criminal Code* set out the circumstances under which a court is empowered to order an assessment of an accused's mental condition, for the purposes of determining whether he or she is "unfit to stand trial." The definition in Section 672.1 makes clear that a medical practitioner must complete any such assessment.

The Committee received submissions from a variety of sources regarding the necessary qualifications for assessing whether an accused is fit to stand trial. For example, the Association of Canadian Review Board Chairs expressed the view that psychologists are equally qualified to conduct assessments and pointed out that there are some jurisdictions where psychiatrists are in short supply. Professor Ronald Roesch also recommended amendments to the *Criminal Code* "to reflect the reality that other professionals have the training and competence to conduct these evaluations".[26] The Canadian Psychiatric Association disagreed with that position, arguing that diagnosis and treatment of mental disorder is a medical act that should be carried out by a medical practitioner.

It was often unclear from written submissions or evidence heard at hearings whether the above recommendations were intended to apply only to assessments done for the purposes of determining fitness to stand trial. It appears that at least some participants thought that psychologists should also be involved in assessments for other purposes. Since assessments done to determine mental state at the time of an offence are qualitatively different from those done to determine fitness, it may well be that they require different skills. For that reason, the Committee suggests that the Department of Justice enter into discussions with Review Board Chairs and provincial and territorial officials to determine just how broad an expansion of these powers is indicated.

In the meantime, the Committee finds itself in agreement with Dr. Derek Eaves who thought that those with the requisite training should be able to conduct fitness assessments, whether they are psychiatrists or psychologists. The chronic shortage of resources in the forensic mental health system serves to make this argument even more compelling. Given the apparent consensus that many other health care professionals with necessary training are quite capable of assessing an accused's "fitness" to stand trial, we

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[26] Submission to the Committee, April 2002, p. 3.

are content to leave the specifics of those training requirements to the Department of Justice and its provincial and territorial counterparts.

RECOMMENDATION 10

The Committee recommends that the definition of "assessment" in section 672.1 be amended to expand, but not make mandatory, the class of persons qualified to assess whether an accused is unfit to stand trial.

Representing the Public Interest

Section 672.5 of the *Criminal Code* sets out the rights of parties and the procedures to be followed when a court or Review Board conducts a hearing to make or review a disposition. Subsections 672.5(3) and (5) require that the Attorney General of the province be given notice and, upon application, made a party to the proceedings. However, the Attorney General is not obliged to send a representative.

The Committee was told that practices varied between provinces. Some report the attendance of Crown counsel on a routine basis, while others note that the Attorney General is represented only some of the time. Dr. John Bradford and Dr. Derek Eaves expressed the view that Crown counsel should be present at all Review Board hearings, given their role in protecting the public. Dr. Eaves, in particular, argued that it is inappropriate to expect the hospitals to represent the public interest, given that their role is to provide evidence regarding treatment response.

The Committee agrees that there will be many instances where the Attorney General of the province should be represented at a disposition hearing, or at least provide a written indication of the Crown's position. However, we also understand that attendance of Crown Counsel requires the allocation of resources, a matter within the control and responsibility of the provinces. For that reason, the Committee believes that this is a matter requiring consultation between the federal, provincial and territorial Ministers responsible for Justice.

RECOMMENDATION 11

The Committee recommends that federal, provincial and territorial ministers responsible for Justice review procedures at disposition hearings to determine whether the public interest would be better served by the mandatory representation of provincial Crown attorneys.

Transfers

Part XX.I of the *Criminal Code* contains provisions to facilitate the interprovincial transfer of accused persons. For example, section 672.86 allows for transfer of an accused who is in custody or subject to a hospital treatment disposition, on the recommendation of the transferring Review Board and with the consent of both provincial attorneys general. According to section 672.88, the Review Board of the receiving province then has jurisdiction over the accused, unless both attorneys general agree to allow the transferring Review Board to retain jurisdiction. Section 672.89 also allows for transfer of an accused who is in custody, without the consent of the receiving Attorney General, but in that case the transferring Review Board retains jurisdiction over and responsibility for the accused unless the two attorneys general agree that the new Review Board will have control over the accused.

The British Columbia Forensic Psychiatric Services Commission suggested that the transfer process should be better coordinated. The Mental Health Law Program of the B.C. Community Legal Assistance Society argued that the co-operation of the review boards is sufficient for out-of-custody transfers and that the consent of the attorneys general is not required, although they were being treated as though consent were necessary. In addition, the Mental Health Law Program of the B.C. Community Legal Assistance Society thought there should be a specific procedure and guidelines to cover the matter of transfers from youth treatment facilities to adult treatment facilities.

RECOMMENDATION 12

The Committee recommends that federal, provincial and territorial ministers responsible for Justice review practices and procedures for transferring youth to other forensic psychiatric facilities and accused to other jurisdictions to determine whether the *Criminal Code* should be amended to provide greater clarity.

AS YET UNPROCLAIMED PROVISIONS

Among the more controversial provisions of Bill C-30 were several that were not proclaimed. They include the same “capping” provisions as were proposed in the 1986 draft legislation, the companion “dangerous mentally disordered accused” provisions, and the “hospital orders” provisions intended to benefit convicted offenders whose criminal responsibility was not negated by reason of mental disorder but who nevertheless required treatment. At the time Bill C-30 was tabled in the House of Commons, then-Justice Minister Campbell indicated that these provisions would not be proclaimed until the provinces had been given a reasonable time to amend their laws as required. In part because of the provinces’ jurisdiction over civil commitment proceedings and the potential costs of implementing some of the inoperative sections, their proclamation has continued to be a matter of some controversy.

Capping

As mentioned elsewhere in this report, the Law Reform Commission of Canada had been highly critical of the indefinite nature of the detention faced by persons found "not guilty by reason of insanity." Furthermore, the Supreme Court of Canada, in the *Swain* decision, found that the resulting automatic committal to custody for an indeterminate period violated sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. In response to those concerns, the proposed "capping" provisions in section 672.64 of the *Criminal Code* were intended to limit the length of time that an unfit or mentally disordered accused person could be detained, having regard to the nature of their "offence" and the maximum penalties available if they had been convicted. Nevertheless, the intention was that persons still viewed as potentially dangerous at the end of their statutory cap, "could be involuntarily committed to a secure hospital under the authority of the provincial mental health legislation."[27]

Following implementation of the mental disorder provisions, the Supreme Court of Canada had occasion to review numerous aspects of the new legislative scheme in a series of cases, most notably *Winko v. British Columbia (Forensic Psychiatric Institution),* where the Court was asked to consider whether the operation of Part XX.I of the *Criminal Code* offended *Charter* rights.[28] The Supreme Court held, unanimously, that the potentially indefinite period of supervision now mandated in Part XX.I does not offend sections 7 or 15 of the *Canadian Charter of Rights and Freedoms.* Comparing the fate of persons convicted with the fate of mentally disordered accused persons, the Court found that "because the NCR accused's liberty is not restricted for the purposes of punishment, there is no corresponding reason for finitude".[29]

Generally speaking, the majority of the support for proclamation of the capping provisions came from legal representatives, advocacy groups and civil liberties organizations. In summary, they argued that a serious inequity results when NCR accused can spend a much longer period of time under supervision than if they were convicted. Many also asserted that the provincial mental health laws could be used for those requiring further detention for the protection of themselves or others. It was also suggested that the capping provisions would provide at least some way out of the forensic psychiatric system for permanently "unfit" accused.

Virtually all treatment providers who participated in the review process were of the view that the capping provisions should not be proclaimed. Many based their objections on the perceived inadequacy of some provincial mental health Acts and services for dealing with those NCR accused who would be released from the forensic system as a

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[27] Department of Justice, *Mental Disorder Amendments to the Criminal Code*, Information Paper, September 1991, p. 6.

[28] *Winko v. British Columbia (Forensic Psychiatric Institution)*, [1999] 2 S.C.R. 625.

[29] Ibid., p. 684.

result. They were also concerned that the Dangerous Mentally Disordered Accused provisions, if enacted, were not a sufficient answer.

Given the lack of uniformity in provincial legislation and services affecting mentally disordered accused, along with the concerns expressed by treatment professionals and others familiar with resource limitations, the Committee agrees that there could be significant risks involved in proclaiming the capping provisions at this time. The Committee also notes there was scant evidence of support for such a move on the part of the provinces whose civil mental health systems would be faced with the management of those accused placed outside the review boards' jurisdiction as a result. On a more positive note, the Committee is persuaded that the scheme enacted in Part XX.I of the Code has brought about a dramatically improved situation for NCR accused, as acknowledged by the Supreme Court of Canada decision in *Winko*. Consequently, we see little, if any, need to proclaim the capping provisions. Furthermore, because we believe that the *Criminal Code* should accurately reflect the intentions of Parliament, the Committee has concluded that the unproclaimed sections should be repealed.

RECOMMENDATION 13

The Committee recommends that sections 672.65, 672.66, 672.79 and 672.8 of the *Criminal Code* (Capping of Dispositions) be repealed.

Dangerous Mentally Disordered Accused

The Dangerous Mentally Disordered Accused (DMDA) provisions were included in Bill C-30 as a means of extending the "cap" for mentally disordered persons accused of a "serious personal injury offence" carrying a penalty of imprisonment for ten years or more. Patterned after the "dangerous offender" scheme found in the *Criminal Code* allowing for persons convicted of a serious personal injury offence to be sentenced indeterminately, the DMDA provisions were intended to enable the courts, in special circumstances, to substitute a life "cap" for the ten-year cap that would otherwise apply.

A majority of the participants in this review process agreed that it would be necessary to proclaim the Dangerous Mentally Disordered Accused provisions if the capping provisions were brought into force. Reiterating that the Committee is opposed to such a move, we agree that capping would necessitate proclamation of the DMDA provisions.

The DMDA designation was intended to mitigate the potential risks engendered by the capping provisions. However, at this time, an NCR accused can be subject to supervision indefinitely, as decided by the court or Review Board. Therefore, so long as the capping provisions are not proclaimed in force, the Committee sees nothing to be gained by proclaiming the DMDA provisions. Furthermore, as with the capping provisions, the Committee believes that they should be repealed.

RECOMMENDATION 14

The Committee recommends that sections 672.65, 672.66, 672.79 and 672.8 of the *Criminal Code* (Dangerous Mentally Disordered Accused) be repealed.

Hospital Orders

The Law Reform Commission's 1976 Report recommended that a therapeutic disposition be made available for persons held criminally responsible for their actions who are, nevertheless, suffering from a mental disorder. Bill C-30 contained such a provision to allow judges to order detention in a treatment facility "as the initial part of a sentence of imprisonment." If proclaimed, section 747 of the *Criminal Code* would allow a sentencing judge to order up to 60 days' treatment for an individual suffering from a mental disorder "in an acute phase," in order "to prevent further significant deterioration of the mental or physical health of the offender, or to prevent the offender from causing serious bodily harm to any person." In response to the concerns of some of the provinces about the potential costs of such a move, the Minister of Justice agreed to postpone proclamation, "to allow pilot projects to be conducted in two or three provinces so that empirical data could be gathered on utilization and costs."[30]

Advocates and interest groups have called for proclamation of these provisions, even though the Supreme Court of Canada decision in *Knoblauch* made clear that treatment orders are already available as part of a conditional sentence.[31]

The Committee heard some support for proclaiming the hospital orders provisions. For example, Dr. John Bradford expressed the view that judges would make frequent use of the provisions if they were in force, although he did acknowledge that they would raise significant resource issues for the provinces. Likewise, Malcolm Jeffcock of Nova Scotia Legal Aid was in favour of allowing for hospital orders, albeit with the caveat that the court should first have to determine that existing *Criminal Code* sentencing principles actually call for a period of incarceration. Although the British Columbia Civil Liberties Association argued that proclamation would improve matters, their brief conceded that hospital orders alone would not meet the treatment needs of mentally ill offenders.

A majority of review participants did not support proclamation of the hospital orders provisions, albeit for a variety of reasons. Dr. Derek Eaves was concerned that hospital orders could encourage the criminalization of patients as a means of getting access to

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30 Tollefson and Starkman (1993), p. 144.

31 In *R. v. Knoblauch*, [2000] 2 S.C.R. 780, the Supreme Court upheld a conditional sentence of two years less a day which required the offender to reside "in a locked secure psychiatric treatment unit where he was currently receiving treatment, until a consensus of psychiatric professionals made a decision to transfer him from that locked unit."

treatment. Both l'Institut Philippe Pinel and the Mood Disorder Society of Canada expressed the view that the hospital orders would be of little use as currently drafted since more than 60 days' treatment would be required in most cases. However, some participants opposed proclamation of the hospital orders provisions out of concern for the additional demands that would be placed on an already overburdened mental health system. For example, the Forensic Service of St. Joseph's Health Care argued that Ontario would not be able to meet the added demand. Likewise, the Criminal Lawyers Association pointed out that the successful placement of offenders was unlikely to happen in a system where individuals are not now being assessed within the time frames set out in the legislation. Others, like the Canadian Psychiatric Association and Dr. Arboleda-Florez, suggested that proclamation of the hospital orders provisions could negatively affect the resources now devoted to general mental health services.

The Committee was impressed with the virtually unanimous expressions of concern about the lack of adequate treatment for some mentally ill offenders, especially those outside the federal prison system. We are also in agreement with Dr. John Bradford's position that incarcerated individuals who suffer from a mental illness require the same standard of treatment as anyone else. However, we are also aware that the delivery of mental health services is a matter that falls primarily within the responsibility of the provinces as part of their jurisdiction over health care. We are also persuaded that hospitals and other components of the mental health system are currently strained to the limits of their capacity. Therefore, the Committee has concluded it would be irresponsible and unrealistic to recommend the implementation of provisions that would place greater burdens on institutions that are the legal and fiscal responsibility of another level of government.

RECOMMENDATION 15

The Committee recommends that sections 747-747.8 of the *Criminal Code* (Hospital Orders) be repealed.

SYSTEMIC ISSUES

Resources

Legislation adopted by Parliament, with even the best policy intentions and law reform goals, can result in unintended consequences, not foreseen at the time of development. Part XX.I of the *Criminal Code* is an illustration of this phenomenon. It is a progressive legislative scheme, *Charter* compliant and transparent in its operation. It has, however, resulted in an increase of mentally disordered accused being processed by this component of the criminal justice system. This has led to pressures on the forensic psychiatric system, causing stresses on the mental health system and community resources.

The issues dealt with in this report are complex. Not only is Part XX.I of the *Criminal Code* difficult in itself to interpret, but its application involves points of intersection between and among a number of federal, provincial, and territorial programs and institutions. To mention only a few, the courts, review boards, law enforcement agencies, mental health institutions, forensic psychiatric institutions, federal and provincial correctional systems, and others are involved directly or indirectly in addressing the needs of mentally disordered offenders.

In recent years, each of these components of the complex of institutions dealing with mentally disordered offenders has been under intense stress due to changes in budget allocations, changing approaches to dealing with this segment of the population, mentally disordered offenders being dealt with by institutions without the required capacity to be effective, and the growing number of those in need of care, support and treatment.

Virtually everyone appearing before us from all parts of the country, from all components of the mental health and criminal justice systems, and with differing opinions on many issues, identified inadequate resources as a major problem. They expressed the view that the goals of the legislation put in place to deal with the needs of mentally disordered offenders are often frustrated by unavailable or inadequate services, inaccessible or non-existent treatment program resources, or inadequate or unavailable beds in institutions.

The adequacy of resources allocated to the care and needs of mentally disordered offenders was identified as an important issue requiring serious attention by, among others, Dr. Arboleda-Florez, Chief of Psychiatry, Queen's Affiliated Hospitals, Kingston, Ontario, the Criminal Lawyers Association, the Mental Health Law Program of the B.C. Community Legal Assistance Society, and Malcolm Jeffcock of Nova Scotia Legal Aid.

The Committee finds compelling the submissions it has received from a diverse range of people involved in all components of the systems in place to meet the needs of mentally disordered offenders. Because the call for added resources was so constant during our review, the Committee believes that the federal, provincial, and territorial ministers responsible for Justice should review this issue at the earliest opportunity. Such a review should determine the extent of resources available to address the needs of mentally disordered offenders, whether they are allocated at a level sufficient to meet those needs, and whether they are allocated effectively among different types of institutions to meet those needs. If those resources are not at an adequate level or are not allocated effectively among different types of institutions, federal, provincial, and territorial ministers responsible for Justice should collaboratively take the necessary steps to deal with these imbalances.

RECOMMENDATION 16

The Committee recommends that the federal, provincial, and territorial ministers responsible for Justice review the level of resources

available to deal with the needs of mentally disordered accused and offenders so as to determine whether they are being used effectively and to see if the level of budgetary allocations is adequate to meet those needs.

Education

A number of those making submissions to us recommended that more educational efforts are required both for the general public and for those dealing directly with mentally disordered offenders within the different institutions with which they come into contact.

In the opinion of some of those appearing before us, mental illness and mental disorder are associated in the minds of many members of the public with violent behaviour and dangerousness. This stereotype is rarely reflected in the lived reality of those dealing daily with the mentally ill and the mentally disordered.

As well, we have been told that some of those who have to deal on a daily basis with mentally disordered offenders have not been adequately educated about the conditions from which these people may be suffering and how to deal with them in day-to-day situations. As well, some of those involved in one way or another with Part XX.I of the *Criminal Code* do not fully understand how to apply it properly, leading to unusual outcomes.

Among others, the Mood Disorder Society of Canada has recommended that officials within the criminal justice system, including judges, lawyers, law enforcement officers, and corrections staff, should be provided with training opportunities and education with respect to mental disorders and their treatment. The Committee agrees.

RECOMMENDATION 17

The Committee recommends that the federal, provincial, and territorial ministers responsible for Justice take the necessary steps to ensure that education programs on mental health and forensic systems, and related issues, are developed for, and delivered to, judges, lawyers, court personnel, law enforcement personnel, corrections staff and others coming into contact with mentally disordered accused and offenders. As well, a similar education program should be developed for delivery to the public to dispel stereotypes surrounding mental illness.

Research and Data Collection

To complete this review, the Committee has had to rely almost exclusively on the efforts of its research staff and the relatively small volume of Canadian research addressed to the issues at the core of this study. The submissions made to the Committee, and the material made available to it by many of those appearing before it were invaluable for the effective completion of this statutorily mandated review.

However useful all of this material was to the conduct of this review, more and better data would have been even more helpful. Anecdote-based, partial information is no substitute for systematic, broad-based data collection and analysis. Because of its limited resources, the Committee did not have the benefit of such data.

It is interesting to compare this statutory review with that of the *Corrections and Conditional Release Act* completed in May 2000 by a sub-committee of this Committee. In preparation for that review, the Department of the Solicitor General published in excess of 20 research reports and a consolidated report for the use of that Sub-Committee in its review, mandated by Parliament. This data provided that Sub-Committee and those participating in its review with a large volume of data upon which that process could be based.

Unfortunately, the Department of Justice did not engage in a similar, extensive data collection process in preparation for this review. One of the consequences of the lack of systematically collected, reliable data is that this review has not been as thorough as it could have been. The failure of the Department of Justice to systematically collect this type of data also means that it will not be in a position to respond knowledgeably and comprehensively to the findings and recommendations contained in this report.

The Committee agrees with the submission made by 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. This is especially important, as will become obvious in the next part of this report, for the carrying out of another statutorily required parliamentary review of Part XX.I of the *Criminal Code*.

RECOMMENDATION 18

The Committee recommends that the Department of Justice and other relevant departments and agencies, in collaboration with their provincial and territorial counterparts, collect, process, and analyze the data necessary to facilitate a further parliamentary review of Part XX.I of the *Criminal Code* in 2007.

Another Statutory Review

This review was carried out because of an obligation Parliament placed upon itself when it adopted the legislation inserting Part XX.I into the *Criminal Code*. This report should be seen as a starting point for Parliament's involvement in the issue of the treatment of mentally disordered offenders.

The findings and recommendations contained in this report set out the Committee's views as to the direction law reform and policy development in this area should take. The next step will be the government response to this report. The Committee believes that Parliament's function should not stop there, but should continue. We have therefore come to the conclusion that this can be best effected by a further parliamentary review of Part XX.I of the *Criminal Code* five years from now. It is expected that at that time, comprehensive, reliable data will have been collected on the functioning of the mental disorder provisions so as to ensure that this future review is a thorough one.

RECOMMENDATION 19

The Committee recommends that the legislation implementing the recommendations contained in this report include a requirement for a further review of the provisions and operation of Part XX.I of the *Criminal Code* within five years of the legislation coming into effect. If no such legislation is adopted by Parliament, it should designate a committee to review the provisions and operation of Part XX.I of the *Criminal Code* in 2007.

LISTE OF RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that the defence of "mental disorder" in section 16 and the definition in section 2 of the *Criminal Code* be retained in their present form.

RECOMMENDATION 2

The Committee recommends that the definition and application of the law relating to "automatism," both sane and insane, be left to the courts.

RECOMMENDATION 3

The Committee recommends that the federal Minister of Justice review the definition of "unfit to stand trial" in section 2 of the *Criminal Code* to consider any additional requirements to determine effectively an accussed's fitness to stand trial, including a test of real or effective ability to communicate and provide reasonable instructions to counsel.

RECOMMENDATION 4

The Committee recommends that the definition of "unfit to stand trial" in section 2 of the *Criminal Code* be amended by adding the words "and to be sentenced" to the title and the words "or sentence imposed" after the words "verdict is rendered" in the definition itself. As well, section 672.11(*a*) of the Code should be amended to allow the court to order an assessment in such cases. Finally, subsection 672.38(1) of the Code should be amended to give the Review Board jurisdiction in such cases.

RECOMMENDATION 5

The Committee recommends that section 672.54 of the *Criminal Code* be amended to allow the courts to absolutely discharge a permanently unfit accused either on its own volition or following the recommendation of a review board.

RECOMMENDATION 6

The Committee recommends that subsection 672.5(5) of the *Criminal Code* be amended to require a court or Review Board conducting a hearing to so notify a victim, if an interest in being notified is given by that person. As well, the Code should be amended to require that victims be notified of their rights and entitlements.

RECOMMENDATION 7

The Committee recommends that subsection 672.51(7) and (11) of the *Criminal Code* be amended to allow the court or Review Board conducting a disposition hearing to issue a publication ban for the benefit of third parties.

RECOMMENDATION 8

The Committee recommends that section 672.541 of the *Criminal Code* be amended to allow for the oral or other form of presentation of Victim Impact Statements at disposition hearings held by the court or Review Board.

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The Committee recommends that sections 672.65, 672.66, 672.79 and 672.8 of the *Criminal Code* (Capping of Dispositions) be repealed.

RECOMMENDATION 14

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RECOMMENDATION 15

The Committee recommends that sections 747-747.8 of the *Criminal Code* (Hospital Orders) be repealed.

RECOMMENDATION 16

The Committee recommends that the federal, provincial, and territorial ministers responsible for Justice review the level of resources available to deal with the needs of mentally disordered accused and offenders so as to determine whether they are being used effectively and to see if the level of budgetary allocations is adequate to meet those needs.

RECOMMENDATION 17

The Committee recommends that the federal, provincial, and territorial ministers responsible for Justice take the necessary steps to ensure that education programs on mental health and forensic systems, and related issues, are developed for, and delivered to, judges, lawyers, court personnel, law enforcement personnel, corrections staff and others coming into contact with mentally disordered accused and offenders. As well, a similar education program should be developed for delivery to the public to dispel stereotypes surrounding mental illness.

RECOMMENDATION 18

The Committee recommends that the Department of Justice and other relevant departments and agencies, in collaboration with their provincial and territorial counterparts, collect, process, and analyze the data necessary to facilitate a further parliamentary review of Part XX.I of the *Criminal Code* in 2007.

RECOMMENDATION 19

The Committee recommends that the legislation implementing the recommendations contained in this report include a requirement for a further review of the provisions and operation of Part XX.I of the *Criminal Code* within five years of the legislation coming into effect. If no such legislation is adopted by Parliament, it should designate a committee to review the provisions and operation of Part XX.I of the *Criminal Code* in 2007.

APPENDIX A

STANDING COMMITTEE ON JUSTICE AND HUMAN RIGTHS

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

COMITÉ PERMANENT DE LA JUSTICE ET DES DROITS DE LA PERSONNE

REVIEW OF THE MENTAL DISORDER PROVISIONS OF THE *CRIMINAL CODE*

ISSUES PAPER

PURPOSE

The House of Commons Standing Committee on Justice and Human Rights is conducting a detailed study of the mental disorder provisions of the Criminal Code, as required by 1991 amendments to the law.

To assist in its study, the Committee is seeking input from non-government organizations, provincial and territorial officials and Boards of Review, and members of the public on the provisions and operation of the mental disorder measures adopted by Parliament in 1991. This Issues Paper is intended to focus the discussion for those who participate in this consultation.

BACKGROUND

Canada's *Criminal Code* has always provided that persons will not be held criminally responsible for their actions if their mental state at the time of an offence rendered them "incapable of appreciating" the nature and quality of the act and knowing that it was wrong. Based on the common law concept that conviction for a crime requires not only a wrongful act but also a guilty mind, the original *Criminal Code 1892* made the "insanity" defence available to an accused whose incapacity resulted from a "natural imbecility or disease of the mind." The law also included a legal presumption of sanity and

persons acquitted on account of such a plea were held in custody at the pleasure of the Lieutenant Governor. Those unfit to stand trial on account of insanity were also held under warrant of the Lieutenant Governor. The original *Criminal Code* insanity provisions remained largely unchanged until the 1991 amendments that are the subject of this review.

In 1975, during its study of the criminal justice system's treatment of mentally disordered accused, the Law Reform Commission found considerable confusion in the practical application of the law, arising in part from a "lack of clear social policy towards the mentally ill." In its working paper and subsequent report, the Commission also questioned a system that focused on custody rather than treatment and resulted in many mentally disordered accused serving longer periods of detention than their "sane" counterparts. The Commission's report was also critical of the Lieutenant Governor warrant scheme which placed effective control over mentally disordered acquittees in the hands of the applicable provincial Attorney General or Cabinet, with no legal obligation to follow the recommendations of existing Review Boards.

By 1985, the Department of Justice Mental Disorder Project had identified specific shortcomings in the *Criminal Code* and recommended changes intended to bring the law into compliance with the *Canadian Charter of Rights and Freedoms.* In particular, the final report questioned the fairness of indefinite confinement for persons found unfit to stand trial, without the Crown having made out a *prima facie* case against them. The report also questioned the automatic detention of mentally disordered acquittees, even in the absence of proof they posed any danger to others.

In 1986, the federal government circulated draft proposals for reform which became the focus of widespread consultation with the provinces as well as organizations and individuals in both the public and private sectors. However, the final impetus for legislative reform came from the 1991 decision of the Supreme Court of Canada in *R*. v. *Swain*: it struck down legislation and common law practices then affecting the defence of insanity. In particular, the Court ruled that section 542(2) of the *Criminal Code*, mandating automatic detention for persons found not guilty by reason of insanity, infringed sections 7 and 9 of the *Charter* in a manner not saved by section 1. Out of concern that the release

of all persons then held under Lieutenant Governors' warrants could pose a danger to the public, the Court granted a six-month temporary period of validity which was later extended in order to give Parliament sufficient time to pass remedial legislation.

BILL C-30

That remedial legislation, in the form of Bill C-30, came into force in 1992: a number of more controversial provisions have yet to be proclaimed. As a result of the amendments creating a new Part XX.1 of the *Criminal Code*, references to "natural imbecility" and "disease of the mind" have been replaced by the term "mental disorder." Instead of being found not guilty because of insanity, the accused may now be held "not criminally responsible on account of mental disorder." Such a finding no longer automatically results in custody. Rather, the court can choose an appropriate disposition or defer that decision to a Review Board. In either case, there is an obligation to impose the least restrictive disposition necessary, having regard to public safety, the mental condition of the accused, and the goal of his or her reintegration into society. Lieutenant Governors in Council no longer have a role in criminal proceedings involving an unfit or mentally disordered accused.

Bill C-30 amendments also spelled out criteria for determining whether an accused is "unfit to stand trial" and gave the courts limited powers to order involuntary treatment for the purposes of rendering an accused fit. In addition, the courts are now obliged to review the case of an unfit accused every two years to determine whether sufficient evidence exists to bring the individual to trial. If the evidence is not sufficient, the accused is entitled to an acquittal.

Proclamation was delayed for a number of Bill C-30 amendments, including the "capping" provisions that would limit the length of time an unfit or mentally disordered accused could be detained on any given charge. The companion "dangerous mentally disordered accused" (DMDA) provisions have also yet to be proclaimed in force. Patterned after the existing dangerous offender scheme in the *Criminal Code*, the DMDA provisions were intended to enable courts to extend the cap to a life term in special circumstances. Additional inoperative sections would allow the courts to order that an

offender serve at least part of a sentence in a treatment facility, if he or she is suffering from a mental disorder “in an acute phase” at the time of conviction.

Because of the provinces’ jurisdiction over mental health civil commitment proceedings and the potential cost implications of implementing some of these inoperative sections, their proclamation in force continues to be the subject of some controversy. In the meantime, it must be noted that the mental disorder provisions now in force have recently been upheld by the Supreme Court of Canada, notwithstanding a continuing potential for indeterminate detention. Concerning the practical administration of the new mental disorder provisions, the adequacy of Review Board powers has been questioned. In addition, there are a handful of related matters not dealt with in Bill C-30 that may need to be addressed. During 1991 committee hearings on the bill, it was recommended that the common law defence of automatism be codified to allow for supervisory orders in appropriate cases. The common law test for fitness to stand trial has also been the subject of criticism, while the common law test or definition of “mental disorder” has come under recent attack.

ISSUES FOR CONSIDERATION

The following questions set out the issues about which the Committee would like to hear your views. This list is not intended to be exhaustive and participants are encouraged to make their opinions known on other issues they consider relevant.

- Are you satisfied with the courts’ application of the mental disorder defence set out in section 16 of the Criminal Code, or should it be narrowed or expanded through amendments?

- Is there a need to clarify or expand the definition and/or criteria for determining fitness to stand trial? If yes, do you have specific recommendations?

- Although the Minister of Justice circulated draft amendments in 1993 that would have codified automatism, the defence continues to be governed by the common law. Should automatism be defined in the Criminal Code? At present, a finding of non-insane automatism requires a complete acquittal, even on the most serious of

charges. Is this appropriate or should courts have the power to impose supervisory orders in some cases of non-insane automatism?

- The Criminal Code gives Review Boards the authority to determine an accused person's fitness to stand trial. A Review Board can also order a mentally disordered accused held in custody, or it can release him or her subject to conditions. Should Review Boards also have the power to order an assessment prior to reviewing an offender's disposition? Should Review Boards have the power to discharge absolutely an unfit accused?

- Should the capping provisions be proclaimed in force? If yes, is there a need to amend existing mental health legislation in your jurisdiction before doing so?

- If the capping provisions were proclaimed in force, would it be necessary or useful to bring the Dangerous Mentally Disordered Accused provisions into force at the same time?

- Do you know how many mentally disordered accused are currently subject to supervision orders in your jurisdiction?

- Should the "hospital orders" provisions be proclaimed in force? Can you provide the Committee with information respecting the availability or adequacy of treatment for mentally disordered offenders sentenced to federal and/or provincial institutions in your jurisdiction?

DECEMBER 2001

APPENDIX B
LIST OF WITNESSES

Associations and Individuals	Date	Meeting
Department of Justice	13/12/2001	58
Douglas Hoover, Counsel		
Catherine Kane, Senior Counsel		
Greg Yost, Legal Counsel		
Royal Ottawa Hospital	12/03/2002	68
Dr. John Bradford, Clinical Director		
Criminal Lawyers' Association	14/03/2002	69
Carol Ann Letman, Director		
Queen's University		
Dr. Julio Arboleda-Florez, Professor and Head, Department of Psychiatry		
Canadian Association for Community Living	19/03/2002	70
Orville Endicott, Legal Consultant		
Jim Mahaffy, CACL Board Representative of NAACJ		
“Institut Philippe Pinel de Montréal”	20/03/2002	71
Dr. Louis Morissette, Psychiatrist		
Canadian Resource Centre for Victims of Crime	21/03/2002	72
Steve Sullivan, President and Executive Director		
St. Joseph's Healthcare		
Dr. Chris Webster		
B.C. Forensic Psychiatric Services Commission	09/04/2002	73
Barbara Fisher, Legal Counsel		
Dr. Mark Riley, Psychiatrist		

Associations and Individuals	Date	Meeting
Community Legal Assistance Society	09/04/2002	73
Corey Bow, Lawyer		
Diane Nielsen, Lawyer		
As an Individual		
Edwin A. Tollefson, Q.C.		
Canadian Psychiatric Association	10/04/2002	74
Dominique Bourget, President		
Helen Ward, Clinical Fellow in Forensic Psychiatry		
Canadian Psychological Association		
Dr. Cinny Bubber		
Dr. Jordan Hanley		
Mood Disorders Society of Canada		
William P. Ashdown, Vice-President		
Phil Upshall, President		
As an Individual		
Hon. Justice Edward F. Ormston		
As Individuals	11/04/2002	75
Dr. Derek Eaves		
Ronald Roesch		
“Association des groupes d'intervention en défense de droits en santé mentale du Québec”	16/04/2002	76
Paul Morin, “coordonnateur du Collectif de défense des droits de la Montérégie”		
Jean-Yves Pronovost, Administrator		
“Barreau du Québec”		
Giuseppe Battista, Lawyer		
Julie Delaney, Lawyer		
British Columbia Civil Liberties Association		
Lindsay Lyster, Policy Director		

Associations and Individuals	Date	Meeting
Ministry of the Attorney General of Ontario	16/04/2002	76
Curt Flanagan, Crown Attorney for Leeds and Grenville		
Robert Gattrell, Assistant Crown Attorney for Simcoe		
Nova Scotia Legal Aid		
Malcolm S. Jeffcock, Lawyer		
Schizophrenia Society of Canada		
Tony Cerenzia, President		
Association of Canadian Review Board Chairs	17/04/2002	77
Maureen Forestell, Counsel to Ontario Review Board and alternate chair of Ontario and Nunavut Review Boards		
Association of Canadian Review Board Chairs		
Lucien Leblanc, Member and President, Quebec Review Board		
Bernd Walter, Chair		
Quebec Defence Attorneys Association		
Lucie Joncas, Lawyer		
Canadian Bar Association	18/04/2002	78
Heather Perkins-McVey, Chair		
Tamra Thomson, Director		
East Coast Forensic Psychiatric Hospital, Nova Scotia		
Dr. Emmanuel Aquino		
Empowerment Council		
Jennifer Chambers, Empowerment Facilitator		
As an Individual		
Dr. Stanley Semrau		
Canadian Police Association	23/04/2002	79
David Griffin, Executive Officer		

Associations and Individuals	Date	Meeting
Centre for Addiction and Mental Health	23/04/2002	79
Dr. Howard Barbaree, Professor and Clinical Director, Law and Mental Health Programs, Department of Psychiatry, University of Toronto		
Gail Czukar, General Counsel		
As an Individual	30/04/2002	83
Dr. Syed Akhtar		

APPENDIX C
LIST OF BRIEFS

Syed Akhtar

American Psychological Association

“Association des groupes d'intervention en défense de droits en santé mentale du Québec”

“Association des services de réhabilitation sociale du Québec inc. ”

Association of Canadian Review Board Chairs

B.C. Forensic Psychiatric Services Commission

“Barreau du Québec”

Canadian Academy on Psychiatry and the Law (The)

Canadian Association for Community Living

Canadian Bar Association

Canadian Criminal Justice Association

Canadian Mental Health Association

Canadian Psychiatric Association

Canadian Psychological Association

Centre for Addiction and Mental Health

Community Legal Assistance Society

East Coast Forensic Psychiatric Hospital, Nova Scotia

Derek Eaves

Empowerment Council

Federal/Provincial/Territorial Working Group

“Institut Philippe Pinel de Montréal”

John Howard Society of Kingston & District

Ministry of the Attorney General of Ontario

Mood Disorders Society of Canada

Nova Scotia Legal Aid

Nova Scotia Review Board

Office for Victims of Crime

Psychiatric Patient Advocate Office

Quebec Defence Attorneys Association

Queen's University

Ronald Roesch

Royal Ottawa Hospital

Schizophrenia Society of Canada

Stanley Semrau

St. Joseph's Healthcare

Edwin A. Tollefson

REQUEST FOR GOVERNMENT RESPONSE

In accordance with Standing Order 109, the Standing Committee on Justice and Human Rights requests that the government provide a comprehensive response to its report.

A copy of the Minutes of Proceedings and Evidence relating to the Standing Committee on Justice and Human Rights, (*Meetings No. 58, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 83 and 96 including the present report)* is tabled.

Respectfully submitted,

Honourable Andy Scott, P.C., M.P.
Fredericton
Chair

MINUTES OF PROCEEDINGS

Wednesday, June 5, 2002
(*Meeting No. 96*)

The Standing Committee on Justice and Human Rights met *in camera* at 4:00 p.m. this day, in Room 209, West Block, the Chair, The Hon. Andy Scott, presiding.

Members of the Committee present: Bill Blaikie, Chuck Cadman, Paul Harold Macklin, John Maloney, John McKay, Lynn Myers, The Hon. Andy Scott, Vic Toews.

Acting Members present: Robert Lanctôt for Pierrette Venne; Ovid Jackson for Carole-Marie Allard; Roy Cullen for Ivan Grose.

In attendance: *From the Library of Parliament*: Philip Rosen, senior analyst.

Pursuant to the Order of Reference of the House of February 26, 2002, the Committee resumed its statutory review of the mental disorder provisions of the *Criminal Code*.

The Committee resumed consideration of a draft report.

It was agreed — That the draft report, as amended, be adopted.

It was agreed — That the Chair, clerks and researchers be authorized to make such grammatical and editorial changes to the report as may be necessary without changing the substance of the report.

It was agreed — That members may submit grammatical and editorial changes to the report as may be necessary without changing the substance of the report until 5:00 o'clock p.m. on Thursday, June 6, 2002, by e-mail to the clerks of the Committee.

It was agreed — That 550 copies of the report be printed in tumble bilingual format.

It was agreed — That pursuant to Standing Order 109, the Committee request the Government to table a comprehensive response to the report.

ORDERED — That the Chair present the report to the House.

It was agreed — That the Committee invite witnesses to speak to Bill C-400, *Lisa's Law* during the week of June 10, 2002.

At 4:51 p.m., the Committee adjourned to the call of the Chair.

Jean-François Pagé / Marie Danielle Vachon
Clerks of the Committee