Mental Health Courts: Can They Break the Cycle?

Richard D. SCHNEIDER*

Today, I'm going to be speaking about the mental health court in Toronto. I may inadvertently flip between referring to it as the 'mental health court' or 'courtroom 102' which is the number on the courtroom door. Courtroom 102 was actually made a little bit famous with the Canadian Broadcasting Network's serial entitled "This is Wonderland." In it, a young lawyer named Alice worked her way through the system, developing her legal skills. Wonderland was the big old courthouse where I preside, which does in many ways resemble a castle. During the course of this show, the mental health court would inevitably factor into each episode, so in Canada at least, the concept of a mental health court became more familiar because of a somewhat famous television show.

I was in Padua, Italy, in July and I was listening to a speaker who indicated that there are approximately 600 mental health courts now around the world (this number seems high to me and may have included 'drug courts'). Most of them are in the United States. Although most of the American courts get some of their funding from one federal envelope, there are no two courts that are exactly the same. Instead, many courts operate quite differently and yet all share this one name—Mental Health Court. I think that, first of all, this is a good thing and moreover, it's a natural thing. Most of these courts, are or have been, children of necessity. In other words, they have been solutions to local problems which have been implemented recourse to local leaders and resources. It stands to reason that they'll look and behave quite differently. The only important thing to take away from that is when you're looking at the literature, it's very important to realise that you may be looking at apples and oranges, if you're comparing what's in the literature to your home jurisdiction, or are researching options for your own community.

* Justice, Ontario Court of Justice, Toronto, Ontario.

In Toronto, for example, we had two principal problems that drove the creation of the court. The first was inordinate delays in sorting out pre-trial psychiatric affairs generally, assessments dealing with either criminal responsibility or, and this is the bigger group, fitness or competency to stand trial. The second big difficulty in our jurisdiction was seen as the so-called 'revolving door syndrome.'

Other jurisdictions have distinct issues and develop appropriate institutional responses, with the result of a lack of uniformity in the shape and form of mental health courts. As a result, I'm rather sceptical or against what are referred to as 'blueprints' or 'best practices'; While it is true that they share the general objective of decriminalizing mentally ill people, it can be problematic to go beyond that.

What I would like to do today is talk a little bit about the history of our court (I should say the history of our jurisdiction predating the court), and the reason for the creation of the court—how it came to be. I'll describe for you what the court looks like today, how it operates and then finally, where I think we should be going from here.

So, a little bit of legal history that I'll try to keep fairly brief. Prior to 1991—a significant year because the Supreme Court of Canada came down with a watershed decision, *Regina v. Swain*,[1] which I'll describe the importance of momentarily. Prior to 1991 in Canada, the deliberate raising of either of the two principal psycho-legal issues, namely, fitness to stand trial or lack of criminal responsibility was generally one that was reserved for more serious offences: homicides, attempt murders, very serious matters. This was called the Lieutenant-Governor's Warrant System. Defence counsel, and I was one, would deliberately try and steer disputes away from those issues. They were seen as rocky and unpredictable shoals on which you didn't want to ground your client. There were a number of fears and you didn't want to raise an issue of that sort lightly. These concerns were based in part on reality and more so, on a misapprehension of how the system worked, but nonetheless, there was great uncertainty with the system in place in Canada.

In Canada, an accused found (or obtains a verdict of) either unfit to stand trial or not criminally responsible on account of mental disorder, was held at what was known as "His or Her Majesty's Pleasure" (a scheme which dates back to the *Criminal Lunatic's Act* of 1800). It was feared however, that these accused were at risk of disappearing into some

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

dungeon of a hospital never to reappear again for many, many years in respect of what might have been relatively minor matters that—had they proceeded in the normal course—would have resulted in no or very little incarceration. So, it was something to steer away from.

There were, in Canada, established boards or tribunals that would review the status of these "customers" on a periodic basis and inform the Lieutenant Governor. And there again, this tribunal was misunderstood for the most part. It was seen as a scary Star Chamber … a tribunal that you would want to steer your client far away from.

In some provinces (it wasn't legislated federally), there was no systematic specified window of time within which an accused's status had to be reviewed. As a result, the other problem with the regime was that most of the less-to-moderately-serious offences (and most criminal matters are less-to-moderately-serious), were processed in the usual manner and medically meritorious cases were not being formally recognized. They were slipping through the system; as a result, we were filling up the penitentiaries and the provincial correctional institutions with mentally disordered accused, who might have, had they been able to avail themselves of these verdicts without such draconian consequences, been dealt with more appropriately.

This takes me right to the Supreme Court of Canada's decision in *Regina v. Swain.*[2] The facts of the case aren't particularly important. What happened to Mr. Swain was this: he committed some serious personal injury offences upon his wife and children in a bizarre manner—Assault and Aggravated Assault—and by the time he came to trial, he was out on bail and re-established in the community. The mental disorder which was operative at the time of the commission of the offences was in remission, and things were going well. The Crown raised—over Swain's objection—the defence of, as it was then known, 'not guilty by reason of insanity.' They were successful. The old legislative scheme that was in place at the time required, upon a verdict of not guilty by reason of insanity, that the accused step into what was known as 'strict custody' and that was regardless of the accused's mental status at the time of the verdict.

So here, Mr. Swain, after the verdict of not guilty by reason of insanity, had to step into the strict custody of a maximum security psychiatric hospital. Now, for a variety of reasons, this went up the court

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[2] *Ibid.*

system, through to the appellate court, and finally to the Supreme Court of Canada. The highest court reviewed the legislative scheme and found that the failure of Parliament to provide a window within which an accused's status *must* be reviewed made it inconsistent with the *Canadian Charter of Rights and Freedoms*.[3] The Court found that the provisions fell short with respect to a variety of constitutional guarantees and, as a result, sent this whole legislative scheme back to Parliament to be fixed-up.

The Supreme Court of Canada gave Parliament six months within which to do that, and the result was that on February 4, 1992, Bill C-30 was proclaimed.[4] It constitutes now, and this is going to mean very little to you, what's known as Part XX.1 of our *Criminal Code*. These provisions tell us how to deal with mentally disordered accused. It sets out tests, standards and procedures and is a 100 section mini-code within the large *Criminal Code*.

And that's where our problem starts. I'm not too sure why, but what I can tell you is that since the proclamation of Bill C-30 and this new legislation, we have seen dramatic increases in the numbers of mentally disordered individuals coming through our criminal courts.

Of course, that causes one to immediately scratch their head and start to wonder—what's going on? And at first, the thinking was well, maybe there's no real increase at all but that the 10% or 15% increase is just the mentally disordered accused holding their own in an overall growing arrest rate across the country. Well, we obtained data from other sources which indicated that over the same period of time the population of mentally disordered accused in the courts was going up by 10-15%, overall arrest rates were actually going down, which makes this curve look even more exponential than it did to us at the beginning. The same trend was observable across Canada from jurisdiction to jurisdiction; it's more or less conspicuous across jurisdictions but the trend is nation-wide.

So, what's going on?

I think that there are a few possible explanations. I have the luxury of absolutely no data to slow down my speculation. I think that the first explanation has to do with the legislative scheme itself. The new provisions that came in with Bill C-30 were seen by the bench and bar as

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[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] S.C. 1991, c. 43.

a brighter, airier, more attractive scheme. There were two principal changes which the defence bar found attractive; the first was that upon a verdict of either NCR (not criminally responsible) or unfit, there was no more automatic strict custody. Instead, whatever bail provisions or detention orders were in place at the time of the verdict were presumed to carry through until the accused's first review by either the court or the review board. That was, of course, the problem Mr. Swain had, and one of the first issues to be rectified by Parliament. So, there was no automatic strict custody upon obtaining either one of these verdicts.

The second change relates to the 'exit door,' side of the issue. The previous legislative scheme granted discharges from the system where there had been what was known as 'substantial recovery.' The dominant (indeed ubiquitous) diagnosis of customers who were subject to the old Lieutenant Governor's scheme was paranoid schizophrenia; substantial recovery for that population was something that often did not occur. That resulted in accused being held for years and years, never released until a substantial recovery had occurred.

With the new scheme, the exit door doesn't have anything to do with the presence or absence of the disorder, but rather upon the accused's dangerousness. And, there is no onus upon the accused to prove lack of dangerousness, unless the State can demonstrate that the accused constitutes a 'significant threat to the safety of the public.' That interpretation of the legislative standard is fleshed out very fully in a subsequent decision by the Supreme Court of Canada in *R. v. Winko*.[5] Unless the State can demonstrate significant threat, the accused is entitled, regardless of the seriousness of the offence, to an absolute discharge which ends entirely and completely all obligations to the criminal justice system.

So the exit door was seen as more attractive. You can imagine that for that 'less-to-moderately-serious' group of customers who may have only committed property offences, it would be awfully difficult for the State to show that they constituted a significant threat.

Therefore, by engaging, and I'm talking now principally about the issue of criminal responsibility, that defence one could be quite confident that a discharge was going to be coming soon if not immediately and with that, of course, they would not obtain the entry of a record of criminal conviction.

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

The unfortunate (or fortunate, depending upon your perspective) thing about this scheme was that, I think a sort of "build it and they will come" phenomenon occurred.

I remember, and at the same time there were failings on the civil side which I'll describe for you, but I can remember as a defence counsel whose practice was largely representing mentally disordered accused, I would have families who were jubilant that Johnny had finally been charged with a criminal offence. Why jubilant? This was the best news because now with this great system that had been put in place, Johnny could finally obtain by way of court order a comprehensive assessment that had eluded the family for years under the civil system.

Sometimes there was even better news down the road: at the conclusion of that assessment and the trial of the issue, if Johnny turned out to be 'unfit to stand trial,' upon a Crown application the court could make an order that Johnny actually be treated against his will for a period of up to 60 days for the purpose of rendering him fit.

And then if, once finally fit to stand trial, Johnny were ultimately found to be not criminally responsible on account of mental disorder, then the State would look after Johnny indefinitely (as long as he remained a significant threat to the safety of the public) and ensure that housing, medication, clothing and support of every kind was put in place.

So what started to emerge was that the Forensic Mental Health Care system was the Cadillac mental health care scheme and the holding of a criminal information or indictment was sort of like the American Express Gold card … 'go to the front of the line with this' … which was unfortunate.

Part of the explanation for this growth was thus as a direct product of the new scheme itself; unfortunately, over the same period of time, we experienced in Canada, North America, and from what I can gather, most of Western Europe as well, cutbacks in health care spending and in particular, mental health care spending. And, it's like this old hydraulic effect that was talked about in the 1930s, namely, you can push people out of one system by closing down hospital beds, but they don't go away, they just pop up in another system. I think we've got a bit of this hydraulic effect going on: as the government is closing down beds in hospitals, they are opening them up under bridges and over subway grates and in the parks. In Toronto, I am fortunately able to walk from my home to the courthouse in about 10 minutes. On each and every trip I run into

mentally disordered and homeless people. They are sleeping on subway grates in the morning and pan-handling in the evenings.

Of course, when this population is left without care, then unfortunately, inherently minor matters often escalate into very serious matters that attract the attention of the constabulary, creating yet another forensic patient. There is a distinct, but complementary explanation of what is driving the phenomenon of increase in mental health populations in the criminal justice system. In Canada and most of the US over the same period of time, we've also witnessed a period of relative 'zero tolerance' and high accountability for public actors. I think we've, if this is a word, really 'disincentivised' the police in terms of exercising their discretion. When they attend on a 911 emergency call or observe a situation on the street, they do have discretion under our civil mental health legislation to exercise their discretion in a manner that de-escalates and avoids criminalization, but given constant public critique, there's really little in it for them.

In Toronto, for example, if an officer elects to arrest somebody under the *Mental Health Act* and take them to a psychiatric emergency, rather than laying a criminal charge, they are often confronted with waiting hours in the psychiatric emergency, only to have a psychiatric resident come out several hours later to tell them the individual doesn't satisfy the criteria for involuntary admission. The customer is across the parking lot before the police are back to their car.

Finally, there is the fact generally in Canada our civil legislation is 'dangerousness-based' rather than based upon a 'need to treat.' I won't spend much time with that, other than to say (I don't know whether we have any actuarial risk predictors here) our ability to predict dangerousness isn't impressive. Therefore, the civil legislation itself is perhaps not scooping up as much of this population as it might, assuming there were places to put them.

In any case, whether these individual explanations are right or wrong or there's a combination of them operating, I'm not sure; but business is up.

Prior to the creation of the mental health court, the court system was being swamped. There were extremely long waiting times when assessment or treatment orders were made. The procedure for assessments at the time involved a 30 day inpatient assessment to a psychiatric hospital. After the assessment was completed, and after

weeks waiting for those to even begin, the matter would come back to court. Then a variety of things could go wrong. The clerks wouldn't know what to do, they wouldn't have the correct forms. The file might come back without the psychiatrist reports, so we had to adjourn again to find out when they would be available to try the issue. Often reports came back, through no fault of the psychiatrist but rather because of the way the requesting order was written, with the wrong issue being addressed. In general, what we were experiencing was an embarrassing mess dealing with this new load of mentally disordered customers swamping the criminal courts. We could not deal expeditiously with these pre-trial psychiatric matters. Something had to be done. People were spending several weeks, if not months, sorting these things out.

A serious problem arose. Had they been a so-called "normal" accused they wouldn't have spent 10 minutes in jail; they would have entered a guilty plea at first instance after reaching a bargain that excluded jail time. Instead, for the mentally disordered accused, after they spend an inordinate time in custody sorting the assessment issues out, as soon as they are fit and have the 'green light' to proceed, they would go ahead and plead guilty. Why? Because, while they may be fit, they may be otherwise un-bailable, and the first thing they want to do (with liberty being the principal interest) is to enter a plea of guilty and go home, or wherever.

So, what were we doing?

Upon entering a guilty plea, typically there would of course be a sentence of 'time served' and that meant we were then releasing people who were fit but mentally ill onto the streets of Toronto in the middle of winter wearing an orange suit, with nowhere to go, no follow-up health care in the community, no funds, no prescription, no medications, and no clothing.

Well, guess what? They were back in a few weeks.

As a result, it was decided that we would create a court specifically designed to deal with the mentally disordered accused. In August of 1997 a proposal was made to the Chief Justice of Ontario, and we opened the courtroom doors in May of 1998.

My account thus far takes us then to the two principal parts of our Court's mandate: 1) expediting the pre-trial assessment process and, 2) slowing down the revolving door. I'll begin by describing briefly how the court works.

The most unusual feature of the court is that we have psychiatrists in the Court every day of the week. The Court is open every day, all day, and individuals who are recognised as having 'issues' are picked up at first appearance court and traversed to the mental health court where they are triaged in open court. Then, if the court has reasonable grounds to believe that further medical evidence is necessary to determine the issue of the accused's fitness to stand trial, I'll order that the individual be assessed.

Psychiatrists come in on a rotating basis at midday and will do anywhere from one to seven or eight fitness assessments. They'll then inform the Crown as to their views. No written reports are required. The assessments are highly focused and very brief. We're not interested in the third sibling's tonsillectomy, we're interested in "is this guy fit or not," it's straight to the bottom line.

With the assistance of the psychiatrist who is there in court, we are able to have the accused assessed; if fitness is a live issue, then we try the issue in the afternoon.

If the accused turns out to be unfit, then the court will entertain the Crown's application for a treatment order, and have the accused packed off to hospital for that purpose on the same day. And so we've taken what was at one time a frustrating process that required several weeks and converted it into one that takes several hours.

The other feature of the court which is interesting or unusual is that we have attached to the Court, nine what we call 'court mental health workers.' These are social workers who pick up on the second aspect of our mandate. They ensure that any person we put back into the community, whether it's on bail or on probation order or a conditional sentence or whatever, anybody who leaves the court and is going back onto the street, they ensure that they're as much as possible plugged back in to the system. They'll assist with obtaining identification documents (we have ID clinics), re-establishing their mental health care coverage, and set them up with an ACT team in the community. We are also able to assist with housing (we have 40 short term housing spots that we can plug people into, until more permanent placements are found). We can also assist in re-establishing social assistance, and hook up with out-patient psychiatric services.

We have, in an old abandoned vault attached to the court room, what we call 'the boutique,' which is a place that receives clothing

donations. So we are able to clothe these customers as well. It is highly desirable to remove their orange prison suits before they're popped back out onto the streets of Toronto.

In addition, we have specially trained duty counsel who are on staff in the court. It is a bit like a public defender system but attached specifically to the mental health court, so that there's some corporate memory and continuity. And, while these lawyers are paid terribly, they are really emerging as experts in the mental health field.

We have specially trained court officers who no longer think it's necessary to wear rubber gloves if you're dealing with a schizophrenic. We have specially trained clerks who have all of the correct phone numbers, and forms, and things to do, so that the process runs more fluidly. We have a team of two dedicated crown attorney's who have received specialized education, and they are permanently attached to the court. These crown attorneys know the files—which come back every day until people are ready to be put back out on the streets.

The physical architecture of the court was very fortuitous. At the same time that this mental health court proposal came to be approved, they were moving the youth court out of the building and we inherited a courtroom that had adjoining cells and offices just on the other side of the courtroom.

As well, we have a special selection of judges. I sit there about 70% of the time and I have a few colleagues who fill in the remaining time. We're not specially trained in any way at all. The job requirements are only patience, a sense of humour, and an ability to read the *Criminal Code* in a very elastic manner.

So, the results.

I don't have any data. I'm not holding myself out as an academic of any sort.

All I can tell you is that obviously with this process, we have saved several hundreds and probably, thousands of in-patient psychiatric remands annually. That's important from two angles.

1) the cost that is inherent, and

2) the liberty interests of the accused.

I think those results are obvious and fairly compelling by themselves.

We don't have any data with respect to recidivism rates. Hopefully, we will soon have funding to assess a broader range of outcomes.

The physical space in the court, in addition to housing the mental health court which has the two principal mandates I've described, also houses the Crown's program for the diversion of mentally disordered accused. I'll just take a second to describe that scheme. It's essentially one where, for low- to mid-range offences, the Crown can approve an accused as a candidate for diversion. The way it works is this. It's first of all voluntary. The accused needn't be fit to stand trial. There's no admission of guilt or criminal responsibility of any sort. There's no sanction for failures or breaches. The accused may withdraw from the program at any time. But if the accused sticks with the diversion program (and this is a program which is again supported by the court mental health workers who act as case managers or brokers), then at the conclusion of whatever the period of time is established if they are successfully stabilized and reintegrated into the community, the Crown will exercise its discretion to withdraw the charge. Again, we've obviated a prosecution which has savings that are obvious.

That's what the court looks like in a nutshell. I think I have about three minutes to talk about the future.

It may come as a surprise to you that I am not completely content with this new wonderful world of mental health courts. I think it's great but I don't think we should be seeing mental health courts as any sort of panacea. In fact, my happiest day, believe it or not, would be the day we could shut the mental health court down.

To my mind, and this is all explained in more detail in the book that I'm shamelessly waving around,[6] if you have a jurisdiction which either has a mental health court or is considering one, to my mind it's symptomatic of a fundamentally broken civil mental health care system.

You've got too many mentally ill people coming through the court house doors if you're considering an enterprise of this sort. To my mind, the accused who come through the mental health court, often labeled forensic patients, could in the alternative be described as "failed civil mental health care patients." I can say that with an awful lot of

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[6] R.D. Schneider, H. Bloom & M. Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Toronto: Irwin Law, 2007).

confidence because 99.9% of the people that come into my courtroom already have extensive histories with the civil mental health care system.

So what have we got? We have a civil system that had that person, but he got away. He slipped through the civil mental health care net either because of the inadequacies in the legislation or resources or both or whatever; I'm not sure. But they float further downstream and they eventually get picked up in the forensic net by the constabulary and brought into court and, as a result, the *Criminal Code* of Canada is emerging as the *Mental Health Act* of last resort. The criminal justice system is emerging as a principal dispenser of mental health care.

And really, that obviously was never intended and is, really, at least to my mind, sort of perverse.

Building mental health courts is, to my mind, like putting bigger and bigger buckets under a leaky roof; the leaky roof being the civil mental health care system which is leaking mentally ill people into the criminal justice system. We've got to put a bucket down to catch them. And while we're building these bigger and bigger buckets to deal with this situation, nobody's really thought about fixing the roof.

I have about 30 seconds to close and I'll just say that, to my mind, the best prophylactic against the scenario of the sort I've described is a potent, well resourced, well legislated, civil mental health care system.

This population is more economically, more efficiently, more appropriately and more humanely dealt with by nurses, social workers, psychologists, psychiatrists and hospitals, rather than by cops and courts and jails and mental health courts.

My final thought is that while mental health courts are great—they're a short term fix. They should not be seen as the long-term solution. Clearly fixing the roof (re-vamping the civil mental health care system) is like turning around the Queen Mary. That's not something that's going to be done overnight. But I think that long term, while the mental health courts are terrific and are providing a very, very valuable service at this point—without doubt what we should be doing is turning to our legislators and our governments to improve the mental health care system: Obviating the need for mental health courts.

I think that that's really the better answer to this horrible problem.

Thank you for your attention.