COURT OF QUEBEC

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
LOCALITY OF MONTREAL
"Criminal and Penal Division"

NO. : **500-01-105636-143**

DATE: February 26, 2015

PRESIDING: THE HONORABLE THIERRY NADON, J.C.Q.

THE QUEEN

v.
C ... R ...
Accused

JUDGMENT
RENDERED ORALLY ON 26 FEBRUARY 2015[1]

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1 **The judgment was rendered from the bench. These reasons may have been altered, modified or expanded to improve presentation and understanding, as provided for in *Kellogg's Company of Canada v. P. G. du Québec*, [1978] C. A. 258, 259-260. However, the disposition remains unchanged.**

CONTEXT

[1] On May 2, 2014, the accused committed acts which caused the death of two people. The Court found him not criminally responsible on account of mental disorder, and rendered a decision providing for his detention under subsection 672.54c) Cr. C.

[2] The prosecution is requesting that the Court find him to be a "high-risk accused". This finding did not exist when the offences were committed. It came into force on July 11, 2014.

[3] The issue is to determine whether the new provisions apply to the accused.

BACKGROUND FACTS

[4] On May 2, 2014, while in a state of psychic disorganization on account of his having reduced the medication necessary to treat his paranoid schizophrenia, the accused was driving a motor vehicle at a speed of almost 100km/h along Sherbrooke Street. At the corner of boulevard de l'Assomption, he collided with cars stopped at a red light. He lost control of his vehicle and hit two pedestrians who were on the sidewalk. The two pedestrians died.

[5] The accused has a long criminal history of violence and has been found not criminally responsible on many occasions in the past.

LEGAL PROCEEDINGS

[6] On September 17, 2014, the Court found him not criminally responsible and rendered a decision ordering his detention. (672.54(c) Cr. C.)

[7] Since then, the parties have requested postponements in order to determine their position on the "high-risk accused" finding. The accused has changed lawyers and positions on the question of the applicability of the legislation and the finding itself.

[8] An assessment order was issued in order to obtain the opinion of the treating team in relation to issues relevant to the "high-risk accused" finding. A delay was also caused by having to wait for the psychiatric report.

[9] The hearing on the "high-risk accused" finding was held on February 12.

POSITION OF THE PARTIES

[10] Before the accused changed lawyers, both parties were of the opinion that the legislation had retrospective effect. Since the arrival of Me Bourgeois, the position has changed.

THE CROWN

[11] The Crown is of the opinion that the legislation applies. Citing *R. v. Johnson*, 2003 SCC 46, the Crown argued that, as is the case with dangerous offenders, the new provisions ensure the safety of the public, and apply to the accused's situation.

THE DEFENCE

[12] With no supporting jurisprudence, the defence provided an alternative argument to the effect that the legislation does not apply to the situation of Mr. R... because the "high-risk accused" regime is akin to a penalty.

Part XX. 1 OF THE CRIMINAL CODE - MENTAL DISORDER

[13] It is appropriate to begin with an overview of the overall context of the provisions dealing with mental disorder. Part XX.1 of the Criminal Code rests on the characterization of the person who commits an offence while mentally ill as "not criminally responsible". *Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625, s 23)

[14] The accused is neither convicted nor acquitted, he is not responsible. Given that the offence was committed while suffering from mental disorder, Parliament may properly use its criminal law power to prevent further criminal conduct and protect society. (*Winko*, para. 32)

[15] These powers are limited and exist as long as there is a significant threat to society. As the individual becomes less of a threat, the criminal law progressively loses authority. (*Winko*, para. 32)

[16] Part XX. 1 of the Criminal Code was a sweeping change in how the criminal justice system dealt with offenders suffering from mental health issues. Parliament has signalled that these offenders are to be treated with the utmost dignity and afforded the utmost liberty with a view toward protecting the public. (*Winko*, para. 17-21, 42) Gone are the days of detention at the pleasure of the Lieutenant Governor.

[17] In order to meet these objectives, Parliament provided for a special stream.

[18] Once a verdict of not criminally responsible on account of mental disorder is rendered, a hearing must be held to determine which disposition to make. This disposition is made by either the Court or the Review Board (672.45, 672.47 Cr. C.)

Three alternatives were, and still are, available in terms of a disposition: absolute discharge (672.54(a) Cr. C.), discharge subject to terms and conditions (672.54(b) Cr. C.) or detention in custody in a hospital subject to specific terms and conditions. (672.54(c) Cr. C.)

[19] The disposition has twin goals: protecting the safety of the public and treating the offender fairly (*Winko*, para. 21, 43). Public safety is the paramount objective. (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, para. 19).

[20] The previous version of section 672.54 Cr. C. provided that the Court or the Review Board was required to render the decision that was the least restrictive to the accused. These terms even required imposing, in the case of a discharge, the least onerous and least restrictive conditions consistent with the level of risk posed in consideration of the mental condition of the accused found not criminally responsible, the objective of eventual reintegration into the community and his or her other needs. (*Penetanguishene Mental Health Centre v. Ontario* (*Attorney General*), 2004 SCC 20, para. 23-24, *Pinet,* para. 21.

[21] On that basis, in *Winko*, the Supreme Court confirmed the constitutional validity of subsection 672.54(c) Cr. C. under section 7 of the *Charter*. The Supreme Court interpreted the section such that the legislation would require that an accused found not criminally responsible be granted an absolute discharge unless the Court or Review Board is able to conclude that accused poses a significant risk to the safety of the public. (*Penetanguishene Mental Health Centre*, para. 22, *R. v. Conway*, 2010 SCC 22, para. 87)

[22] At the hearing, a person suffering from mental disorder is not presumed dangerous; the significant risk to the safety of the public must be established in each case. (*Winko*, para. 35)

[23] In interpreting the former version of section 672.54 Cr. C., and assessing its constitutionality, the Supreme Court added that the risk must be supported by evidence, and must be foreseeable and significant. There must also be a serious risk of physical or psychological harm created by an activity criminal in nature. If this finding cannot be made, there is no power in Part XX.1 to maintain restraints on the accused's liberty. (*Winko*, para. 57, 69)

[24] In interpreting the former version of section 672.54 Cr. C. the Supreme Court wrote that the section did not place burdens of proof on either party (*Winko*, para. 52); however:

> "Since there must be a positive finding of a significant risk to the safety of the public to engage the provisions of the Code and support restrictions on liberty, something less -- i.e., uncertainty -- cannot suffice." (*Winko*, para. 49)

[25] The Court added:

> "absent a finding that the NCR accused represents a significant risk to the safety of the public, there can be no constitutional basis for restricting his or her liberty. " (*Winko*, para. 49)

[26] Moreover:

> "If the evidence does not support the conclusion that the NCR accused is a significant risk, the NCR accused need do nothing; the only possible order is an absolute discharge. " (*Winko*, para. 52)

[27] If the accused is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Review Board's jurisdiction. (*R. v. Conway*, 2012 SCC 22, para. 94).

[28] Therefore, the not criminally responsible accused is to be treated in a special way in order to meet the twin goals of protecting the public and treating the accused fairly and appropriately. This accused occupies a special place in the criminal justice system; he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public. (*Winko*, para. 30).

[29] The special stream emphasizes treatment and stabilization over incarceration and punishment. (*Penetanguishene Mental Health Centre*, para. 21, 23-24)

[30] The law favours treatment over a prison sentence. (*Winko*, para. 39) It recognizes the need to protect society while addressing the cause of the offending behaviour—the untreated or controlled mental issues of the accused. (*Winko*, para. 40-41)

[31] In sum, the accused must be confined only for reasons of public protection, not punishment (*R. v. Owen*, 2003 SCC 33, para. 25.

[32] An elaborate review process is in place in order to ensure that the detention of the accused ceases as soon as the threat the accused poses to society becomes acceptable. (672.81, 672.82 Cr. C.) (*Winko*, para. 28)

THE LAW AND THE CHANGES TO THE CRIMINAL CODE

OVERVIEW

[33] The Act to amend the Criminal Code and the National Defence Act (mental disorder), S.C. 2014, c. 6. amended the Criminal Code. The amendments to the Criminal Code came into force on July 11, 2014.

[34] The summary of the Act provided:

> "This enactment amends the mental disorder regime in the Criminal Code and the National Defence Act to specify that the paramount consideration in the decision-making process is the safety of the public and to create a scheme for finding that certain persons who have been found not criminally responsible on account of mental disorder are high-risk accused. It also enhances the involvement of victims in the regime and makes procedural and technical amendments."

[35] The then Minister of Justice, Hon. Rob Nicholson, made the following statement at the House of Commons on the purpose of the Act:

> "Bill C-54, which is before the House, has three main components. First, it seeks to ensure that public safety is the paramount consideration when decisions are made about not criminally responsible and unfit accused. Second, it creates a new high-risk, not criminally responsible accused designation. Third, it enhances victim safety and victim involvement in the mental disorder regime." Hansard 217 (House of Commons, *Journals*, 41st Parliament, 1st session, volume 146, number 217, p. 14484 (March 1st, 2013).

"HIGH-RISK ACCUSED" AND COROLLARY CHANGES TO PART XX.1. OF THE CRIMINAL CODE

[36] A new scheme now provides for the possibility of designating a person found not criminally responsible on account of mental disorder a "high-risk accused". (672.64 Cr. C.)

[37] In parallel with the creation of the "high-risk accused" finding, a multitude of corollary changes were made to Part XX.1 of the Criminal Code with respect to mental disorder.

[38] Here are a few examples of the changes:

[39] The ability of the Court or Review Board to order an assessment of the accused's mental condition for the purpose of revoking or reviewing the "high-risk accused" finding (672.11 (d.1), 672.121 Cr. C.)

[40] The requirement that the Review Board hold a hearing not later than forty-five days after the "high-risk accused" finding. If the Court is satisfied that there are exceptional circumstances, it may extend the time for holding a hearing to between 45 and 90 days. (672.47(5) Cr. C.) At this hearing, the law imposes a disposition upon the Review Board. The disposition must be detention in custody in a hospital, subject to appropriate terms and conditions. (672.47(3), 672.54, 672.64(3) Cr. C.).

[41] Section 672.54 Cr. C., which offers alternate dispositions for the Court or Review Board, has changed its wording. It now reads: "the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused". The words "makes the decision ... the least restrictive for the accused" has been removed.

[42] Section 672.5401 Cr. C. codifies the Supreme Court's definition of the notion of significant threat to the safety of the public.

[43] The obligation to take into account any statement filed by a victim. (672.541 Cr. C.)

[44] The obligation on the Court or Review Board to consider whether it is desirable, in the interests of the safety and security of a victim or witness to the offence or a justice system participant, to include as a condition of the disposition that the accused abstain from communicating with any victim, or any other condition specified in the disposition. (672.542 Cr. C.)

[45] The Review Board may delegate to the person in charge of the hospital the authority to direct that the restrictions on the liberty of the accused be increased or decreased. (672.56(1) Cr. C.) If the accused is a high-risk accused, this disposition does not allow the person in charge of the hospital to permit the accused to be absent from the hospital unless it is appropriate for medical reasons or for any purpose that is necessary for the accused's treatment. The accused must be escorted and a structured plan must be prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public. (672.56(1.1) and 672.64(3) Cr. C.)

[46] A finding that an accused is a high-risk accused is subject to appeal. (672.64(4)(5), 672.72 to 672.75 Cr. C.).

[47] The Review Board may extend the time for holding a hearing in respect of a high-risk accused to a maximum of 36 months after making or reviewing a disposition if the parties are represented by counsel and consent to the extension. (672.81(1)(1.31) Cr. C.)

[48] The Review Board may also extend the time for holding a subsequent hearing to between 12 and 36 months if, on the basis of any relevant information, the accused's condition is not likely to improve and that detention remains necessary for the period of the extension. (672.81(1.32) Cr. C.)

[49] As was the case previously, if the Review Board extends the time, it shall provide notice of the extension, and the decision may be appealed. (672.83(1.4)(1.5) Cr. C.)

[50] Discretionary reviews provided for in section 672.82 Cr. C. are possible for a "high-risk accused". They may be held at any time.

[51] If the Review Board is satisfied that there is not a substantial likelihood that the high-risk accused will use violence that could endanger the life or safety of another person, it must refer the finding for review to the superior court of criminal jurisdiction. (672.84(1) Cr. C.)

[52] The Review Board may never provide for the discharge of a high-risk accused. It must refer the matter to the superior court for a revocation of the "high-risk accused" finding.

[53] The superior court has the power to review the finding. It may revoke the finding when there is no longer a substantial likelihood that the high-risk accused will use violence, and, therefore, discharge the accused absolutely or discharge the accused subject to conditions. (672.54(a)(b) Cr. C.) The superior court may decide not to revoke the finding and return the matter to the Review Board, which shall hold a hearing not later than 45 days and review the terms and conditions of detention. Detention is the

only alternative. Terms and conditions may be modified, but within the limits imposed. (672.54(c), 672.64(3), 672.84 Cr. C.)

[54] Within five years of their coming into force (i.e. as of July 11, 2014), a comprehensive review of the operation of sections 672.1 to 672.89 of the Criminal Code is to be undertaken by a committee of the Senate, or of the House of Commons. This Committee must submit a report to Parliament. (S.C. 2014, c. 6, s. 20.1.

WHO CAN BE FOUND A HIGH-RISK ACCUSED?

[55] An accused can be a high-risk accused if the accused has been found not criminally responsible on account of mental disorder for a serious personal injury offence, where the accused was 18 years of age or more at the time of the commission of the offence.

[56] A serious personal injury offence means an indictable offence involving the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person. (s. (672.81(1.3) Cr. C.) It also means an indictable offence referred to in section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 271, 272 or 273 or an attempt to commit such an offence.

[57] The prosecution must show that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person. It may also demonstrate and argue that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person. (672.64(1)a)b) Cr. C.)

[58] In order to render a decision, the Court must consider, notably,: the nature and circumstances of the offence; any pattern of repetitive behaviour of which the offence forms a part; the accused's current mental condition; the past and expected course of the accused's treatment, including the accused's willingness to follow treatment; and the opinions of experts who have examined the accused (672.64(2) Cr. C.)

WHAT ARE THE CONSEQUENCES OF THIS FINDING?

[59] First of all, the accused is found to be a "high-risk accused".

[60] The Board must hold the first hearing within the same timeframe (45 days to a maximum of 90 days) applicable to other accused persons found not criminally responsible by reason of mental disorder. However, the Review Board cannot order anything other than detention and cannot provide for absences from the hospital unless it is appropriate, in the opinion of the person in charge of the hospital, for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused's treatment,. The accused must be escorted and a structured plan must be prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public. (672.47, 672.56(1.1), and 672.64(3) Cr. C.).

[61] Without engaging in an interpretation of the new section 672.54 C. cr., the latter provides a stark contrast to other accused found not criminally responsible. For the latter, the Board or the Court may render the decision indicated--either discharge, discharge on terms and conditions or detention on appropriate terms and conditions not limited to the very circumscribed outings provided for a high-risk accused. (672.83, 672.54 Cr. C.)

[62] The review must be done within twelve months as for all others. (672.81 Cr. C.) The period may be extended to 36 months. This time limit may not, however, be extended except if the Review Board is satisfied that the condition of the accused is not likely to improve and that detention remains necessary in light of all the evidence.

[63] Optional or mandatory reviews for high risk accused are similar to those available to other accused declared not criminally responsible. (672.82, 672.81(2), 672.81(3) Cr. C.).

[64] During subsequent reviews, if the Review Board is satisfied that there is not a substantial likelihood that the high-risk accused will use violence that could endanger the life or safety of another person, it must refer the finding for review to the superior court of criminal jurisdiction. (672.84(1) Cr. C.)

[65] Otherwise, the only disposition that it can make is detention (672.84 (2) C. cr.). It may not provide for absences from the hospital unless the person in charge of the hospital believes that it is appropriate for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused's treatment. The accused must be escorted and a structured plan must be prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public. (672.56(1.1), and 672.64(3) Cr. C.).

[66] The Superior Court is the only body empowered to revoke the "high risk accused" finding. If the finding is revoked, the accused reverts to an accused found not criminally responsible and is treated as such under the law.

[67] Before the House of Commons, Minister Nicholson said the following regarding the impact of the new scheme:

> "I would like to turn to one of the key features of Bill C-54. The bill proposes a new scheme that would permit the courts to designate certain non-criminally responsible accused as high risk. This high-risk accused designation would ensure that a person so designated would be held in custody and could not be considered for release by the review board until the designation was revoked by the court. A person found by the court to be a high-risk accused would not be entitled to unescorted passes into the community. " Hansard 217 (House of Commons, *Journals*, 41st Parliament, 1st session, volume 146, number 217, p. 14484 (March 1st, 2013).

[68] As can be seen, this is a regime which is intended to ensure the protection of the public against accused persons who are not-criminally responsible, but who are considered dangerous and who present an unacceptable risk to society. To do this, the legislation provides for the continued detention of the accused until the substantial likelihood of use of violence disappears. It imposes the obligation to appear before the superior court in order to have the finding revoked.

[69] Specifically, the regime assures that accused persons found not criminally responsible, but who are dangerous, are subject to detention under potentially longer and more stringent conditions, but only as long as the danger persists.

LEGAL PRINCIPLES APPLICABLE TO THE APPLICATION OF THE LEGLISLATION

[70] The Supreme Court in *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin* 2004 SCC 59 explained the difference between the principles of retroactivity, immediate application and retrospectivity:

> "[46] The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. New legislation does not operate retroactively when it is applied to a situation made up of a series of

> events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force (Côté, supra, at p. 175). If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, supra, at pp. 152 et seq.). If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date (Côté, supra, at pp. 133 et seq. and pp. 194 et seq.). When new legislation modifies those prior effects, its effect is retroactive (Côté, supra, at pp. 133 et seq.) . Professor Driedger gave a good explanation of this distinction between retroactive and retrospective effect:
>
> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates *backwards*. A retrospective statute *operates forwards,* but it looks backwards in that it attaches new consequences for *the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]
> >
> > (E. A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268- 69)"

[71] The non-retroactivity of legislation is a fundamental principle from which the legislature may derogate. (Pierre-André Côté, with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada* (4th Edition. 2009), p. 143) There is also a presumption against the retrospective application of legislation. (*R. v. Dineley*, 2012 SCC 58, para. 18) On the contrary, where the enactment deals with procedure only, there is a presumption of immediate application. (*Application under s. 83.28 of the Criminal Code (Re)* 2004 SCC 42, para. 62)

[72] In *Dineley,* the majority of the Supreme Court summarized retrospectivity and the formula to apply:

> "There are no transitional provisions that provide express guidance as to whether the Amendments apply retrospectively, that is, to conduct which occurred before

> the Amendments came into force. Resort must be had to general principles and to the effect of the Amendments." (para. 3)

[73] What are these general principles? In *Dineley*, the majority, under the pen of Justice Deschamps wrote:

> "[10] There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (*Angus v. Sun Alliance Insurance Co.,* 1988 CanLII 5 (SCC) [1988] 2 S.C.R. 256, at pp. 266-67; Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32). However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (Application under s. 83.28 of the Criminal Code (Re), at paras. 57 and 62; Wildman, at p. 331).
>
> [11]Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2009, at p. 208. Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions “procedural” or “substantive”, but in discerning whether they affect substantive rights.”

[74] The author Ruth Sullivan in her treatise, *Sullivan on the Construction of Statutes*, Sixth Edition, Lexis-Nexis, 2014, writes that there seems to be an exception to the presumption against retrospectivity when the purpose of the legislation is the protection of the public.

[75] This exception is, however, limited and Sullivan concludes: “…*when new penal consequences, such as fines or loss of freedom, are imposed for conduct that occurred*

in the past, the legislation offends the rule of law and should be strongly presumed not to apply." (Sullivan, para. 25.92)

ANALYSIS

[76] From the outset, we will analyze the arguments equating the regime to a penalty.

[77] The accused was declared not criminally responsible and as such may not be punished or receive a sentence.

[78] Minister Rob Nicholson, stated before the House of Commons, on March 1, 2013: "the proposed reforms do not seek to impose penal consequences on people who have been found by the courts to be not criminally responsible on account of mental disorder." Hansard 217 (House of Commons, Journals, 41st Parliament, 1st session, volume 146, number 217, 14483 (March 1st, 2013).

[79] The argument that the former legislation applies to Mr. R... because the new regime imposes a penalty is rejected. The Crown's argument based on the *Johnson* case is also rejected. In *Johnson,* the Supreme Court applied subsection 11(i) of the *Charter* in order to ensure the application of legislation that was more advantageous to the accused. The "high-risk accused" regime is therefore not covered by subsection 11(i) of the *Charter*.

[80] Do the changes apply retrospectively, that is to say to acts committed before their entry into force?

[81] Contrary to what was provided for in the legislation in *R. v. Clarke*, 2014 SCC 28 which specifically provided for the temporal application of the law, the legislation in

question here is silent. There is no clear intention on the part of the legislature that it apply retrospectively. We must, therefore, return to the presumption of non-retrospectivity of legislation or determine whether the changes affect a substantive right. If so, the legislation cannot have retrospective application.

[82] In the present case, we cannot say that the changes do not affect any substantive rights.

[83] They affect the rights of the accused. We are in the presence of a new procedural mechanism. A "high-risk accused" finding leads to many serious and substantial consequences for the accused.

[84] The Minister of Justice, Rob Nicholson, when he appeared before the Standing Committee on Justice and Human Rights on June 1, 2013, (Just-75, p. 2-3), even mentioned these consequences himself. He spoke of a new procedure, a new mechanism that would apply only to a limited number of people. The accused would be required to be detained in hospital and the Review Board would not have the power to grant a discharge on terms and conditions. The accused would not have the right to leave the hospital without an escort and only for treatment purposes. The finding would also have an impact on the timeframes for reviews conducted by the Review Board. A new procedure would require an accused found to be “high-risk” to seek revocation of his designation from a judge of the Superior Court.

[85] Are the changes covered by the public safety exception?

[86] The amendments to the legislation were aimed at protection of the public. However, the consequences are not akin to an order setting out the conditions of a

sentence. (*R. v. Roy*, 2010 QCCA 16, para. 99). They do not result in administrative penalties, loss of the right to employment, dismissal or loss of benefits (see the cases cited by *Sullivan*, 25.88 and following). They have the potential to deprive an individual of his liberty.

[87] Because of the importance attached to liberty, the teachings of the Supreme Court in *Winko* on detention as a last resort for an accused found not criminally responsible and the absence of a provision allowing for retrospective application leave us no choice but to conclude that the general rule should be followed.

[88] Consequently, the legislation does not apply retrospectively and therefore to the situation of the accused.

[89] For all these reasons, the Crown's application is dismissed.

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THIERRY NADON, J.C.Q.
Signed and filed in the registry on March 3, 2015

Me Dannie Leblanc
Crown Attorney

Me Rodolphe Bourgeois
Counsel for the defence

Hearing Date: February 12, 2015