Citation: Doucet v. Adult Forensic Psychiatric Services and AGBC
2000 BCCA 0195

Date: 20000323
Docket: V03239
Registry: Victoria

# COURT OF APPEAL FOR BRITISH COLUMBIA

**IN THE MATTER OF DELISLE AUGUST DOUCET**

APPELLANT

AND:

THE DIRECTOR OF ADULT FORENSIC PSYCHIATRIC SERVICES

RESPONDENT

AND:

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

RESPONDENT

Before: The Honourable Mr. Justice Lambert
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Braidwood

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|---|---|
| S. Wishart | Counsel for the Appellant |
| M. Acheson | Counsel for the Respondent Director of Adult Forensic Psychiatric Services |
| L. Hillaby | Counsel for the Respondent The Attorney-General of British Columbia |
| Place and Date of Hearing: | Victoria, British Columbia 21 October, 1999 |
| Place and Date of Judgment: | Vancouver, British Columbia 23 March, 2000 |

**Written Reasons by:**
The Honourable Mr. Justice Lambert

**Majority Reasons, Concurring in the Result by:** (p.15, para.18)
The Honourable Madam Justice Rowles

**Concurred in by:**
The Honourable Mr. Justice Braidwood

**Reasons for Judgment of the Honourable Mr. Justice Lambert:**

**I**

[1] The only issue raised in the factums, and the principal issue argued on this appeal, is whether the Review Board for British Columbia, established under Part XX.1 of the ***Criminal Code***, lost its jurisdiction to hold a hearing and make a disposition in relation to Mr. Doucet under s.672.47 of the ***Code*** when, without the Review Board holding a hearing and making a disposition, more than 45 days had passed after the entry of a verdict of not criminally responsible on account of mental disorder against Mr. Doucet.

[2] A further issue was raised in argument, without objection, to the effect that the time limit had, on the facts of this case, actually been extended to 90 days and, since the hearing occurred within that time, no question of loss of jurisdiction could be said to arise in relation to Mr. Doucet.

**II**

[3] In December, 1994, on a charge of assault causing bodily harm and attempted theft, a verdict was entered against Mr. Doucet of not criminally responsible on account of mental disorder. In February, 1995 he was granted an absolute discharge. In April, 1997 he was charged with assault and mischief. In May, 1997 he was charged with a count of arson and two counts of assault. In June, 1997 he was convicted on the May information. On 3 October, 1997 the Honourable Judge Filmer entered a verdict of not criminally responsible on account of mental disorder on the charges contained in the April, 1997 information. Judge Filmer deferred disposition to the Review Board to hold a hearing and make a disposition within 90 days. An application was made by the Director to the Honourable Judge Ehrcke on 17 November, l997, 44 days after Judge Filmer's verdict of 3 October, 1997, for an extension of time under s-s.672.47(2). Judge Ehrcke refused the extension, finding that no exceptional circumstances had been established. Notwithstanding that refusal, the Review Board held a hearing

and made the disposition of a conditional discharge on 15 December, 1997, 73 days after Judge Filmer's verdict. The conditions of the discharge related to attendance on a psychiatrist who was expected to help with Mr. Doucet's needs for daily medication to control his mental stability.

**III**

[4] The directly relevant sections of the ***Criminal Code*** are these:

> **DISPOSITION HEARINGS**
>
> **HEARING TO BE HELD BY A COURT**
>
> 672.45 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused, the court may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing.
>
> (2) At a disposition hearing, the court shall make a disposition in respect of the accused, if it is satisfied that it can readily do so and that a disposition should be made without delay.
>
> . . .
>
> **REVIEW BOARD TO MAKE DISPOSITION WHERE COURT DOES NOT**
>
> 672.47 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.
>
> (2) Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.
>
> (3) Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of an accused, the Review Board shall hold a hearing on a day not later than the day on which the disposition ceased to be in force, and not later than ninety days after the disposition was made, and shall make a disposition in respect of the accused.

. . .

**PROCEEDINGS NOT INVALID**

672.53 Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice.

**DISPOSITIONS THAT MAY BE MADE**

672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

> (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.
>
> (my emphasis)

**IV**

[5] The appeal book contained this document:

**DEFERRAL OF DISPOSITION**

(Criminal Code 672.57 and 672.46 - Form 49)

Canada: Province of British Columbia

To the British Columbia Review Board:

**Delisle August DOUCET**, of Victoria, B.C.

The accused has been charged with:

**File #93103: 28APR97-at Victoria-Commit mischief under $5,000.00-Section 430(4) of the Criminal Code.**

**#93191: On 25APR97-at Victoria-Commit assault of another person-Section 266 of the Criminal Code**.

The accused was found: **not criminally responsible on account of mental disorder**

The Court: **deferred disposition to the Review Board**.

Be released on an Undertaking, copy of which is attached, and to appear before the Chairperson of the British Columbia Review Board.

The Court deferred disposition to the Review Board to hold a hearing and make a disposition within 90 days.

Dated October 3, 1997 at Victoria, B.C.

(signature)

Clerk of the Court on behalf of

The Honourable Judge Filmer

(the underlining is mine)

[6] As is apparent on the face of the document it is dated 3 October, 1997; it is signed by the Clerk of the Court on behalf of the Honorable Judge Filmer; and it bears the stamp of the British Columbia Review Board as having been received on 12 November, 1997, 40 days after Judge Filmer's decision. Again, as is apparent on its face, it states that the Review Board must hold a hearing and make a disposition within 90 days. The Court could only set that period under s-s.672.47(2).

[7] Counsel for the Director of Adult Forensic Psychiatric Services argued that the order of Judge Filmer must be taken to be a valid extension of time under s-s.672.47(2). Counsel for Mr. Doucet said that the order did not show that exceptional circumstances had been found to exist and so s-s.672.47(2) had not been complied with.

[8] An order that is valid on its face cannot be made subject to collateral attack in proceedings in which the order is not the focus of the proceedings. See ***British Columbia (Attorney General) v. Mount Currie Indian Band*** (1991), 54 B.C.L.R. (2d) 129; [1991] 4 W.W.R. 507 (B.C.S.C.). And there is a presumption that court orders, and indeed all judicial and administrative orders, are properly and validly made. That presumption was not rebutted in this case. And it would be a collateral attack on the order to say that it has not been demonstrated that exceptional circumstances were established at the time Judge Filmer made his order.

[9] For those reasons I would conclude that the extension of time was valid. Since the hearing was held after 73 days, well within the 90 day extended limit, I would conclude that the Review Board held the hearing and made its disposition while acting within its jurisdiction. The application before Judge Ehrcke was not required because the extension had already been granted by Judge Filmer.

[10] For those reasons I would dismiss the appeal.

**V**

[11] Since the principal argument on this appeal related to whether the Review Board lost its initial jurisdiction if it did not hold a hearing and make a disposition within 45 days of the verdict that the accused was not criminally responsible on account of mental disorder, and since there are said to be conflicting decisions of the Review Board on that question, I propose to state my opinion.

[12] The imperative "shall" is used in s-s.672.47(1). "Shall" means that what

the section requires must be done. However, where the obligation imposed by the word "shall" is imposed on a public officer or public body, the word "shall" has sometimes been interpreted as being directory only. In other circumstances the word "shall" has been considered to be mandatory in the sense that jurisdiction to carry out the public duty would be lost if the time limit were not complied with. But the true focus for the distinction was put in this way by Chief Justice Iacobucci in the Federal Court of Appeal in ***Cleary v. Canada (Correctional Services)*** (1991), 44 Admin.L.R. 142 at 145:

> Whether the legislation is penal or not is irrelevant. What is relevant is that the decision involved is of importance to the Appellant and has serious consequences to him. Moreover, there is little conviction in the "mandatory - directory" dichotomy to answer the question before us. At bottom, what we are seeking is legislative intention. According to the ***Interpretation Act***, "shall" is to be construed as imperative [***Interpretation Act***, R.S.C. 1985, c. I-23, section 11]. But whether failure to comply with a command entails nullity, and if so to what extent, surely depends on the legislative scheme as a whole.

(my emphasis)

[13] So the task of interpretation of a legislative provision using the word "shall" in imposing a public duty, in order to determine whether the provision is directory or mandatory, and whether failure to comply entails nullity requires an examination of the intention of Parliament as derived from the harmony of the entire legislative scheme and from a consideration of whatever additional aids are available. But it must, as always, have a primary focus on the wording chosen by Parliament to express its intention in the section under consideration. If s-s.672.47(1) stood alone within the section, it might well be difficult to determine whether the provision was intended to be directory, involving no loss of jurisdiction if the time limit were not met, or mandatory, in the sense that failure to comply entails nullity and a loss of jurisdiction. But s-s.672.47(1) does not stand alone. It is immediately followed by s-s.672.47 (2) which provides that the time limit of 45 days set by s-s.(1) may be extended by the Court to give a total period of up to 90 days under these conditions: "Where the court is satisfied that there are exceptional circumstances that warrant it". In my opinion, s-s.(2) would have no effect whatsoever if the jurisdiction of the Review Board continued after the lapse of 45 days in which no extension was granted, or, as in this case, where a request was made for an extension after 44 days and the extension was refused. It is contrary to one of the most fundamental principles of statutory interpretation to suppose that Parliament enacted a totally ineffective provision. If the "shall" in s-s.672.47(1) were directory only, and involved no loss of jurisdiction if the time limit was not met, then s-s.672.47(2) would be wholly

ineffective and unnecessary. In my opinion, against the background of s-s.672.47 (2), the imperative "shall" must be construed as being mandatory in the sense that failure to comply entails nullity. If no extension is granted, then the Review Board's initial jurisdiction is lost after the lapse of 45 days from the date of the verdict.

[14] If failure to observe the time limits set by s-s.672.47(1) does not result in a loss of jurisdiction by the Review Board, then there would be two significant consequences. The first would be that s-s.672.47(2) would become absolutely meaningless. There would no longer be a reason to apply for an extension of time and there would no longer be a need to show exceptional circumstances. The second consequence is that the person found not criminally responsible on account of mental disorder, and his or her family, could no longer rely on that person obtaining a timely disposition following a timely hearing, as Parliament surely contemplated. Instead the person would have to take the initiative of compelling a hearing, an initiative that many such persons would be unlikely to take.

[15] In my opinion the "slip" provision in s.672.53 is intended to cover procedural irregularities in the disposition hearing itself and cannot, in the generality of its terms, have the effect of entirely overriding the express terms of s-s.672.47(2) which circumscribes the conditions on which time limits can be extended for the initial hearing of the Review Board.

[16] So what happens after the initial jurisdiction of the Review Board is lost? In my opinion the jurisdiction of the Court which reached the verdict of not criminally responsible on account of mental disorder remains in place. And that is so even if the Court has deferred disposition to the Review Board, because that deferral of disposition became ineffective when the Review Board lost jurisdiction. So, in those circumstances, the Court which reached the verdict should be asked to hold a hearing and make a disposition and, if not asked, should hold a disposition hearing on its own motion. After the hearing, the Court should make a disposition under s.672.54. Then, if the disposition is other than an absolute discharge, a new jurisdiction of the Review Board goes into effect under s-s.672.47(3), and the Review Board, under the new jurisdiction, must hold a hearing and make a further disposition, not later than 90 days after the Court disposition is made. It is not necessary in this case to decide whether the "shall" in s-s.672.47(3) is directory or mandatory. Different considerations apply to the place of s-s.672.47(3) in the totality of the legislative scheme, than apply to s-s.672.47(1), since s-s.(1) is governed in its interpretation by s-s.672.47(2), but s-s.(3) has no similar provision governing its interpretation.

**VI**

[17] For the reasons contained in Part IV, I would dismiss this appeal.

"The Honourable Mr. Justice Lambert"

**Reasons for Judgment of the Honourable Madam Justice Rowles:**

[18] The main issue on this appeal is whether a Review Board, established under Part XX.1 of the ***Criminal Code***, R.S.C. 1985, c. C-46, loses jurisdiction to hold a hearing and make a disposition under s. 672.47(1) of the ***Code*** if it has not done so within 45 days of a verdict of not criminally responsible on account of mental disorder being rendered.

[19] The appellant contends that since the Review Board did not hold a hearing until 73 days after the verdict was rendered, it was without jurisdiction to make a disposition order. The relief sought by the appellant is an order quashing the disposition order made by the Review Board.

**Part XX.1 of the Criminal Code**

[20] The statutory provisions under consideration on this appeal are part of the amendments Parliament made to the ***Criminal Code*** following the decision of the Supreme Court of Canada in ***R. v. Swain***, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481. In that case, the Supreme Court of Canada struck down as unconstitutional s. 542(2) of the ***Criminal Code***, R.S.C. 1970, c. C-34 [am. 1985, c. 19, s. 206], [R.S.C. 1985, c. C-46, s. 614(2)] which provided:

> 542. (2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or provincial court judge before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or provincial court judge directs, until the pleasure of the lieutenant governor of the province is known.

[21] As A.J.C. O'Marra has pointed out in "Hadfield to Swain: The Criminal Code Amendments Dealing With The Mentally Disordered Accused" (1993) 36 Crim. L.Q. 49, the Lieutenant-Governor's Warrant System in relation to those found not guilty by reason of insanity was a very old one, based on the English ***Criminal Lunatics Act***, 1800 (U.K.), c. 94. The warrant system was incorporated into the ***Criminal Code*** in 1892 and remained virtually unchanged in substance until the Supreme Court of Canada reviewed it in ***Swain***.

[22] Mr. Swain was charged in 1983 with assault and aggravated assault on members of his family. While at a psychiatric centre, Mr. Swain exhibited

bizarre and regressive behaviour but his condition improved quickly once he took anti-psychotic drugs. Mr. Swain was released pending trial on the condition that he continue to see a psychiatrist. He remained on bail until trial when he was found not guilty by reason of insanity. The automatic detention required under what was then s. 542(2) of the ***Code*** came into play and, under various warrants, Mr. Swain was subsequently held in custody in various psychiatric and mental health facilities. Finally, in September 1986, the Lieutenant-Governor of Ontario ordered that his warrant detaining Mr. Swain be vacated and that Mr. Swain be discharged absolutely. Before his absolute discharge, however, Mr. Swain had appealed his committal into custody on the ground that s. 542(2) violated his rights under ss. 7 and 9 of the ***Canadian Charter of Rights and Freedoms.***

[23] The Supreme Court of Canada held that s. 542(2) infringed an accused's rights under both s. 7 and s. 9 of the ***Charter*** and was not saved by s. 1. While the only provision in issue before the Supreme Court was s. 542(2), Chief Justice Lamer observed that the other sections underlying the Lieutenant-Governor's Warrant System were constitutionally suspect as they lacked procedural safeguards.

[24] In the course of his analysis, Chief Justice Lamer referred to the fact that the order of strict custody remained in effect until the pleasure of the Lieutenant-Governor of the province was "known". He observed that an insanity acquittee could be left to languish in the strict custody of the Lieutenant-Governor who was not statutorily required to ever make an order regarding that person.

[25] The Chief Justice also observed that the "indeterminate remand" under s. 542(2) was anomalous in comparison to other parts of the ***Criminal Code*** which provided for a limited remand for psychiatric observation.

[26] After ***Swain*** was decided, Parliament enacted Part XX.1 of the ***Criminal Code*** [S.C. 1991, c. 43]. One of the major changes brought about by the legislation is the change in the role of the review boards. Review Boards are now independent tribunals rather than merely advisory boards.

[27] Section 672.38(1) of Part XX.1 provides for the establishment of Review Boards for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder ("NCRMD") is rendered.

[28] Section 672.39 requires that a Review Board have at least one member who is entitled to practise psychiatry and, where only one member is so entitled, to have at least one other member with training and experience in the field of mental health who is entitled to practise medicine or psychology.

[29] In ***Davidson v. British Columbia (Attorney-General)*** (1993), 87 C.C.C. (3d)

269, Mr. Justice Goldie commented on the nature of a review board, at p. 277, referring to it as "a specialized administrative tribunal, the skills of whose members provide institutional insight into the legal and medical problems of mental health. It is given inquisitorial powers to summon witnesses and compel them to give evidence."

[30] In its recent decision in ***R. v. Winko***, [1999] 2 S.C.R. 625, 135 C.C.C. (3d) 129, the Supreme Court of Canada considered the argument that Part XX.1 of the ***Code***, in particular s. 672.54, violated the rights of an NCRMD accused under ss. 7 and 15 of the ***Charter.*** In rejecting the argument that s. 672.54 was unconstitutional, Madam Justice McLachlin, as she then was, referred, at para. 22, to the House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General,* No. 7 at p. 6 (7 October 1991) in which Daniel Préfontaine, then an Assistant Deputy Minister at the Department of Justice, summarized the objectives of Part XX.1:

> The aim of the bill is twofold: to improve protection for society against those few mentally disordered accused who are dangerous; and to recognize that mentally disordered offenders need due process, fundamental fairness and need the rights accorded to them for their protection when they come into conflict with the criminal law.
>
> [Emphasis added.]

[31] Of the scheme established, Madam Justice McLachlin stated, at para. 42:

> By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case.

[32] As Madam Justice McLachlin observed, at para. 29, "the provisions clearly emphasize the role to be played by the specialized Review Board in the ongoing assessment and management of the NCR accused and, indeed, it is likely that most inquiries will be conducted by the Review Board in practice".

[33] Part XX.1 is unique in the ***Criminal Code*** in that it departs from the "traditional adversarial model" into what Madam Justice McLachlin, in ***Winko***, at paras. 54-55, described as an "inquisitorial" system:

> It places the burden of reviewing all relevant evidence on both

> sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present. This is fair, given that the NCR accused may not be in a position to advance his or her own case. The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board....
>
> As a practical matter, it is up to the court or Review Board to gather and review all available evidence pertaining to the four factors set out in s. 672.54: public protection; the mental condition of the accused; the reintegration of the accused into society; and the other needs of the accused. The court and the Review Board have the ability to do this. They can cause records and witnesses to be subpoenaed, including experts to study the case and provide the information they require. Moreover, with particular reference to the Review Board that may assume ongoing supervision of the NCR accused, Parliament has ensured that its members have special expertise in evaluating fully the relevant medical, legal and social factors which may be present in a case: s. 672.39.

**Relevant statutory provisions**

[34] The provisions of Part XX.1 relating to disposition hearings that are relevant to the arguments put forward on this appeal are sections 672.45, 672.46, 672.47, 672.53 and 672.54. Those sections provide:

> **672.45** (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused, the court may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing.
>
> (2) At a disposition hearing, the court shall make a disposition in respect of the accused, if it is satisfied that it can readily do so and that a disposition should be made without delay.
>
> **672.46** (1) Where the court does not make a disposition in respect of the accused at a disposition hearing, any order for the interim release or detention of the accused or any appearance notice, promise to appear, summons, undertaking or

recognizance in respect of the accused that is in force at the time of the verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered continues in force, subject to its terms, until the Review Board makes a disposition.

(2) Notwithstanding subsection (1), a court may, on cause being shown, vacate any order, appearance notice, promise to appear, summons, undertaking or recognizance referred to in that subsection and make any other order for the interim release or detention of the accused that the court considers to be appropriate in the circumstances, including an order directing that the accused be detained in custody in a hospital pending a disposition by the Review Board in respect of the accused.

**672.47** (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.

(2) Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.

(3) Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of an accused, the Review Board shall hold a hearing on a day not later than the day on which the disposition ceases to be in force, and not later than ninety days after the disposition was made, and shall make a disposition in respect of the accused.

**672.53** Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice.

**672.54** Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

[1] where a verdict of not criminally responsible on account of mental disorder

has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

[2] by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

[3] by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

[35] Section 672.55(2) provides:

> **672.55** (2) No disposition made under paragraph 672.54(c) by a court shall continue in force for more than ninety days after the day that it is made.

**Loss of Jurisdiction**

[36] Jurisdiction is regarded as the legal authority of a court to entertain an action, petition or other proceeding. In criminal matters, jurisdiction is the legal power by which a court is authorized to deal with a particular accused in respect of a particular offence. [See E.G. Ewaschuk, *Criminal Pleading & Practice in Canada*, 2d ed. (Aurora, Ontario: Canada Law Book, Release May 1999) at 1:0010.]

[37] The development of the concept of loss of jurisdiction over the offender and the offence and its attenuation by amendments to the ***Criminal Code*** in 1976 [S.C. 1974-75-76, c. 93, s. 43], in 1985 [R.S.C. 1985, c. 27 (1st Supp.) s. 67], and in 1997 [S.C. 1997, c. 18, s. 40] is summarized in J. E. Salhany, *Canadian Criminal Procedure*, 6th ed. (Aurora, Ontario: Canada Law Book, Release November 1999) at pp. 6-104 to 6-108.

[38] In ***R. v. Krannenburg***, [1980] 1 S.C.R. 1053 at 1057, 51 C.C.C. (2d) 205, Chief Justice Dickson referred to loss of jurisdiction over the person as arising when the court failed to follow the prescriptions of the ***Criminal Code*** pertaining to adjournments and remands. Loss of jurisdiction over the offence (i.e. the information or indictment) was held to occur where the court failed to deal with the information on the day scheduled for the accused's appearance [***Trenholm v. Ontario (Attorney-General),*** [1940] S.C.R. 301, 73 C.C.C. 129] or where the court failed to do anything when the accused appeared at the proper time and place for his trial [***Krannenburg***].

[39] The issue in ***Krannenburg*** was stated thus, at 1055:

> It has long been recognized in our law that an inferior court may suffer loss of jurisdiction by reason of some procedural

> irregularity, as for example, when the date to which an accused is remanded or to which a case is adjourned for trial comes and goes without any hearing or appearance, "with nothing done". The narrow question in this appeal is whether s. 440.1 of the *Criminal Code*, a curative section proclaimed in force April 26, 1976, remedies a loss of jurisdiction resulting from the failure of a court to proceed with a case at the appointed time and place.

The Supreme Court of Canada concluded that the curative section did not remedy the loss of jurisdiction in that case.

[40] An amendment to what is now s. 485 of the ***Code*** was made in 1985 [R.S.C. 1985, c. 27 (1st Supp.) s. 67], in response to ***Krannenburg***, and was designed to cure not only loss of jurisdiction over the person but also over the offence.

[41] Section 485 of the ***Code***, which incorporates the substance of the various amendments referred to above, now provides:

> **485.** (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.
>
> (1.1) Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally, so long as paragraph 537(1)(j) or subsection 650(1.1) applies and the accused is to appear by counsel.
>
> (2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.
>
> (3) Where no summons or warrant is issued under subsection(2) within the period provided herein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1.
>
> (4) Where, in the opinion of the court, judge, provincial court judge or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge,

> provincial court judge or justice may adjourn the proceeding and may make such order as it or he considers appropriate.

[42] The concept of a Review Board having jurisdiction over the offence is obviously not one that fits into the scheme established under Part XX.1 of the ***Criminal Code*** where an accused has been found not criminally responsible on account of mental disorder. For that reason, the fact that there is no equivalent to s. 485(1) found in Part XX.1 of the ***Code*** is unremarkable.

**Statutory Interpretation**

[43] Whether a Review Board loses jurisdiction over an NCR accused if it fails to hold an initial disposition hearing within the time specified in s. 672.47 (1) is a matter of statutory interpretation.

[44] The appellant relies on certain principles of statutory construction to support his argument that a failure to comply with the time requirements set out in s. 672.47 necessarily results in a loss of jurisdiction. Central to the appellant's argument is the principle set out in s. 11 of the ***Interpretation Act***, R.S.C. 1985, c.I-23, that the word "shall" is to be construed as imperative and the word "may" as permissive.

[45] Imperative provisions must be complied with, that is, performance is not at the discretion of the tribunal, but the consequences of the failure to comply will vary depending on the statutory context.

[46] There is no issue that s. 672.47(1) is mandatory in the sense that it imposes on the Review Board a requirement to hold a hearing within the time specified. The contentious question is what consequences flow from non-compliance with the time requirement.

[47] Traditionally the courts have resolved the question of the consequences of non-compliance by categorizing the imperative direction as either "mandatory" or "directory":

> Failing to comply with a mandatory direction will render any subsequent proceedings void while failing to comply with a directory command will not result in such invalidation (although the person to whom the command was directed will not be relieved from the duty of complying with it - i.e. he may be subject to an order of mandamus or to internal discipline).
>
> The determination of whether an imperative command is mandatory or directory, however, turns on the intent of the statute.
>
> * * *

> The various Interpretation Acts, however, do not provide much guidance as to whether a "shall do" provision is mandatory-imperative or directory-imperative.
>
> [MacAulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (Carswell, Looseleaf ed.) Vol. 2 at p. 22-11, para. 22.5.1.]

[48] A similar point is made by P. Côté in *The Interpretation of Legislation in Canada*, 2d ed. (Quebec: Les Éditions Yvon Blais, 1992) at pp. 203-204:

> "Shall" by itself is insufficient to suggest the legislator intended nullity as a consequence of non-respect. The Quebec *Interpretation Act* (s. 51) and its federal counterpart (s. 28) "... clearly distinguish between that which is permissive and that which is not, but they do not decree the nullity of that which has not been done (according to the law)".
>
> * * *
>
> If the statute provides that non-compliance, be the formality imperative or directory, does not result in nullity unless the law so states or unless real prejudice has been caused, the question is easily resolved. The courts distinguish between mere technicalities and seriously vitiated procedures in order to interpret such provisions strictly.

See also *Maxwell on The Interpretation of Statues*, 12th ed. (London: Sweet & Maxwell, 1969) at pp. 314-315.

[49] The factors which the courts have looked to in undertaking the task of categorizing imperative provisions as "directory" or "mandatory" include the subject matter of the legislation, whether the statute provides a remedy in case of non-compliance, and the prejudice caused by non-compliance on the facts of the case. See *Interpretation of Legislation*, *supra*, at 204-205, and Jones and de Villars, *Principles of Administrative Law*, 2d ed. (Carswell, 1994) at 137.

[50] In ***Cleary v. Canada (Correctional Service)*** (1990), 44 Admin L.R. 142, 56 C. C.C. (3d) 157 (F.C.A.), an issue of the consequences of non-compliance with procedural requirements arose. In that case, Mr. Cleary had been convicted of sexual assault with a weapon and sentenced to imprisonment for seven years. Mr. Cleary had earned remission and could have been released on the presumptive release date, subject to the detention provisions of the ***Parole Act***, R.S.C. 1985, c. 34 (2nd Supp.). The procedure under the ***Parole Act*** and *Regulations*

required that the Correctional Service of Canada refer to the Parole Board any case for a detention hearing that could result in the inmate not being released on his presumptive release date. Section 17 of the *Regulations* stipulated that the Board "shall provide" the inmate with a written summary of the relevant information in its possession at least 15 days before the date set for the hearing.

[51] As a result of a strike involving Correctional Service of Canada employees, the relevant information was not delivered to Mr. Cleary until nine days before his scheduled hearing. He argued that by not following the time limits set out in the statute, the Parole Board did not have the jurisdiction to proceed. In oral argument, Cleary's counsel agreed that the non-observance of the time frame went to an error of law and not to jurisdiction in the strict sense. He also conceded that Mr. Cleary had had enough time to prepare for his case and that the Board had offered to adjourn the hearing if he required more time. In the trial division of the Federal Court it was held that the provisions in the ***Parole Act*** and *Regulations* were not penal in nature and so the time frames set out therein were not mandatory but directory. As a result, Mr. Cleary's application for *certiorari* was dismissed.

[52] On appeal, Chief Justice Iacobucci, as he then was, discussed the interpretation of the word "shall" in the legislation and disagreed with the interpretation placed upon it by the trial division. He stated, at p. 145 (Admin. L.R.):

> Whether the legislation is penal or not is irrelevant. What is relevant is that the decision involved is of importance to [Cleary] and has serious consequences to him. Moreover, there is little conviction in the "mandatory - directory" dichotomy to answer the question before us. At bottom what we are seeking is legislative intention. According to the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 11, "shall" is to be construed as imperative. But whether failure to comply with a command entails nullity, and if so to what extent, surely depends on the legislative scheme as a whole.
>
> [Emphasis added.]

[53] In that case, the Federal Court of Appeal found that the intention of the provision was to allow Cleary a minimum period of time to examine the information against him. As the time frames stipulated were held to be imperative, without more, Mr. Cleary would have been entitled to *certiorari*. The granting of *certiorari* is a discretionary remedy, however, and since Mr. Cleary had suffered no prejudice, the Court of Appeal held that it would have been a proper exercise of discretion for the trial court to refuse to grant *certiorari*.

[54] The question in this case is whether Parliament intended that a failure by a Review Board to comply with the stipulated time limit in s. 672.47(1) would result in an order made by a Review Board being quashed for want of jurisdiction.

[55] Part XX.1 of the ***Code***, unlike s. 485, does not mention jurisdiction and its possible loss, but Part XX.1 does contain a saving provision with regard to procedural irregularities. Section 672.53 provides that "[a]ny procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice". That section deals directly with the consequences of non-compliance with procedural requirements and is an important factor in determining legislative intent. By that section, the validity of the hearing is not undermined unless the procedural irregularity causes substantial prejudice to the accused.

[56] The legislation under consideration is also structured in such a way that an NCRMD accused has an immediate remedy if a Review Board fails to hold a hearing within the stipulated time. The orders that apply or may be made with respect to an NCRMD accused are set out below.

[57] Section 672.46(1) provides that where a court does not make a disposition in respect of an accused at a disposition hearing, any order, whether for release or detention, in force at the time of the NCRMD verdict continues in force until the Review Board makes its disposition. Under subsection (2) of s. 672.46, a court may, on cause being shown, vacate such an order and make any other order for the interim release or detention of the accused that the court considers appropriate.

[58] Section 672.45(1) provides that where an NCRMD verdict is rendered, a court may of its own motion, and "shall", on application by the accused or the prosecutor, hold a disposition hearing. In other words, the court must conduct a disposition hearing if an application is made by either the accused or the prosecution. Under subsection (2), the court "shall" make a disposition order "if it is satisfied that it can readily do so and that a disposition should be made without delay".

[59] Subsection 672.47(3) provides that where a court makes a disposition under s. 672.54 other than an absolute discharge, the Review Board shall hold a hearing within 90 days of the court disposition.

[60] Under s. 672.47(1), where an NCRMD verdict is rendered and the court makes no disposition, the Review Board "shall", as soon as is practicable but not later than 45 days after the verdict was rendered, hold a hearing and make a disposition.

[61] Subsection 672.47(2) provides that where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time

for holding a hearing to a maximum of 90 days after the verdict was rendered.

[62] If a Review Board fails to hold a hearing within the time prescribed in s. 672.47(1), the NCRMD accused is not without a procedural and substantive remedy. If no disposition hearing has been held by the court following the NCR verdict, the NCRMD accused can apply to the court to hold a hearing. In view of the mandatory language used in s. 672.45(1), the court is required to hold a disposition hearing if either the accused or the prosecution applies.

[63] In the somewhat unlikely event that the court in which the NCR verdict was rendered has already held a disposition hearing but not made any order, the NCRMD accused could apply for an order in the nature of *mandamus* directed to the Review Board. In view of the mandatory language used in s. 672.47, there can be no issue that *mandamus* is an appropriate remedy: see ***Cleary v. Canada (Correctional Service)***, *supra*.

[64] Taking into account the purpose of the legislative scheme as elucidated in ***R. v. Winko***, *supra*, and the pivotal role the Review Board must play in that scheme, the remedies available to an NCRMD accused should a Review Board fail to comply with the time constraints imposed by s. 672.47, and the saving provision in s. 672.53, I am of the view that Parliament did not intend to have the validity of a delayed hearing, or any order which resulted therefrom, defeated unless the delay resulted in substantial prejudice to the NCRMD accused.

[65] In this case, no prejudice to the appellant was shown.

**Result on the appeal**

[66] I have had the advantage of reading in draft the reasons for judgment of Mr. Justice Lambert. As my colleague has pointed out, a further point was raised during argument about the effect of the ninety-day time period specified in the deferral order. I agree with Mr. Justice Lambert that the order made by the Provincial Court judge, being valid on its face, cannot be made subject to collateral attack when the order is not the focus of the proceedings. For that reason, I agree with him that the order made by the Provincial Court judge must be taken to be valid. As the hearing before the Review Board took place within the 90 days, the appeal must be dismissed.

[67] On the question to which counsel addressed their main argument, however, I respectfully disagree with the opinion expressed by Mr. Justice Lambert for the reasons I have given.

"THE HONOURABLE MADAM JUSTICE ROWLES"

**I AGREE:**

"THE HONOURABLE MR. JUSTICE BRAIDWOOD"