

**Conway: A Bittersweet Victory for Not Criminally Responsible  
Accused\***

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The slow accretion of decisions by the Supreme Court of Canada on Part XX.1 of the *Criminal Code* must have been frustrating for detainees like Paul Conway. Clearly, progress has been made since *Swain*<sup>1</sup> swept away the pernicious regime of Lieutenant-Governor's Warrants and Parliament substituted the modernized dispositional provisions largely administered by Criminal Review Boards. *Winko*<sup>2</sup> has been the seminal case in the new era. In addition to determining that s. 672.54 of the *Code* survived scrutiny under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, it emphasized "individualized assessment and the provision of opportunities for appropriate treatment," while ensuring "the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness,"<sup>3</sup> and it certified that "[a]ny restrictions on the liberty of NCR accused are imposed for essentially rehabilitative and not penal purposes."<sup>4</sup>

This apparent benignity has not produced wholly satisfactory results. Some accused face huge obstacles in obtaining the kind of treatment they desire, and the promise of eventual liberty and reintegration remains unfulfilled for them: "Almost one quarter of NCRMD/UST cases are spending at least ten years in the Review Board systems and some have been in for significantly longer."<sup>5</sup> Having spent twenty-six years in custody, Mr. Conway has not yet benefitted from the doctrinal advances in the post-Mental Disorder Amendments jurisprudence. His victory in the Supreme Court may prove to be Pyrrhic. *Conway*<sup>6</sup> deserves to be heralded for its sensible confirmation that Canadians must be able "to assert their *Charter* rights in the most accessible forum available, without the need for

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\*Mr. Conway has himself said: "The decision is bittersweet for me." See Makin, "Legal victory was historic, but plaintiff remains in psychiatric ward," *infra*.

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<sup>1</sup>*R. v. Swain* (1991), 5 C.R. (4th) 253 (S.C.C.).

<sup>2</sup>*Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625, 25 C.R. (5th) 1 (S.C.C.).

<sup>3</sup>*Ibid.*, at para. 43.

<sup>4</sup>*Ibid.*, at para. 94.

<sup>5</sup>Jeff Latimer and Austin Lawrence, *Research Report: The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Ottawa: Dept. of Justice Canada, January 2006) at 39.

<sup>6</sup>*R. v. Conway*, reported *ante* p. XXX [hereinafter cited as *ConwaySCC*].

bifurcated proceedings between superior courts and administrative tribunals.”<sup>7</sup> On the other hand, the implications of *Conway* for this accused and for the future of others with a prospective mental disorder defence do not set the stage for an unhesitant celebration.

In this comment, the attractions of *Conway* both for accused subject to Criminal Review Board dispositions and for others detained under provincial mental health legislation are recognized. However, owing to the reasoning in several previous cases cited in *Conway* and its own unsympathetic outlook, the decision is seen as having a restricted potential for accused. Moreover, it is argued that the tolerability in *Conway* of extremely long periods of supervision seems to diminish the likelihood of any Parliamentary or judicial reconsideration of the relevance of the principle of proportionality in mental disorder cases. On balance, it will be concluded that *Conway* may further discourage the utilization of the already rarely invoked not criminally responsible defence.

### **Review Boards and the *Charter*: A Welcome Combination**

*Conway* will be influential for its according Review Boards what seemed to be in the offing for years: a relatively generous allocation of basic s. 24(1) remedial jurisdiction. Review Boards have finally been recognized as courts of competent jurisdiction whose *Charter* powers have not been fettered by Parliament: a “quasi-judicial body with significant authority over a vulnerable population,” “authorized to decide questions of law,” and “entitled to decide constitutional questions, including *Charter* questions.”<sup>8</sup> Subject to Steve Coughlan’s trenchant analysis<sup>9</sup> and the reservations in the next section, the stage has been set for further opportunities to explore the scope of this authority, based upon whether the “particular remedies sought” are ones which “Parliament appeared to have anticipated would fit within the statutory scheme.”<sup>10</sup>

For psychiatric inmates, both civil and criminal, *Conway* establishes a forum where detainees can raise a host of issues where previously there would have been a “denial of early access to remedies,” an effective “denial of an appropriate and just remedy.”<sup>11</sup> While it is unquestionable that its analysis of the Ontario Review Board extends to all other Review Boards constituted under the *Criminal Code*, *Conway* presumptively endows provincial and territorial *Mental*

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<sup>7</sup>*Ibid.*, at para. 79.

<sup>8</sup>*Ibid.*, at para. 84.

<sup>9</sup>“Tribunal Jurisdiction over Charter Remedies: Now You See It, Now You Don’t,” *ante* p. XXX.

<sup>10</sup>*Ibid.*, at para. 85.

<sup>11</sup>*Ibid.*, at para. 79.

*Health Act* tribunals with the same jurisdiction. For example, the Review Board under the *Involuntary Psychiatric Treatment Act (I.P.T.A.)*<sup>12</sup> is a “specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge”<sup>13</sup> of involuntary patients,<sup>14</sup> where nothing in the *I.P.T.A.* suggests that the House of Assembly “intended to withdraw *Charter* jurisdiction from the scope of the Board’s mandate.”<sup>15</sup> The Nova Scotia Review Board under the *I.P.T.A.* is “authorized to decide questions of law,”<sup>16</sup> using the same rationale as in *Conway*, as parties “may appeal on any question of law from the findings of the Review Board to the Nova Scotia Court of Appeal.”<sup>17</sup> The subsequent question in *Conway*, about the fit between the remedies sought and “the statutory scheme,” must be answered in both Review Board contexts.<sup>18</sup>

For civil and criminal mental health detainees (and other prisoners), the availability of the *Charter* at Review Board hearings should provide enhanced access to justice in settings where it has been difficult to invoke the protection of the law, let alone the *Charter*. These tribunals vitally affect the dignity, liberty and living conditions of institutionalized persons. Before *Conway*, the exercise of discretion by clinicians and administrators was virtually invisible and unchallengeable, but now Review Boards can be asked to shine the brighter light of the *Charter* on their decision-making. Early reactions to this aspect of *Conway* have varied, with advocates for persons with disabilities being predictably enthusias-

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<sup>12</sup>Stats. N.S. 2005, c. 42.

<sup>13</sup>*ConwaySCC*, *supra*, at para. 84.

<sup>14</sup>See s. 68(1) of the *Involuntary Psychiatric Treatment Act*, *supra*, for the range of applications maintainable before the Review Board, in addition to regular mandatory reviews under s. 37. Other provinces and territories have Review Boards with similar powers, although, consistent with the reasoning of *Conway*, the statutory authority of each tribunal would have to be examined. For instance, see the Alberta *Mental Health Act*, RSA 2000, c. M-13, wherein the review panel is empowered to hear patient applications to challenge admission and renewal certificates and community treatment orders (s. 38) and must also conduct regular reviews of extended periods of involuntary status (s. 39). Appeals are to the Court of Queen’s Bench (s. 43). Although the grounds for appeal are not specified, both the chair and vice-chair must be lawyers (s. 34(1)) and the Minister is obliged to “provide secretarial, *legal*, consultative and interpretation services and other assistance to review panels” (s. 34(5)).

<sup>15</sup>*ConwaySCC*, *supra*, at para. 84.

<sup>16</sup>*Ibid.*

<sup>17</sup>*I.P.T.A.*, *supra*, s. 79(1).

<sup>18</sup>*ConwaySCC*, *supra*, at para. 85.

tic,<sup>19</sup> and clinicians and institutional representatives more reticent or even condemnatory.<sup>20</sup>

In the United States, where such litigation has been commonplace for some time, the critical gaze of the courts on the troubling issues confronted by patients confined to institutions has assisted the expansion of their rights and has hastened the improvement of the social and physical atmosphere within many facilities. In the 1974 case of *Wolff v. McDonnell*, the United States Supreme Court captured the obligation to bring the Constitution into carceral environments when it famously observed that “. . . a person is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”<sup>21</sup> Michael Perlin said that it is imperative to bring the same lifeline to psychiatric detainees: “It is axiomatic that persons institutionalized because of mental disability must have at least as many, if not more, rights than one charged with or convicted of a criminal offence.”<sup>22</sup> His text provides a useful survey of the scope of institutional issues that have been examined in the American courts, such as the rights to free exercise of religion, visitation, free expression, counsel, access to justice, sexual interaction, due process in institutional decision-making, and economic fairness in employment.<sup>23</sup> While the *Charter* is different substantively and has a distinctive remedial framework, *Conway* should open Review Board proceedings to comparable assertions on behalf of Canadian mental health detainees, whether criminal or civil.

### **Limits on the Remedial Scope of an Otherwise Auspicious Decision: The New Context**

While *Conway* is, on balance, a promising precedent, it may not be as effective a guarantor of the rights of mental health detainees as would first appear. In part, this is a matter, as Steve Coughlan has argued *ante* p. XXX, of the case merging “the existence of the remedy and the criteria for granting the remedy into a sin-

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<sup>19</sup>See Kirk Makin, “Tribunals can apply Charter rights, Supreme Court rules,” *The Globe and Mail*, June 11, 2010, reporting Marlys Edwardh, counsel for Mr. Conway, as saying “the sky is the limit . . . an absolutely huge victory.”

<sup>20</sup>See Kirk Makin, “Legal victory was historic, but plaintiff remains in psychiatric ward,” *The Globe and Mail*, June 18, 2010, noting Kristin Taylor, a CAMH lawyer, as being concerned about delays and complexities, and Richard O’Reilly, a psychiatrist, as predicting that “Charter issues will swamp hearings.”

<sup>21</sup>*Wolff v. McDonnell* (1974), 418 U.S. 539 (U.S. Sup. Ct.), 555-56.

<sup>22</sup>Michael L. Perlin, *Mental Disability Law; Civil and Criminal*, 2nd Ed., Volume 2 (Charlottesville: Lexis, 1989), at 394.

<sup>23</sup>*Ibid.*, see Chapter 3C-1, “Other Institutional Rights”, pp. 386-493.

gle question.” It is also a function of the Supreme Court’s overready reliance on some of its precedents in barring Mr. Conway’s petition for a s. 24(1) remedy either to free “the Board from statutory limits”<sup>24</sup> and to permit him to have an absolute discharge or, in the event that option was precluded, to provide a treatment order. *Winko*, *Mazzei*<sup>25</sup> and *Nasogaluak*<sup>26</sup> are cited to support the Court’s outlook on the unavailability of absolute discharges, treatment orders and constitutional remedies respectively. The extreme circumstances of *Conway* ought to have motivated the Court to reconsider some of its prior holdings in a more sympathetic and contemporary spirit. This section will first examine the Supreme Court’s general standpoint on both statutory interpretation and the availability of s. 24(1) relief in light of emerging international legal norms and the particular challenges presented by persons like Mr. Conway who consistently refuse to accept treatment, before going on to look at the issues surrounding treatment orders and obstacles to the use of the *Charter*.

Lang J.A., dissenting in part in *Conway* at the Ontario Court of Appeal, observed that many accused have “illnesses or conditions that may be difficult, or impossible, to treat” and that “these are some of the most vulnerable members of society” whose treatment by society “is a measure of our civilization.”<sup>27</sup> The Supreme Court reiterated at least the first part of these themes in *Conway*, accepting that the Review Board has “authority over a vulnerable population.”<sup>28</sup> In *J.J.*, albeit in a different statutory context, determining the duty of the courts under adult protection legislation to “impose terms and conditions on plans proposed by the Minister for a vulnerable adult’s care,”<sup>29</sup> the Supreme Court obliged courts to “monitor the scope” of the limitations on the “adult’s autonomous decision making and liberty” and to offer “muscular protection from state intervention incompatible with the adult’s welfare.”<sup>30</sup> *Conway* does not evince the same level of concern for guarding the NCR accused against unwarranted state intrusions, and its attitude on s. 24(1) remedies falls short of providing “muscular protection.”

This deficiency is of even more concern given Canada’s recent ratification of the *Convention on the Rights of Persons with Disabilities*. The *Convention* signals a

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<sup>24</sup>*Conway* SCC, *supra*, at para. 96.

<sup>25</sup>*Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, 36 C.R. (6th) 1 (S.C.C.).

<sup>26</sup>*R. v. Nasogaluak*, 2010 SCC 6, 72 C.R. (6th) 1 (S.C.C.).

<sup>27</sup>*R. v. Conway*, 2008 ONCA 326 (Ont. C.A.) [hereinafter cited as *Conway* ONCA], at para. 64.

<sup>28</sup>*Conway* SCC, *supra*, at para. 84.

<sup>29</sup>*J. (J.), Re*, 2005 SCC 12 (S.C.C.), at para. 15.

<sup>30</sup>*Ibid.*, at para. 23.

shift away from virtually exclusive reliance on the medical model,<sup>31</sup> with its concentration on illness, clinical discretion, mutability of the individual and decisions founded on best interests judgements, towards a rights-based or disability paradigm. The key insight of the contemporary international consensus reflected in the Convention is that “[d]isability is not intrinsic, but rather extrinsic . . . situated not in an individual pathology, but in society’s failure to embrace diverse ways of being in the world.”<sup>32</sup> The *Convention* should encourage a frontal assault on the amplified stigma, “the largest barrier to change in every level of the system,”<sup>33</sup> that surrounds persons with mental illness who are in conflict with the law and should foster a recognition of the “sanism” that “permeates mental disability law.”<sup>34</sup> The *Convention* buttresses the requirement to reconsider many doctrines and precedents in a manner which is more consistent with its progressive normative emphasis, including the exhortation in Article 14(1)(b) that “. . . the existence of a disability shall in no case justify a deprivation of liberty.” Despite the *Convention* not having been acted upon statutorily, Canada is obliged to consider the relevance of the *Convention* in situations such as those exposed in *Conway*, although none of its underlying precedents seem to echo its spirit. While beyond the scope of this comment, basic principles of international and domestic law compel some incorporation of the *Convention*. For example,

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<sup>31</sup>U.N.G.A. A/61/661, December 2006. The *Convention* was signed by Canada on March 30, 2007 and ratified on March 11, 2010. See Foreign Affairs and International Trade Canada, News Release, No. 368, “Government of Canada Tables Convention on Rights of Persons with Disabilities” (3 December 2009), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/media/aff/news-communications/2009/368.aspx?lang=eng>>. The accompanying “Backgrounder-Convention on Rights of Persons with Disabilities” notes that “[t]he Convention embodies an *important shift toward a human dignity approach to disability and away from a charity and medical model approach*” [emphasis added].

<sup>32</sup>Catherine Frazee, “Disability Studies: The Unexpected Guest in Health Law Discourse,” *Special Edition Health L.J.* (2003) 257 at 260. Acceptance of the disability model requires society “to remove structural constraints that would enable more people to participate and gain access to social resources.” Christopher Donaghue, “Challenging the Authority of the Medical Definition of Disability: An analysis of the resistance to the social constructionist paradigm,” *Disability and Society* 18 (2003) 199 at 204.

<sup>33</sup>Senate of Canada, Interim Report of the Standing Committee on Social Affairs, Science and Technology, Report 1, *Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada*, Part 3, Ch. 8.2.1.

<sup>34</sup>Professor Michael L. Perlin has developed this concept: “[A]n irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry.” “‘A Change Is Gonna Come’: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law,” *Northern Illinois Univ. L.R.* 29 (2008-9) 483 at 487.

the United Nations advises that “[o]ne of the fundamental obligations contained in the Convention is that national law should guarantee the enjoyment of the rights enunciated in the Convention.”<sup>35</sup> Within Canada, the Supreme Court has emphasized the necessity of statutory implementation of a *Convention*, but has affirmed that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”<sup>36</sup>

### Interpretative Limits

Mr. Conway was originally refused an absolute discharge on non-constitutional grounds by the Review Board, as it found that he remained a significant threat to public safety. The Ontario Court of Appeal did not interfere with this conclusion, but nonetheless allowed the appeal on the merits and remitted “the matter back to the ORB for a new hearing to consider which conditions, if any, should be imposed in order to break the impasse.”<sup>37</sup> The Supreme Court determined that Parliament had withdrawn the power to give an absolute discharge in the face of the finding that the accused remained a threat, as to do so “would frustrate the Board’s mandate” and “undermine the balance required by s. 672.54.”<sup>38</sup> The passages from *Winko* which the Court relies upon in *Conway* appear to justify this conclusion, but highly unusual cases such as *Conway* ought to inspire a more flexible interpretation of the *Winko* case and should provide the impetus for a more open stance on s. 24(1). For many accused, treatment may be “necessary to stabilize the mental condition of a dangerous NCR accused.”<sup>39</sup> For an uncertain proportion of accused, such as Mr. Conway, it is obvious that the essence of the approach of the institution, mandating that “antipsychotic medication is a necessary precondition for any successful course of treatment,”<sup>40</sup> has failed and that continued living in an institutional environment will be counterproductive.

Mr. Conway’s refusal of drug therapy is reminiscent of other patients who are adamant about their decisions. In *Fleming*,<sup>41</sup> the Ontario Court of Appeal

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<sup>35</sup>United Nations, *From Exclusion to Equality; Realizing the rights of persons with disabilities*, Handbook for Parliamentarians (Geneva: U.N., 2007), at 52.

<sup>36</sup>*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 70, per L’Heureux-Dubé J.

<sup>37</sup>*ConwayONCA*, *supra*, at para. 34.

<sup>38</sup>*ConwaySCC*, *supra*, at para. 98.

<sup>39</sup>*Winko*, *supra*, at para. 39.

<sup>40</sup>*ConwayONCA*, *supra*, at para. 9.

<sup>41</sup>*Fleming v. Reid* (1991), 4 O.R. (3d) 74 (Ont. C.A.). Mr. Conway has been a frequent litigant concerning, among other issues, his objection to the use of anti-psychotic medica-

promulgated the “common law right to determine what shall be done with one’s own body and the constitutional right to security of the person”<sup>42</sup> and demonstrated its understanding of the patient’s outlook: “Few medical procedures can be more intrusive than the forcible injection of powerful mind-altering drugs which are often accompanied by severe and sometimes irreversible side effects.”<sup>43</sup> Similarly, in *Starson*,<sup>44</sup> the Supreme Court in deciding that Mr. Starson had the capacity to refuse medication, noted that “[t]he wisdom of Professor Starson’s treatment decision is irrelevant,”<sup>45</sup> and that “[h]e believes that all previous medication of a similar kind has significantly dulled his thinking . . . medication has invariably made him miserable in the past.”<sup>46</sup>

It would be more consistent with the evolving understanding of disability, symbolized by the *Convention on the Rights of Persons with Disabilities*, to accept the capable decisions of patients (or their substitute decision-makers) to refuse some forms of treatment and to recognize that continued hospitalization is, in many ways, like an iatrogenic infection or other complication of treatment. That is, the institution’s activity, manner, treatment, therapy or diagnostic procedures may induce or assist in prolonging symptoms. While it would be an overstatement to claim that Mr. Conway’s institutionalization is responsible for all of his “inappropriate, antisocial and unlawful behaviour,”<sup>47</sup> as summarized by the Ontario Court of Appeal, it is not too speculative to suggest that his ongoing con-

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tion. See, e.g., *Conway v. Fleming*, [1996] O.J. No. 1242 (Ont. Gen. Div.), in which Gibson J. dismissed his action for damages based upon his having been subjected to an involuntary injection to control his behaviour. See also *Conway v. Jacques*, [2002] O.J. No. 2333 (Ont. C.A.), wherein the Ontario Court of Appeal allowed an appeal by Dr. Jacques and required Mr. Conway’s substitute decision-maker to act in his best interest, rather than in accord with his prior capable wishes to refuse anti-psychotic medication, which were “not applicable in the circumstances” (para. 40). In *Conway v. Darby*, [2008] O.J. No. 4205 (Ont. S.C.J.), Mr. Conway’s appeal against the decision of the Consent and Capacity Board that he was incapable of consenting to treatment with anti-psychotic medication was allowed and the matter was remitted back to the Board with new procedural directions. Mr. Conway is also pursuing a complaint of discrimination before the Ontario Human Rights Tribunal (see *Conway v. Ontario (Ministry of Health and Long Term Care)*, 2009 HRTO 1952). He has in addition made an application for writs of habeas corpus and mandamus before the Ontario Superior Court of Justice, in *Conway v. Barbaree et al*, Court File No. CR-09-00000242-00M0 (January 19, 2010).

<sup>42</sup>*Ibid.*, at para. 41.

<sup>43</sup>*Ibid.*, at para. 42.

<sup>44</sup>*Starson v. Swayze*, 2003 SCC 32 (S.C.C.).

<sup>45</sup>*Ibid.*, at para. 112.

<sup>46</sup>*Ibid.*, at para. 67.

<sup>47</sup>*Conway ONCA, supra*, at para. 8.

finement not only produces the setting for his acting out, but makes a causal contribution to his maladaptive patterns. Society may well be protected adequately from some accused, even when he or she is untreated or incompletely treated, by the utilization of other controls over living in the community which are available through the criminal law and by the provision of appropriate supports and services. As noted in *Winko*, a Review Board is not permitted to “refuse to grant an absolute discharge because it harbours doubts as to whether the NCR accused poses a significant threat to the safety of the public.”<sup>48</sup> Review Board authority over an accused is only maintainable where “the individual poses a significant risk of committing a serious criminal offence.”<sup>49</sup> Mr. Conway’s contention that s. 24(1) should be able to provide him with an absolute discharge “notwithstanding the Board’s finding that he is a significant threat to public safety”<sup>50</sup> may not be too far-fetched if the nature of the risks posed by him were anticipated prior to any release from Review Board control and the public was adequately protected by a compendium of measures outside the dispositional provisions of Part XX.1 of the *Criminal Code*. Public protection may still be achieved, were a Review Board or court to find that the remedy under s. 24(1) for a constitutional infringement was an absolute discharge. This level of reconsideration of the *Winko* interpretation of s. 672.54 and the *Conway* articulation s. 24(1) of the *Charter* does not seem to be on the immediate horizon for the Supreme Court.

### Other Limits on Treatment Orders and s. 24(1) Remedies

*Conway* depends on *Mazzei* to deny the accused’s second s. 24(1) petition, for “an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy.”<sup>51</sup> The majority of the Ontario Court of Appeal had remitted the case back to the Review Board, concerned that the Board “did not address the clear treatment impasse,” and maintained that the reliance on “several suggestions” rather than including conditions was unreasonable.<sup>52</sup> Lang J.A. concurred in this aspect of the decision, although in a slightly more directive manner, providing “*Mazzei*-type guidance regarding treatment,” particularizing the Review Board’s suggestions concerning “whether Mr. Conway sustained any brain damage, for a ‘renewed

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<sup>48</sup>*Winko, supra*, at para. 49.

<sup>49</sup>*Ibid.*, at para. 57.

<sup>50</sup>*ConwaySCC, supra*, at para. 96. The median disposition, a discharge subject to the conditions, under s. 672.54(b) might be another option.

<sup>51</sup>*Ibid.*, at para. 96.

<sup>52</sup>*ConwayONCA, supra*, at para. 34.

treatment team’ and for group therapy” as conditions<sup>53</sup> and specifying additional conditions recommended by a psychologist regarding “treatments other than medication.”<sup>54</sup> The Supreme Court rejected the accused’s submission that a more powerful s. 24(1) order was due on the treatment issue, as they decided that such prescriptive authority under the *Charter* had been withdrawn from the Board by Parliament by s. 672.55 of the *Criminal Code* and because “*Charter* rights can be effectively vindicated through the exercise of statutory powers and processes,”<sup>55</sup> noting *Nasogaluak*.

I have earlier commented critically on the limitations of *Mazzei*, contending that the decision was timorous and unjustifiably reluctant to tread upon clinical independence. The case was characterized as likely to “frustrate NCR accused who are caught in the web of an apparently supportive statute and caselaw, but whose actual ability to have their needs [to be] reintegrated into society is potentially thwarted, first by an unresponsive hospital and now also by an illogically constrained Supreme Court decision.”<sup>56</sup> Given the confining features of *Mazzei*, it is hard to have much confidence in the potential authority of any order emerging from it. The *Mazzei* interpretation of the *Criminal Code* will not reliably vindicate the accused’s rights as seems to be assumed in *Conway*, and the weakness of the *Mazzei* strictures is evident, supplying additional impetus to the argument for a s. 24(1) remedy.

*Conway* is founded on another recent precedent, *Nasogaluak*, to justify withholding s. 24(1) relief, a case which I also earlier criticized for its remedial conservatism. Both *Nasogaluak* and *Conway* seem overinvested in the protective utility of statutes: “*Charter* rights can be effectively vindicated through the exercise of statutory powers and processes”<sup>57</sup>; “*Nasogaluak* [. . .] abruptly constrains the potentially more direct, flexible and forceful utilization of the remedial framework of the *Charter* without making it apparent why the Court was so reluctant.”<sup>58</sup> Admittedly, there is flexibility within s. 672.54 to consider some aspects of the broad narrative of the *Conway* case, but *Nasogaluak* confines the scope of *Charter* intervention to “exceptional cases,”<sup>59</sup> and the Supreme Court

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<sup>53</sup>*Ibid.*, at para. 82.

<sup>54</sup>*Ibid.*, at para. 81.

<sup>55</sup>*Conway SCC, supra*, at para. 103.

<sup>56</sup>H. Archibald Kaiser, “*Mazzei*: Constrained Progress in Constraining Review Board Powers,” (2006) 36 C.R. (6th) 37, at 53.

<sup>57</sup>*Conway SCC, supra*, at para. 103.

<sup>58</sup>H. Archibald Kaiser, “*Nasogaluak*: Foregone Opportunities in an Unduly Restrained Sentencing Decision,” (2010) 72 C.R. (6th) 29, at 31.

<sup>59</sup>*Nasogaluak, supra*, at para. 6.

was obviously unpersuaded that the aggregate of facts in *Conway* was sufficiently compelling.

*Conway* shows a Court content to deny the detained accused any constitutional remedy even where previous dispositions under the *Criminal Code* have never provided effective relief in a desperate set of circumstances. *Conway* offers insufficient solace to mental health detainees through the *Charter*, as the case fails to provide a release from Review Board controls or even to ensure that what could be an efficacious treatment regime sought by an accused within an institution will be delivered. Its stance does not seem consonant with its previously expressed assurance of the muscular supervision of the state by the courts for vulnerable people and is unmindful of any emerging responsibilities under the *Convention on the Rights of Persons with Disabilities*.

### **The Effective End to Proportionality for NCR Accused**

The rejection of any of the *Charter* remedies sought by Mr. Conway leaves this accused, already detained for twenty-six years, in a custodial forensic psychiatric facility with little hope of release and no guarantee he will receive the kind of treatment he wants, assuming his detention continues. It is possible that *Mazzei*-type treatment conditions which the Review Board could add in a new hearing might breathe some fresh air into the prospects of his eventually being permitted to live in the community. Similarly, it is conceivable that the extension of s. 24(1) remedial jurisdiction to Review Boards by Conway might assist in addressing some of his needs within the institution as one of his counsel opined: “What you hope will happen is that decision-makers start to act in a way that complies with the *Charter*.”<sup>60</sup> These must be seen as distant prospects for this accused given the extraordinary length of his detention.

In an era where what passes as “law reform” in the criminal domain is dominated by a retributive, *ad hoc* and reactionary spirit, it may seem naive to call for the reintroduction of some kind of restraint on the indeterminacy of NCR dispositions. However, a number of factors coalesce to suggest this direction. The marathon impasse between this accused and the institutions in which he has been detained should highlight the urgency of legislative action. The restrained Supreme Court perspective on providing s. 24(1) remedies to direct either absolute discharges or treatment orders underlines a serious gap in the Mental Disorder Amendments. The human rights promoting paradigm for NCR accused, which is mandated by the *Convention on the Rights of Persons with Disabilities*, should help to resurrect the partial recognition of proportionality which appeared in the original mental disorder reform package.

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<sup>60</sup>Makin, “Legal victory was historic, but plaintiff remains in psychiatric ward”, *supra*.

When the Mental Disorder Amendments were introduced, Bill C-30 contained “capping provisions which were designed to guard against NCR accused being detained for longer periods than if they were convicted and sentenced.”<sup>61</sup> The unproclaimed sections were unfortunately repealed in 2006.<sup>62</sup> The rejection of this attempt to address the proportionality issue has been based on several factors. Partly, there was uncertainty over whether provincial mental health legislation could play an effective role in controlling some accused’s release into the community at the end of a capped period of hospitalization.<sup>63</sup> In addition, *Winko* rather summarily dismissed any concerns over the unproclaimed sections. In *Hoepfner*, the Manitoba Court of Appeal, addressing an overbreadth challenge to Part XX.1, had determined: “In the absence of a capping provision there is no measure of proportionality between the seriousness of the offence and the potential period of lost liberty.”<sup>64</sup> Without explanation, McLachlin J. (as she then was) simply said “I cannot agree” in refusing to accept this foundation of the s. 7 argument.<sup>65</sup> Gonthier J. was more expansive in vetoing the vigilance about proportionality evinced by *Hoepfner*: “Capping provisions belong to the sentencing system and are not suited for NCR accused. The notion of proportionality cannot be applied to NCR accused because they did not rationally commit the criminal act in question.”<sup>66</sup> More fundamentally, he held that “[i]f punishment cannot be one of the objectives of Part XX.1, then the correlative principle of proportionality cannot apply either.”<sup>67</sup> Disappointingly, it has been recounted that the “Criminal Bar did not argue for regaining the capping provision,” submitting that “it was sufficient from a justice point of view for a disposition order to be consistent with the principles concerning individual assessment and least onerous disposition set out in *Winko*.”<sup>68</sup> The Department of Justice adopted this perspective in its discussion of the repeal of capping: “However, recent court decisions confirm that, even without the capping provisions, the law already

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<sup>61</sup>Joan Barrett and Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Toronto: Carswell, 2006), at 1-14.

<sup>62</sup>S.C. 2005, c. 22, s. 24.

<sup>63</sup>Barrett, Shandler, *Mental Disorder in Canadian Criminal Law*, *supra*, at 1-14/5.

<sup>64</sup>*R. v. Hoepfner*, [1999] M.J. No. 113, 25 C.R. (5th) 91 (Man. C.A.), at para. 52.

<sup>65</sup>*Winko*, *supra*, at para. 71.

<sup>66</sup>*Ibid.*, at para. 171.

<sup>67</sup>*Ibid.*, at para. 172.

<sup>68</sup>Peter Carver and Cherie Langlois-Klassen, “The Role and Powers of Forensic Psychiatric Review Boards in Canada: Recent Developments” (2006) 14 *Health Law Journal* 1, at 9.

includes sufficient safeguards.”<sup>69</sup> After *Conway*, it is difficult to believe that the defence bar would retain the same level of confidence in s. 672.54 and its judicial progeny.

None of the arguments advanced to eliminate the capping provisions are convincing. The supposedly stark contrast between punishment and treatment advanced in *Winko* seems simplistic and exaggerated when juxtaposed against the facts in *Conway*. Had Mr. Conway originally been found guilty of sexual assault with a weapon, he would have been liable to imprisonment for a term not exceeding fourteen years under s. 272(2) of the *Criminal Code* and would likely have received a sentence far below the maximum. Under the repealed sections, his capped period of Review Board control would have been “the shorter of either ten years or the maximum period of imprisonment,”<sup>70</sup> surely a sufficient period to determine if the accused was amenable to treatment and to consider alternative ways of ensuring public safety were he released to the community. The virtual doubling of the statutory maximum for Mr. Conway’s detention for his index offence appears cruel and draconian, even in light of his behaviour during his hospitalization. The summary by the Ontario Court of Appeal is replete with instances of his grossly inappropriate actions, but “allegations of physical assault are significantly less [frequent] than verbal assaults.”<sup>71</sup> Mr. Conway’s institutional conduct, while no doubt obnoxious and unpleasant at times, may not demonstrate a high probability that the accused “poses a significant risk of committing a serious criminal offence” in the community.<sup>72</sup> The Bazelon Center, commenting on the duration of oversight of accused before mental health courts, expresses a more humane spirit, recommending that the supervision period “should never exceed the typical sentence and probationary period for the underlying charge,” as to do so “would compound the discriminatory inequities people with mental illness already face.”<sup>73</sup>

The dichotomization between treatment and punishment which supplies the foundation for the abandonment of such a fundamental principle as proportionality (and capping) crumbles in cases like *Conway*. This accused was charged with a serious crime and was found to have “committed the act . . . that formed the

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<sup>69</sup>Department of Justice Canada, *Backgrounder*, “Measures to Modernize the Mental Disorder Provisions of the *Criminal Code*,” May 2005, at 3.

<sup>70</sup>Barrett, Shandler, *Mental Disorder in Canadian Criminal Law*, *supra*, at 1-14.

<sup>71</sup>*Conway* ONCA, *supra*, at para. 8. Lang J.A. recorded that “there have apparently been no acts of physical assault,” at para. 75.

<sup>72</sup>*Winko*, *supra*, at para. 57.

<sup>73</sup>Bazelon Center for Mental Health Law (2004), “The Role of Mental Health Courts in System Reform,” at 29. Online: <<http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts/>>.

basis of the offence charged,” under s. 672.34 of the *Criminal Code*. As a result, he was directed to “be detained in custody in a hospital,” pursuant to s. 672.54(c), and he has been deprived of his liberty for twenty-six years, during which time he has had to reside in an institution with strict controls over behaviour and has been subjected to forcible chemical restraints and involuntary seclusions. The restraint of his liberty and the intrusions upon his physical and psychological autonomy have all been purportedly authorized by either criminal or mental health law and have been carried out notwithstanding the accused’s forceful objections. If the state sought to do precisely the same things as a form of punishment in a conventional prison, the accused would have benefitted from the shorter statutory maximum period of imprisonment and any corporal measures would have been more limited or forbidden. The outright prohibition on even making an argument that the duration or conditions of Mr. Conway’s detention is disproportionate to the nature and severity of his index offence seems unjust and discriminatory. The reintroduction of the capping provisions would at least restore some sense of proportionality to such a disturbing saga.

### **Further Discouragement of the NCR Defence**

As Don Stuart has observed, the mental disorder defence “will still likely result in indeterminate detention” and is “therefore likely to be rare, except in those cases where the accused faces the option of a long prison sentence.”<sup>74</sup> Kent Roach refers to the same hazards of indeterminacy of detention or subjection to conditions in explaining the infrequent invocation of the defence “despite evidence that many in our prisons suffer from a mental disorder of some form.”<sup>75</sup> The actual proportion of accused who advance the NCR defence is indeed small, 1.8 per 1000 adult court cases in 2004, although the same study predicts growth in the Review Board population of 2000 by 2015.<sup>76</sup> Whether or not the NCR utilization rate will actually increase to this extent may be more uncertain after *Conway* and other developments.

Despite its propitious basic holding on Review Board authority over s. 24(1) remedies, *Conway* should discourage the use of the defence for some accused, particularly for people who have some of Mr. Conway’s personality features. The tolerability of this accused’s extremely long detention and the unwillingness of the Supreme Court to provide a *Charter* remedy for his detention or treatment should concern counsel defending clients who have a comparably complex or

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<sup>74</sup>Don Stuart, *Canadian Criminal Law: A Treatise*, 5th Ed. (Toronto: Carswell, 2007), at 391-2.

<sup>75</sup>Kent Roach, *Criminal Law*, 4th Ed. (Toronto: Irwin, 2009), at 263.

<sup>76</sup>Latimer, Lawrence, *Research Report: The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study*, *supra*, at 12.

uncertain diagnosis, including “an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.”<sup>77</sup> Personality disorders can qualify as “diseases of the mind” and can, particularly when the accused exhibits features of other diagnoses, meander through the other requirements of s. 16. That said, counsel should assess the likelihood of the accused’s successfully adapting to an institutional environment and the willingness of the accused to consider the conventional treatments which will likely be recommended. Some accused, for reasons that are quite intelligible and reasonable, may decide to reject psychotropic medications, preferring instead some type of non-biological treatment, such as psychotherapy. These treatment preferences may not accord with the dominant psychiatric outlook and the accused may become isolated and apprehensive, even hopeless, about his or her future. Other factors to consider in deciding whether to recommend the mental disorder defence include the general climate of the forensic facility. Efforts should be made to explore the experience of previous accused, the rehabilitative programs on offer, the levels of commitment of the treatment team to considering patient input, the policies of the institution regarding patient rights, any relevant academic or professional writing or public policy contributions by clinicians, and so on. A thorough analysis should encompass the fairness of local Review Board hearings, the thoroughness of its decisions in similar cases and the length of subjection to Review Board authority before the issuance of an absolute discharge in roughly parallel circumstances. Such planning should be part of any trial preparation where the mental disorder defence is legally viable.

In general, Hy Bloom and Brian Butler suggested (in 1995) that “[p]ost *Swain*, it is almost always advantageous to pursue the defence, particularly if your client has almost completely recovered”<sup>78</sup> and no longer represents a threat. Although Bloom and Butler advert to other factors in this evaluative process (such as “the consequences of an NCR defence” compared to “a mitigated sentence”),<sup>79</sup> their highlighting of the primacy of recovery does suggest the inadvisability of the defence of instances of complex, personality-interwoven, refractory cases such as *Conway*. Nonetheless, in a few instances accused will have little practical option but to advance the defence, for example, where an accused is charged with murder while floridly psychotic.

Where there are alternatives to advancing the mental disorder defence, preferably ones which might be the subject of a resolution discussion, these ought to be

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<sup>77</sup>*Conway* SCC, *supra*, at para. 10.

<sup>78</sup>Hy Bloom and Brian Butler, *Defending Mentally Disordered Persons*, 1995 (Toronto: Carswell, 1995), at 58.

<sup>79</sup>*Ibid.*

explored. Although each option must be scanned to reduce the hazards of indeterminacy,<sup>80</sup> some of the possibilities include: diversion by the Crown or police, transfer into a mental health court, a joint sentencing recommendation that takes account of the accused's condition, a recognizance under s. 810.1 of s. 810.2, a conditional sentence of imprisonment, or probation. Obviously, the Crown can attempt to override an accused's decision not to defend on the basis of mental disorder using the *Swain* procedures, but the burden of proof under s. 16(3) of the *Criminal Code* rests "on the party that raises the issue."

### **Conclusion: No Resolution After Twenty-Six Years**

Paul Conway's case has presented a series of difficult dilemmas for everyone with any involvement. Most importantly, Mr. Conway remains confined after nearly three decades of institutionalization, despite, since 1992, exposure to a relatively new statutory scheme that is meant to provide rehabilitation and community reintegration. His counsel have had to continue their duties to be zealous advocates over an extended period, notwithstanding the legal and institutional obstacles through which the case has had to navigate. Clinicians have not yet devised an effective treatment plan that comports with Mr. Conway's capable wishes and their own outlooks on appropriate therapeutic modalities. Review Boards have tried hard to explore their statutory mandate and institutional responsibilities. The courts have endeavoured to be the arbiter in the face of many collisions of institutional roles and a wide range of legal conundrums. Sadly, twenty-six years of conflict have not resolved this multi-faceted impasse.

*Conway* will be an epochal case for review board jurisprudence. It may offer mental health detainees a lifeline that they have never had in Canada, but the case also exposes a range of gaps and fault lines in Canadian criminal law and policy which remain problematic. *Conway* and its precedential underpinnings are a mixture of hopeful findings on some issues and limiting and discouraging stances on others. Although it would be naive to be too optimistic, Parliament and the Supreme Court may yet be stimulated by the emerging progressive outlook on disability represented by the *Convention on the Rights of Persons with Disabilities*, but in the meantime the requiem for *Conway* remains troubling and unsatisfying.

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<sup>80</sup>The list of feasible alternatives to the indeterminacy of a s. 672.54 disposition should *not* normally include resort to civil mental health law. For an analysis of the risks of the use of such legislation in *Conway*-type cases, see J. Andres Hannah-Suarez, "Psychiatric Gating of Sexual Offenders under Ontario's Mental Health Act: Illegality, *Charter* Conflicts and Abuse of Process" (2005-2006) 37 *Ottawa L. Rev.* 71.