

Criminally Responsible... Not

Despite the prevalence of mental health issues in Canadian prisons,^[1] a statistically tiny portion of offenders (less than 1%) seek the designation of, and are subsequently deemed, 'Not Criminally Responsible on Account of Mental Disorder' [NCR].^[2] Those who do receive the designation are held to lack the mental capacity necessary for a finding of criminal responsibility, and rather than being sentenced in the criminal justice system, are sent to medical facilities that focus on treating their disorders.

Since individuals deemed to be NCR are detained in those facilities for an indeterminate period of time, an NCR designation can have an impact on their *Charter* rights. For that reason, the constitutionality of the designation has been tested in the courts. These constitutional challenges have resulted in important reforms being made to the NCR scheme in order to ensure that infringements to an individuals' rights to life, liberty, and security of the person are reasonable and justifiable.

Recent reforms to the NCR scheme, many of which substantially increase the restrictions placed on NCR individuals lives and liberties, have not yet faced constitutional scrutiny in the Supreme Court - but may well soon, if the Crown decides to pursue the new 'high-risk' NCR designation in Matthew de Groot's case.^[3]

The Context - Matthew de Groot

At an end-of semester party in April of 2014, de Groot murdered five fellow university students by stabbing them repeatedly with a kitchen knife.^[4] During the commission of the offences he believed himself to be, among other things, an alien engaged in a war against vampires.^[5] As a result the court decided that, on a balance of probabilities, he suffered from a disease of the mind that prevented him from knowing that his actions were wrong.^[6] The trial judge designated him Not Criminally Responsible.

What does 'Not Criminally Responsible' mean?

Generally speaking, the NCR designation is issued when an offender is found to be mentally incapable of forming the intent to commit the crime for which he or she is charged. Seeking an NCR designation can therefore be a defence to criminal charges.

If deemed NCR, offenders are placed in a locked medical facility where they are provided with medication and treatment. Though these individuals are detained for an indeterminate length of time, their detention is periodically reviewed by a panel of legal and medical experts.

A successful NCR application can be controversial, since the individual is neither tried for, nor found guilty of, the crime. A judge's finding of NCR can thus be unpopular with the public and is often ill-received by victims of the crime. Though those designated NCR are confined to medical facilities, the designation is sometimes derided as a 'get out of jail free

card’.

On the other hand, the possibility of indeterminate detention can have a chilling effect: discouraging an accused person from pursuing the designation.^[7]

‘Not Criminally Responsible’ in the *Criminal Code*

Being found guilty of a crime usually requires a guilty act and a guilty mind. You must have actually committed the criminal act, but - more relevant to the NCR defence - during the commission of the act you must also have understood what you were doing, and known that what you were doing was wrong.^[8] This ensures that the stigma of being labelled ‘guilty’ is reserved for people who have not only done something wrong, but also intended to do so.

The NCR defence established by section 16 of the *Criminal Code* directly reflects this fundamental aspect of criminal justice. However, availing yourself of the NCR defence is not a small task. Not only is there a presumption of sanity that is yours to disprove on a balance of probabilities,^[9] but you must also meet the legal test set out in section 16(1) of the *Code*:

No person is criminally responsible for an act committed or an omission made while [1] suffering from a mental disorder that rendered the person incapable of [2a] appreciating the nature and quality of the act or omission or of [2b] knowing that it was wrong.^[10]

Courts must first determine the threshold issue of whether the accused was suffering from a mental disorder. If the accused is not found to have a disorder the NCR analysis is over and the criminal process resumes. However, if the court does believe that the accused was suffering from a mental disorder, it also has to consider whether the accused could both appreciate the nature and quality of the act or omission, and knew that it was wrong.^[11] If the accused was incapable of either at the time of the offence, then he or she is deemed NCR.

In de Grood’s case, the judge found that he suffered from a disease of the mind that satisfied the threshold issue: he had completely lost touch with reality because of a severe and acute psychotic episode.^[12] The judge then decided that, although de Grood was capable of appreciating the nature and quality of his actions, he was incapable of knowing that his actions were wrong:^[13] his delusions caused him to feel he was in a kill or be killed situation; at the time of his victims’ deaths, he believed his actions were morally justified.^[14]

The Result of Being Deemed NCR

Detainment

Individuals meeting the criteria outlined in section 16(1) of the *Criminal Code* (that is: those deemed ‘not criminally responsible on account of mental disorder’) are not guilty, nor are they - strictly speaking - innocent. Instead, they are deemed not criminally responsible for their actions and become patients of mental institutions that emphasize treatment and recovery while de-emphasizing punishment.^[15]

Although not prisons, these mental institutions do share several similarities with them: constant monitoring, locked doors, and restrictions on basic privileges. It should be noted that though patients are not forced to undergo treatment (or receive medication) against their will,[\[16\]](#) discharge is largely contingent on the success of their treatment.

Periodic Review

The most serious long-term impact of an NCR designation on an individual's liberty is the ongoing review of his or her detention conducted by a mental health Review Board. These Boards are provincial tribunals established and empowered by the *Criminal Code* to review the detention of every individual deemed NCR. The Review Boards sit in panels of 3-5 members.[\[17\]](#) Hearing cases year-round, they assess the current mental state of patients.[\[18\]](#) They have the power to grant an order - by majority vote - that the patient either:

- remains detained in a hospital,
- be discharged with conditions attached, or
- be discharged absolutely.[\[19\]](#)

An order for continued detention maintains the significant restrictions imposed on the patient when he or she was first deemed NCR. A conditional discharge allows for a certain measure of freedom, but also typically requires the patient to report for regular hospital check-ups, take medication, and refrain from the use of drugs or alcohol.[\[20\]](#) An absolute discharge ends the review process and allows for a return to a 'normal' life. To receive an absolute discharge, the Board has to be convinced that the patient is not a "significant threat to the safety of the public."[\[21\]](#)

When deciding which of these orders to make, the Board has to take into account the safety of the public (which is the "paramount consideration"), the mental condition of the accused, the reintegration of the accused into society, and any other needs of the accused.[\[22\]](#)

Matthew de Grood

Since the court verdict, Mr. de Grood has been held at the Southern Alberta Forensic Psychiatry Centre.[\[23\]](#) At the hearing, the tribunal decided that he should remain in a hospital and be granted no privileges, with a review date set for July 2017.[\[24\]](#) Following Mr. de Grood's hearing, the Crown confirmed that it is considering seeking the newly established 'high-risk' designation in his case.[\[25\]](#)

"High-Risk" NCR designation

In 2014, the federal Government enacted amendments to the *Criminal Code* that resulted in greater restrictions on NCR individuals generally.[\[26\]](#) Additionally, it created a new "high risk" category in section 672.64 of the *Code*. This new designation allows the Crown to seek greatly increased restrictions on people who have been deemed NCR and were accused of a personal injury offence, when they feel the public would not be adequately protected by the

ordinary NCR provisions.[\[27\]](#)

If the Board were to deem Mr. de Grood 'high risk' he would face:

- Potentially longer wait times between Board reviews (up to 36 months)[\[28\]](#)
- Detention in a hospital until the 'high-risk' designation is revoked by a justice of the Court of Queen's Bench[\[29\]](#)
- The complete denial of unescorted visits into the community[\[30\]](#)
- Only being permitted escorted visits into the community for medical reasons or treatment[\[31\]](#)

For victims of the crime and society in general, the advantages of the new designation are the enhanced supervision of the patient, both in ensuring medication is taken while the person is detained, and in restricting visits to the community.[\[32\]](#)

Constitutionality of the reformed NCR legislation

As a result of previous constitutional challenges, legislative changes were made to the NCR mental health diversion process, including: (1) guaranteed frequent, individualized review of a patient's file; (2) requirements that the Review Board decide in the way that is least onerous and restrictive to the patient; (3) requirements for an absolute discharge once a patient ceases to be a significant threat to the public.[\[33\]](#)

The legislative amendments under the *NCR Reform Act* of 2014 may well affect the overall constitutionality of the NCR system. In a change that impacts all individuals deemed NCR, the federal Government removed the section of the *Code* requiring the Board to decide in a way that is "least onerous and least restrictive to the accused."[\[34\]](#) It also ensured that the 'safety of the public' became the paramount consideration.[\[35\]](#)

Given the outcome of previous cases challenging the NCR scheme under section 7 of the Charter, it is possible that violations to an accused's right to life, liberty and security would be found if the new more restrictive regime were challenged. It is also possible that the 'high-risk' designation, which includes the most restrictive reforms to the NCR system, will be found to infringe those rights - and not at all certain that the government will be able to justify that infringement.

Constitutionality of the "High-Risk" designation

Potential Challenge

Should Mr. de Grood wish to contest the additional restrictions that a 'high-risk' status entails, he might make a constitutional argument that the new legislative reforms unjustifiably infringe his right to life, liberty, and security of the person as guaranteed by section 7 of the *Charter of Rights and Freedoms*.

He could argue, for example, that the recent amendments to the *Code* are not a minimal impairment of his right to liberty because of the possibility that he may spend a much longer, even more indeterminate period of time in a mental institution. His inability to engage in community visits could also be problematic: if deemed 'high-risk', he would (for example) likely not be allowed out to attend the funeral of a loved one. As he has not been found guilty of a crime the Crown may not be able to justify such an infringement upon his rights.

The difficulties of justifying those infringements

The government could argue that the new 'high-risk' designation is designed to ensure that individuals accused of a personal injury offence (who are found Not Criminally Responsible for their actions) are no longer a threat to their victims or communities before they are released.^[36] The court will then need to balance the accused's right to life, liberty and security against the government's goal of ensuring public safety.

The biggest hurdle for the government will likely be proving that the provision allowing an accused to wait up to three years between Board reviews is not only an effective way, but also [among the least intrusive](#) ways, of meeting its public safety objective. Another hurdle will be justifying the inability of 'high risk' individuals to seek supervised community visitation privileges for *any* non-medical reason, no matter how compelling, before their 'high-risk' designation is revoked.^[37]

^[1] As can be seen in both the 2009/10 and 2014/15 annual reports of the Correctional Investigator, mental health is a significant concern for prisons. Over 20% of individuals admitted into federal prisons are taking a prescribed medication for a psychiatric condition. Additionally, 30% of female offenders have previously been hospitalized for psychiatric reasons: see John Howard Society, "Fact Sheet - Prisons and Mental Health", online: <<http://johnhoward.ab.ca/docs/factsheets/FactSheet110402-PrisonsAndMentalHealth.pdf>>; Canada, "Annual Report of the Office of the Correctional Investigator 2009-2009" (29 June 2009), online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20082009-eng.pdf>; Canada, "Annual Report of the Office of the Correctional Investigator 2014-2015" (26 June 2015), online at 12-18: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>.

^[2] Zoran Miladinovic & Jennifer Lukassen, "Verdicts of not criminally responsible on account of mental disorder in adult criminal courts, 2005/2006-2011/2012" Statistics Canada (2014), online: <www.statcan.gc.ca/pub/85-002-x/2014001/article/14085-eng.htm#a1>.

^[3] Note that the 'high-risk' designation has, however, been applied by the courts. See e.g. *R v Carter*, 2015 CarswellOnt 15574, 125 WCB (2d) 285. The 'high-risk' designation has been applied retroactively to an individual already in the NCR scheme when the amendments were introduced: *R v Schoenborn*, 2015 BCSC 2254 .

[4] *R v de Grood*, 2016 ABQB 294 at paras 18-19 .

[5] *Ibid* at paras 90-92.

[6] A mental disorder is defined by the *Criminal Code* in section 2 as a “disease of the mind”. Case law has determined that a ‘disease of the mind’ includes “any illness, disorder or abnormal condition which impairs the human mind and its functioning”: *Cooper v the Queen*, [1983] 1 SCR 240 at 1159; see also *de Grood*, *supra* note 5 at paras 105-07.

[7] Paola Loriggio, “Not criminally responsible defence not a 'get out of jail free card': lawyer” (17 December 2014), online: <www.ctvnews.ca/canada/not-criminally-responsible-defence-not-a-get-out-of-jail-free-card-lawyer-1.2152709>.

[8] The Canadian Criminal Law Notebook, “Actus Reus and Mens Rea”, online: <www.criminalnotebook.ca/index.php/Actus_Reus_and_Mens_Rea>.

[9] *Canadian Criminal Code*, RSC, 1985, c C-46, s 16(2), (3) .

[10] *Ibid* [emphasis added].

[11] See *Kjeldsen v the Queen*, [1981] 2 SCR 617, *R v Chaulk*, [1990] 3 SCR 1303 , *R v Oommen*. [1994] 2 SCR 507.

[12] *de Grood*, *supra* note 5 at paras 116-17.

[13] *Ibid* at para 129.

[14] *Ibid* at para 120-28.

[15] Alberta Health Services, “Information: Southern Alberta Forensic Psychiatry Centre”, online: <<http://www.albertahealthservices.ca/info/service.aspx?id=1921>>.

[16] *Criminal Code*, *supra* note 9 at s 672.55 (1).

[17] Government of British Columbia, “Mental Health Review Board”, online: <www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/partners/colleges-boards-and-commissions/mental-health-review-board>; Government of Ontario, “Ontario Review Board: About Us”, online: <www.orb.on.ca/scripts/en/about.asp>; Government of Alberta, “Review panels: formal patients under the Mental Health Act”, online: <www.health.alberta.ca/newsroom/mental-health-act-panels.html>.

[18] *Ibid*.

[19] *Criminal Code*, *supra* note 9 at s 672.54.

[20] Department of Justice, “Research Report: The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study” (January 2006), online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/rr06_1.pdf> at 3.

[21] *Ibid* at 2.

[22] *Ibid*.

[23] Kevin Martin, "Alberta Review Board hearing will determine treatment for Matthew de Groot" *Calgary Herald* (11 July 2016), online: <www.calgaryherald.com/news/crime/alberta-review-board-hearing-will-determine-treatment-for-matthew-de-groot>.

[24] Meghan Grant, "Calgary house party killer Matthew de Groot says 'no one deserves the pain I caused' at 1st NCR hearing" *CBC News* (13 July 2016), online: <www.cbc.ca/news/canada/calgary/matthew-degroot-ncr-hearing-brentwood-murder-1.3678110>.

[25] Tania Kohut, "What a high-risk NCR designation could mean for Matthew de Groot" *Global News* (25 May 2016), online: <www.globalnews.ca/news/2721739/what-a-high-risk-ncr-designation-could-mean-for-matthew-de-groot/>.

[26] *Criminal Code*, *supra* note 9 at s 672.54.

[27] *Ibid* at s 672.64 (1).

[28] *Ibid* at s 672.81 (1.31).

[29] *Ibid* at s 672.84 (1).

[30] *Ibid* at s 672.64 (3).

[31] *Ibid*.

[32] Canadian Resource Centre for Victims of Crime, "Arguments Presented Before the Standing Committee on Justice and Human Rights in Support of Bill C-54" (12 June 2013), online: <https://crcvc.ca/wp-content/uploads/2011/10/C-54-NCR-Reform-Act_Justice-Cttee_Jun13.pdf>.

[33] *Ibid*.

[34] *Not Criminally Responsible Reform Act*, SC 2014, c 6, s 9 . See for comparison, *Criminal Code*, *supra* note 9 (version in force between Dec 12, 2013 and May 31, 2014).

[35] *NCRRA*, *supra* note 37 at s 9.

[36] *Ibid* at SUMMARY.

[37] *Ibid*.