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The Role of Crown Counsel in Post-Verdict Disposition Hearings for Accused found “Not Criminally Responsible On Account of Mental Disorder”

Sadie Bond*

Post verdict disposition hearings of those found “not criminally responsible on account of mental disorder” (NCR) are a new phenomenon resulting from the Mental Disorder Amendments that came into force in February, 1992. Thus far, there is no generally accepted characterization of the role of the Crown in these hearings. This paper is a proposal for the establishment of a defined role for the representative of the Crown in post-verdict hearings. It is also a plea for Crown counsel to adopt a particular frame of mind and stance in reference to the mentally disordered offender.

My approach will focus on the new legislation regarding those found NCR – its purpose and its spirit. I will argue that Crown counsel must consider, and be guided by the specifics of the new legislative scheme. I will also argue, that in the administration of this legislation, Crown Attorneys must adopt a new perspective with regard to the mentally disordered offender. If the aims of the new legislation are not incorporated by Crown Counsel into their role in the administration of the law then its objectives will be compromised.

I should point out that my concerns regarding the role of the Crown in disposition hearings arise after having observed a hearing before the Review Board in Nova Scotia. My observations of that hearing, and subsequent discussions with a number of Crown Attorneys in Nova Scotia, indicated to me that the goals of the Mental Disorder Amendments may be threatened by an antagonistic approach to its implementation.

THE NEW LEGISLATIVE SCHEME

The new legislative scheme, enacted in Bill C-30 in response to the Swain decision, changed the process of dealing with the mentally disordered accused to such an extent that it is possible to speak of the "pre-Swain" and "post-Swain" era. The substance of the "insanity defence" remains unchanged, but the verdict has been changed from "not guilty by reason of insanity" (NGRI) to "not criminally responsible on account of mental disorder." The old Lieutenant Governor's Warrant system was abolished, and a new post-verdict disposition scheme put in its place.

Under the pre-Swain system, those found NGRI were ordered into strict custody until "the pleasure of the Lieutenant Governor is known." The pleasure of the Lieutenant Governor would generally be determined by an advisory board which would review the case and make a recommendation to the him or her. The Lieutenant Governor would then issue a warrant for the detention of the accused in a psychiatric hospital. The Board was required to review the case six months after issuance of the warrant, and every twelve months thereafter, to determine whether or not the person had "recovered," and if so, whether it would be in the best interest of the public and of the person to discharge him or her. The Board would make what it determined to be the appropriate recommendation to the Lieutenant Governor.

The hearings were generally informal and non-adversarial in nature, involving the accused person, with legal representation, an attending psychiatrist, and other hospital staff members. In Ontario, counsel for the Ministry of Health or the Attorney General would occasionally attend, but this would be the exception rather than the rule. This would appear to have been the case in Nova Scotia also.

Under the post-Swain scheme, the involvement of the Lieutenant Governor has been eliminated. The initial disposition decision, after a verdict of NCR, may be made either by the court or referred to a Review Board. It is anticipated

2 Criminal Code, R.S.C. 1985, c.C-46, as amended by S.C. 1991, c.43, ss. 1-10, s. 672.34.
4 A.J.C. O’Mara, "Legislative Changes to the Operation of the Lieutenant Governor’s Board of Review in Ontario" (1992), 26(1) Law Society Gazette 55 at 60-61.
5 Ibid. at 63-4.
6 Ibid. at 64.
7 Interview with Christine Mosher, solicitor to the Lieutenant Governor's Advisory Board in Nova Scotia, 9 November 1992, Halifax.
8 Criminal Code, supra note 2, s. 672.45 and s. 672.47.
that courts will generally defer to the Review Board for a decision. The Board is also required to review the disposition every twelve months.

The Review Boards created by the amendments are "independent quasi-judicial bodies" and their decisions are comparable to court orders. Section 672.5(1) of the Criminal Code states: "The hearing may be conducted in a manner as informal as is appropriate in the circumstances." Other requirements of that section, however, suggest a higher level of formality than that of advisory board hearings under the old system. For instance, the board must give notice of the hearing to the parties (which would include the accused and the person in charge of the hospital where a person is, or would be, detained), and to the Attorney General of the province. All parties, including the accused, have "the right to be represented by counsel," and the board must assign counsel to the accused "wherever the interests of justice so require." In addition, any party may adduce evidence, make written or oral submissions, and call and cross-examine witnesses. Furthermore, the proceedings must be recorded and the Board must provide reasons for its decision.

This new higher level of formality was no doubt introduced in order to inject into the decision-making process principles of fundamental justice found lacking by the Supreme Court in R. v. Swain. In Swain, it was held that the automatic detention of the accused following a finding of NGRI violated the Charter in that it did not provide the minimum procedural safeguards required by s.7. Lamer, C.J.C. also noted that while the surrounding legislative scheme would not be subjected to Charter scrutiny in that case, the lack of procedural safeguards in sections 617 and 619 "attract suspicion." This higher degree of formality may lead to a more adversarial type of proceeding. It must be recognized by all participants, however, that the procedural safeguards introduced by the legislation are intended to protect the accused's Charter rights. The disposition hearing must not be characterized by...
the same adversarial atmosphere that prevails at trial, nor should it become a re-
trial of the offence.

The Crown's Participation and the Public Interest

The Code requires that the Attorney General be made a party to the hearing upon
application. Whether the Crown would apply to attend a particular hearing will
presumably be either a matter of policy or a matter to be determined on a case-by-case basis. The British Columbia Crown Counsel Guide to Bill C-30
suggests that "Crown Counsel will attend before the Review Board if, bearing in
mind all of the circumstances of the matter and/or the accused, it is in the public
interest to do so." Apparently, in Nova Scotia, the Crown will be represented
where such representation is deemed necessary.

Counsel for the Crown, as an agent of the Attorney General, is entrusted
with the representation of the public interest. The characterization of the
Attorney General as the "custodian" or "guardian" of the public interest is a
long standing convention of British and Commonwealth legal traditions. The
notion of public interest, however, is not clearly defined. As Edwards points
out, "no set of criteria exists that can ensure an interpretation of the public
interest which will command universal support by all political parties or by all
segments of society." He argues, however, that society has a right to expect
nonpartisan determinations of the public interest. The Report to the Royal
Commission on the Donald Marshall Jr. Prosecution, has also raised the issue of
political interference, or the perception thereof, in the prosecutorial function.

Concern about political interference in the decision to detain or release an
insane acquittee has been addressed in the new legislation. In some provinces,
under the old LGW system, the Provincial cabinet would be involved in the
decision-making process. This overt political involvement has been eliminated

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20 Supra note 2, s. 672(3).
21 Supra note 9 at 17.
22 This view was expressed by John Pearson, Director of Public Prosecutions for Nova
Scotia, at a meeting of the Nova Scotia Public Prosecution Service Management Council,
4 December 1992, Halifax.
23 J. Edwards, The Attorney General, Politics and the Public Interest (London: Sweet
and Maxwell, 1984) at 139.
24 Ibid. at 135
25 Ibid. at 333.
26 Ibid.
27 B. P. Archibald, "Prosecuting Officers and the Administration of Justice in Nova
28 M. E. Coles and F.E.Grant, "Detention of Accused Persons Found Not Guilty by
Reason of Insanity: Diversion or Preventive Treatment" (1990) 10(4) Health Law in
by the new Review Board system. Concern regarding what may be termed "political" considerations in a broader sense, however, cannot be so easily eliminated through the introduction of procedural safeguards. There remains a risk that a decision-making body may give inappropriate weight to misconceived public concerns regarding the release of an individual found NCR. In order to avoid inordinate sensitivity to the potential for irrational public outcry, the Review Board must be guided by the specifics of the new legislation.

Parliament has provided guidance for defining the notion of public interest in the context of the disposition of an accused found NCR. This statutory definition of the public interest in the relevant context is compatible with the general notion of the public interest as applied in the criminal law.

The concept of public interest was recently given consideration by the Supreme Court in *R. v. Morales*. In striking out "public interest" as a basis for the denial of bail from s. 515(10)(b) of the *Criminal Code*, Lamer, C.J.C. argued that the provision violated the constitutional doctrine of vagueness. He argued that "at the very least, the term 'public interest' is subject to interpretation" and has not been given a "constant or settled meaning by the courts." The comments by Lamer, C.J.C. are in regard to the rather narrow concern of the statutory basis for denial of bail. Nevertheless, they point to the difficulty of providing a definition for the term public interest.

The dissenting comments of Gonthier, J. in *Morales* provide a general definition of public interest:

> In this regard, it is first, significant to recognize the general sense of the phrase [public interest], which is a reference to the special set of values which are best understood from the point of view of the aggregate good and are of relevance to matters relating to the well-being of society. Indeed, in this sense, it is at the heart of our legal system and inspires all legislation as well as the administration of justice. The concept of public interest is indeed broad but it is not meaningless, nor is it vague.

Gonthier goes on to argue that the notion of public interest must be considered in the specific context in which it operates.

The public interest, then, is judicially recognized to encompass values related to the well-being of society and the aggregate good. In regard to

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*Canada* 239 at 242.


31 *Ibid.* at 120.

criminal justice, these may include: the detection, investigation and prevention of criminal behaviour; the maintenance of public confidence in the system; and, public safety. They may also include fair and just administration of justice.33

Although the public interest factors that apply generally to the criminal law may be applied in the post-verdict disposition hearings of those found NCR, the context requires a more specific definition of the public interest. In setting out the factors to be considered in determining the appropriate disposition by the Review Board, Parliament has defined the public interest in this context.

Indeed, the vague public interest element in decision-making under the pre-Swain regime has been eliminated. Under the old legislation, a person found to be NGRI could be released by the Lieutenant Governor if, in his opinion, it would be in the best interest of the accused and not contrary to the public interest to do so.34 In addition, the grounds for release of an accused upon review were, as stated in s. 619(5)(d), “that the person has recovered and...it is in the interest of the public and of that person...that he be discharged.”35 These vague references to public interest have been replaced in the new provisions with specific factors that must be considered by the Board in making its decision.

The factors set out in the new legislation define the public interest for the Board. They must be adopted by Crown counsel as defining the public interest that they are mandated to represent. The notion of public interest should not be left to the individual Crown Attorney’s unfettered discretion, but must be conditioned and animated by the language and spirit of the new legislation.

THE SPECIFICS OF THE LEGISLATION: SECTION 672.54

Section 672.54 of the Criminal Code36 contains four factors that must be considered by the Board in making its disposition decision: “the need to protect the public from dangerous persons, the mental condition of the accused, the re-integration of the accused into society and the other needs of the accused.” All must be considered in making the disposition that is “least onerous and least restrictive” to the accused. Each of these factors and the making of the least restrictive and least onerous disposition must be included in any conceptualization of the public interest in dealing with mentally disordered offenders according to law.

Protection of the public from dangerous persons in the public interest is

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34 Criminal Code, supra note 3, s. 617(1)(b).
35 Criminal Code, supra note 3, s. 619(5)(d).
36 Supra note 2 s. 672.54.
uncontroversial. The Public Prosecution Service Annual Report states that the public interest "encompasses the need to protect the overwhelming percentage of law-abiding citizens through the conviction of criminals and the deterrence of crime." Although the report recognizes that public safety does not exhaust the content of public interest, its focus is clearly on protection of the public as the primary determinant of the public interest.

In Morales, public safety was accepted as a constitutionally valid basis for denial of bail. Lamer, C.J.C. suggested that, although our society does not countenance preventive detention in general, protection of the public is a legitimate ground for detention in the context of a person awaiting trial for a criminal offence. Gonthier, J. in dissent, noted that the public interest cannot be equated with public safety. He argued that "the concept of public interest is broader than that of protection or safety of the public, and includes interests which may not be properly included within the categories of public health or safety." 39

Gonthier made this argument in support of his view that public interest is a constitutionally acceptable ground for the denial of bail, and that an element of discretion is necessary for the bail system to serve a variety of public goals. Turning the argument on its head, it may be said that as the public interest includes considerations other than public safety simpliciter, it is legitimate that the notion of public interest be broadly defined as it is in s. 672.54. In removing unfettered discretion from the conceptualization of the public interest in a particular context, and providing a statutory definition thereof, factors beyond mere public safety must be included. Crown counsel, then, must keep protection of the public in mind in making representations to the Board. Public safety, however, cannot be the sole concern of the Crown.

In what manner the mental condition of the accused ought to be considered in the disposition is not clear from the legislation. It would appear, however, to be of relevance at least in relation to the first criterion, protection of the public. Indeed, Recommendation 40 of the Mental Disorder Project: Criminal Law Review Final Report suggests that this link be made specific in the legislation. It states: "[i]t is recommended that criteria such as 'is no longer suffering from a mental disorder likely to result in a substantial risk to the safety of society' be articulated in the Criminal Code." 41 Although this wording is not present in the

38 Morales, supra note 29 at 109.
39 Ibid. at 122.
40 Ibid. at 123.
41 Department of Justice (Canada), Mental Disorder Project: Criminal Law Review, Final Report, (Ottawa: Queen's Printer, 1985) at 50.
new Code provisions, it is arguable that it is in this manner that the mental condition of the accused should be considered by the Board.

This definition suggests that the dangerousness of the accused person must be linked to the proposition that the accused person continues to suffer from a mental disorder. Any dangerousness which cannot be linked to mental disorder would then be irrelevant to any disposition decision. As Lamer, C.J.C. stated in Morales, preventive detention based on a "proclivity to commit crime" is not countenanced in our society.42

The mental condition of the accused is also relevant in reference to the purpose of the "insanity defence" itself. As Coles and Grant point out, the defence "is a recognition of the fact that people whose criminal acts or omissions are symptoms of mental illness require treatment rather than punishment."43 If that basic premise is accepted, at least on a theoretical level,44 then it is clear that a particular disposition must be appropriate to the treatment needs of the accused. For instance, an accused no longer suffering from a mental disorder would not benefit from a custodial disposition, and this must be taken into account as supportive of release. It is also possible that the accused's mental illness may be managed or treated outside a psychiatric institution or on an outpatient basis. These alternatives must be considered, despite the possibility that the individual may still be deemed dangerous and the need to protect the public might militate against release. It must be recognized that the provision of appropriate treatment to the mentally disordered is in the public interest.

The reintegration of the accused into society is clearly in the public interest on a fundamental level. Society benefits from the meaningful and productive participation of all its members. It is in the public interest to return the individual to society to participate productively in the economic and social life of the community. Rehabilitation of the offender has long been a foundation principle of criminal law. Rehabilitation must be construed broadly in the context of criminal law to mean more than mere correction for the purpose of preventing further criminal behaviour. It must be construed to mean the successful return of the offender to the community.

This view of the purposes of the criminal law is exemplified in the Young

42 Morales, supra note 29 at 106.
43 Supra note 28 at 242.
44 It is arguable that the insanity defence is in reality an aspect of mental disorder discrimination in that it imposes preventive detention upon the mentally disordered who have committed an offence. The mentally well offender cannot be detained at the end of her sentence on the grounds that she is a danger to the public. See, for example, Campbell and Heginbotham Mental Illness: Prejudice, Discrimination and the Law, at 130.
The focus of the Act is on rehabilitation rather than deterrence or punishment. The principles upon which the Act is based, set out in s. 3, demand restraint in the application of the criminal law to young persons with a view to maintaining, rather than severing, the offender’s connections with his or her community and family. In the context of the mentally disordered offender, where the principles of deterrence or punishment are not applicable, rehabilitation and reintegration are the primary goals. As goals of the criminal justice system they are also societal goals, and the achievement thereof should be recognized and represented by Crown counsel as in the public interest.

The factors to be considered under the heading of other needs of the accused would depend on the particular individual before the Board. These might include an accused’s need for contact with family and friends, gainful employment, or religious observance. In general, the legislation demands that the accused person’s individual needs not be lost or submerged under an overwhelming concern for public safety. In a sense, what is demanded is the recognition of the accused’s dignity and humanity in the disposition decision.

After considering these four factors, the board is to make the disposition “least onerous and least restrictive to the accused.” Indeed, s. 672.54(a) requires that if “in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public” he or she must be “discharged absolutely.” This requirement reverses the presumption of detention that existed in the pre-Swain legislation. Under the new legislation, the presumption is in favour of release.

This presumption is noted in Orlowski v. British Columbia (A.G.) and Cluney v. The Queen, two of the few appellate decisions that have been made under the new legislation. In Orlowski, the British Columbia Court of Appeal stated:

(That the structure of this section [s. 672.54] makes it apparent that the Board must reach a decision (on whether it has an opinion) on “significant threat” before it can decide upon a disposition other than Absolute Discharge. This is because s. 672.54 requires the Board to make one of the three possible dispositions “that is the least onerous and least restrictive to the accused.”

46 Ibid. s. 3.
47 Criminal Code, supra note 2 s. 672.54.
50 Supra note 48 at 17.
Chief Justice McEachern, for the court, argued that based on the legislation, the Board must consider adequately the question of significant threat before considering any other disposition. It does not require that the Board come to a definite conclusion as to whether or not the accused is a significant threat. It simply requires that the Board consider the issue, and if it is of the opinion that the accused is not a significant threat, then the accused must be discharged absolutely.\(^\text{51}\)

This decision was followed in Cluney, where the Nova Scotia Court of Appeal held that the Board's reasons must "clearly articulate whether or not it holds the opinion that the accused is not a significant threat to the safety of the public."\(^\text{52}\) In addition, Chipman, J.A. stated that "in making its decision the Board must articulate, having regard to the relevant factors, what is least onerous and restrictive to the appellant."\(^\text{53}\)

Parliament, then, has determined that it is not in the public interest to subject an accused to a more onerous or more restrictive disposition than is necessary upon consideration of the four factors contained in s. 672.54. Conversely, Parliament has determined that it is in the public interest to impose only the least onerous and least restrictive disposition.

It is essential that Crown Attorneys advert to the least onerous, least restrictive principle in their conceptualization of the public interest in the context of the disposition hearing. The new legislation demands not only that the least onerous disposition be recognized as being in the accused's best interest, but also that it be understood as being in the public interest.

THE ACCUSED'S INTERESTS AS PUBLIC INTERESTS

That the least restrictive alternative for the accused is in the public interest should not be seen as radical or unusual. As noted above, the Young Offenders Act and the Marshall Report\(^\text{54}\) demand consideration of the needs of the accused and alternatives to criminal prosecution. In dealing with those found NCR for otherwise criminal acts, where there is no punitive element involved in the disposition, this would be even more reasonable. If the criminal law ought to be applied with due consideration of the rights and interests of the accused, then a

\(^\text{51}\) Ibid. at 14.

\(^\text{52}\) Supra note 49 at 6.

\(^\text{53}\) Ibid.

\(^\text{54}\) The Marshall Report includes a list of factors to be considered in the determination of the public interest component in the exercise of prosecutorial discretion. They include the fairness of prosecuting the individual in question and the availability of alternatives to prosecution. Supra note 37 at 53. This list has been adopted in the Nova Scotia Public Prosecution Service, Annual Report. Supra note 37 at 90.
fortiori this approach would be appropriate in its application to the mentally disordered offender.

As noted above, the public interest involves values essential to the well-being of society and the aggregate good. Respect for the needs and rights of all individuals in a society is a value essential to the well-being of that society. Indeed, in setting out principles of the application of criminal law, the Law Reform Commission of Canada has stated:

(a) the criminal law should be used only in circumstances where other means of social control are inappropriate or inadequate;

(b) The criminal law should be used in a manner which interferes no more than is necessary with individual rights and freedoms.55

The application of the criminal law with restraint, and with respect for the individual subject to it, is a fundamental principle of law in our society. Lamer, C.J.C. stated in Swain that "the basic principles underlying our legal system are built on respect for the autonomy and intrinsic values of all individuals."56 As such, it must be in the public interest to promote and maintain that principle.

In "The 'Public Interest' Element in Prosecutions," Andrew Ashworth argues in favour of a broadening of the notion of public interest to include diversion of some accused out of the formal criminal law system.57 He points out that this involves appreciation of the fact that the "traditional cycle of prosecution-conviction-sentence is not the only approach to law enforcement."58 He advocates the application of a principle of restraint to the administration of the criminal law. In Ashworth’s view, the Crown Prosecutor must exercise prosecutorial discretion in a manner in keeping with the public interest to ensure that the accused’s interests are respected by the criminal justice system.

The post-Swain legislative scheme may be seen as an effort to incorporate the principle of restraint into the law dealing with mentally disordered offenders. It demands recognition that the pre-Swain cycle of prosecution-verdict-detention is not the only, or in many cases the most efficacious, manner of dealing with the mentally disordered offender.59 The Crown Prosecutor must recognize that

55 Law Reform Commission of Canada, Report, as quoted in Coles and Grant, supra note 27 at 239.
56 Supra note 1 at 280.
57 Supra note 33 at 602.
58 Ibid.
59 This recognition is undoubtedly the basis for the alternative measures mandated by the Young Offenders Act.
the least onerous disposition is not only in the accused's interest, but also in the public interest. The interests of the public do not stand contrary to the interests of the accused. Rather, the interests of the accused and respect therefor are included within the public interest.

This is not to suggest that concern for protection of the public is to be eclipsed by concern for the interests of the accused. Protection of the public is clearly an objective of the criminal law in general, and of the new mental disorder provisions in particular. The notion of public interest, however, must be broadly conceived by Crown Attorneys to include, along with public safety, the interest of the accused in humane treatment, and the least restrictive disposition possible under the circumstances.

THE APPROPRIATE MODE OF CONDUCT OF THE CROWN

The adoption of a broad conception of the public interest in disposition hearings mandates the rejection of a narrowly conceived role for the Crown Attorney. Because the legislation is silent on this question, it is necessary to return to first principles regarding the proper mode of conduct of Crown counsel at different stages in the criminal process.

The seminal case dealing with the role of Crown counsel at trial is R. v. Boucher. In Boucher, the Supreme Court of Canada stated:

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.60

This passage was quoted with approval in R. v. Stinchcombe dealing with Crown disclosure,61 where it was noted that the role of the prosecution is fundamentally different from that of the defence and carries with it a duty of full disclosure.62

In “The Prosecutor as Minister of Justice: A Critical Appraisal,” Howard Shapray raises concerns regarding what he sees as incongruity between the ideals of justice that receive “lip-service”63 in the system, and the reality of an

60 R. v. Boucher (1955), 20 C.R. 1 (S.C.C.) at 8 [hereinafter Boucher].
62 Ibid.
administration of justice based on the ‘sporting theory’ of truth-finding. In theory, he suggests, criminal prosecution is meant to result in justice on the basis of the determination of the truth. Based on this, the prosecutor is ‘a non-partisan fact-presenter. He is part of the court, and has been regarded as a Minister of Justice rather than counsel representing any special interest.’ This view of the prosecutor as a Minister of Justice is echoed elsewhere. Arthur Maloney states, ‘insofar as he is a representative of society, he should ensure that the whole case is brought out, including evidence in favour of the accused as well as against him.’

Both Maloney and Shapray point out the difficulty of maintaining this non-partisan stance in an adversarial system of justice. Maloney notes that ‘[m]any prosecutors find themselves torn between the oft-times antithetical demands of advocacy and impartiality.’ His conclusion is that the ‘prosecution of a criminal case must be conducted with firmness, and it would be a disservice if it were orchestrated by eunuches.’ This conclusion fails to address the issue; it assumes that the adversarial criminal procedure necessarily entails zealous advocacy on the part of Crown counsel. Shapray’s analysis is more critical, noting that ‘the ‘fight system,’ or ‘sporting event,’ as the adversary system has been characterized, does not appear entirely compatible with its alleged objective, the quest for truth.’ In such a system, the prosecutor will use tactics of advocacy in the pursuit of victory rather than placing all relevant evidence before the court in the pursuit of truth. Shapray’s conclusion is that a ‘comprehensive re-evaluation of the administration of justice, with specific reference to the prosecutor’s office, is of the utmost priority.’ He is not willing to accept that the present adversary system of justice demands that the prosecutor adopt a partisan role.

It is Maloney’s view, however, that appears to be the more generally accepted. Indeed, the Public Prosecution Service Report quotes Boucher as supporting the traditional view of the prosecutor as a Minister of Justice. It states, however, that the Crown is nonetheless an advocate:

64 Ibid. at 133.
65 Ibid. at 126.
68 Ibid. at 472.
69 Ibid.
70 supra note 63 at 128.
71 Ibid. at 140.
In assuming this role the Crown Attorney need not forsake the arts of the advocate. Prosecution should be conducted with vigour and skill. The Crown Attorney’s duty is to see to it that every material point is made which supports the prosecution’s case or destroys the case put forward by the defence. This duty must be pursued relentlessly, but with scrupulous fairness.72

While recognizing the prosecutor’s duty to be fair and impartial, this statement does not advert to the fundamentally different role that the prosecutor plays as a Minister of Justice.

The codes of ethics published by the Canadian Bar Association and the Nova Scotia Barristers Society both deal with the role of the prosecutor as simply a special aspect of the role of the lawyer as advocate. Each warns that the duty of the prosecutor is to seek justice rather than conviction and demands that he or she exercises that function fairly and dispassionately.73 Neither code points specifically to the unique position of the prosecutor as a minister of justice with a special duty to present all evidence to the court in an impartial manner.

Even if the adversarial system of justice requires that the Crown Attorney acts as a vigourous and relentless advocate (and, as Shapray demonstrates, it is a debatable point), it cannot be said of disposition hearings. The purpose of the hearing is not to determine the truth or falsity of a particular proposition; it is not to answer a question of individual guilt. The goal is to determine the appropriate disposition for an individual who has been found to have committed a criminal act while suffering from a mental disorder, and, as such, is not criminally responsible.

It may be illustrative to compare the role of the Crown at the disposition hearing to that at the sentencing stage of the criminal process. Although the principles of deterrence and punishment, applicable in the sentencing decision, do not figure in the disposition of mentally disordered accused, there are similarities between the two processes.

John Olah, in “Sentencing: The Last Frontier,” addresses the "conceptual distinction between the trial process and the sentencing hearing."74 Olah points out that while the trial is governed by strict evidentiary rules to ensure that the final “determination is confined to the factual allegations giving rise to the

72 Public Prosecution Service, supra note 37 at 9.
offence,"75 the sentencing process is not so restricted. "The function of the sentencing hearing is to make available to the sentencer a comprehensive profile of the accused, so that he may impose the appropriate penalty."76 Strict evidentiary rules are thus seen as inappropriate.

This view of the sentencing hearing was given judicial sanction by the Supreme Court in R. v. Gardiner.

It is commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail....The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.77

The importance of providing the sentencer with the broadest and most exhaustive information possible about the offender may be applied equally to the disposition hearing. Indeed, the factors that must be considered by the Board in making its disposition require that it have a complete and comprehensive picture of the accused. As in sentencing, the Board must fit the disposition to the individual accused rather than to the criminal act which he or she has committed. For this reason, it is essential that Crown counsel assist the Board with all relevant evidence regarding the accused.

By analogy, the proper approach for Crown counsel at the disposition hearing is to present all relevant information to the Board in an impartial manner, in order to assist in its determination of the appropriate disposition for the accused. This is even more important in dealing with an accused found NCR, because, unlike a sentencing court, the Board cannot be guided by the usual tariff applied to a particular offence. The sentence must be appropriate to the particular accused, but it is generally accepted that the sentence must also match the severity of the offence. This approach is unacceptable in the context of the accused found NCR as the principles of punishment and deterrence are irrelevant.

The informality of the disposition process, like that of the sentencing process, encourages the neutral approach advocated here for the Crown Attorney. If the adversarial atmosphere of a trial encourages zealous advocacy, the informal nature of the disposition hearing should not.

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75 Ibid.
76 Ibid. at 103.
The Proper Stance of the Crown

The appropriate conceptualization of the role of the Crown would not be complete without including an articulation of the proper attitude that the Crown Attorney ought to bring to the disposition hearing. The goals of the post-Swain system will be threatened if the spirit of the Swain decision and the new legislation are not adopted by those who administer that system. Legal duties and statutory requirements are insufficient to effect a change in the manner in which mentally disordered offenders are treated in the criminal justice system.

This call for the adoption of an appropriate attitude by Crown counsel arises, in part, from the recognition that our society has little concern for the mentally disordered offender. Moreover, our society's attempts at dealing with the mentally disordered are woefully inadequate and, indeed, the motives behind them are suspect. As a result, a certain level of skepticism regarding the avowed goals of forensic psychiatry and of the criminal law in relation to the mentally disordered is reasonable.

In Orlowski, the court suggested:

It appears that the Board adopted an avuncular or patronizing attitude toward the Appellants, and seemed more concerned with their own subjective views about what would best insure successful integration into society than with the legal questions which they were also called upon to decide under the provisions of the Code.78

Evidence of patronizing and avuncular attitude on the part of society in general towards the mentally disordered is found, for example, in provincial civil commitment legislation. This legislation often allows involuntary admission to a psychiatric facility on the grounds that, in the opinion of a medical practitioner, a person is in need of treatment and is a danger to him or herself.79

Crown Attorneys must guard against bringing a patronizing attitude to the disposition hearing.

Crown counsel must also be cognizant of the fact that a finding of not criminally responsible on account of mental disorder is a special verdict. It is not a conviction. Although it is clear evidence of anti-social and, if the incident in question involved violence, dangerous behaviour, it should not be considered a basis for the imposition of punishment.

An American source presenting the results of a survey of judges, mental health professionals, defence and prosecuting attorneys found that more than

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78 Supra note 48 at 10.
79 See for example Hospitals Act, R.S.N.S. 1989, c.208.
three quarters of the prosecutors felt that "NGRI defendants" who committed violent offenses are released too soon. In addition, almost half of the prosecuting attorneys polled viewed the insanity defense as a loophole in the law that allows too many guilty people to go free. Crown counsel must avoid the perception of the accused found NCR as a guilty person who "got off" on the plea of mental disorder. They must not introduce into the process any notion of deterrence or punishment that might figure properly in the sentencing of an accused found guilty. To do so would be to usurp the finding at trial and subvert the purposes of the mental disorder verdict.

Crown counsel must avoid discriminatory views that stem from and perpetuate a predominant "irrational fear of the mentally ill in our society." It is now recognized that "mentally disordered persons are not more dangerous than non-mentally disordered persons, according to almost all of the available empirical data." Crown counsel must be guided in the exercise of their duties by realistic views of the mentally ill, and not by prejudicial myths. Concern about dangerousness is, of course, mandated by concern for protection of the public as one of the goals of criminal law, and as one of the factors to be considered in the disposition. The issue must be addressed dispassionately and without unfavourable preconceptions.

Crown Attorneys must also be aware that it is well documented that "psychiatric prediction of dangerousness...simply cannot be done with any accuracy." Mental health professionals cannot be relied upon to make accurate predictions of the potential for violent behaviour in the future. This inability to predict ought not be seen as a ground for detaining individuals whose future dangerousness is in issue. Boards and Crown counsel ought not err on the side of detention. The question of dangerousness must be addressed broadly, taking into consideration a variety of factors that might be relevant. Throughout, it must be recognized that the likelihood of future violent behaviour is dependent as much on environmental elements as on "personality factors." Dangerousness

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81 Ibid. at 165.
82 Swain, supra note 1 at 283.
84 Ibid. at 182.
85 C. Webster, B. Dickens and S. Addario Constructing Dangerousness: Scientific, Legal and Policy Implications (Toronto: University of Toronto Centre of Criminology, 1985) at 36.
NOT CRIMINALLY RESPONSIBLE

is not a constant affixed to an individual's character or psychological make-up. It is very much a result of the interaction between an individual's particular personality and temperament, and circumstances in which the individual finds him or herself. Since a conditional discharge, for example, makes some control over environmental elements possible, the risk of recidivism can thereby be reduced. A presumption of dangerousness, based on past violent behaviour, should not lead to a presumption of detention.

CONCLUSION

In performing his or her role as the representative of the public, Crown counsel must include within his or her conception of the public interest the concerns that Parliament sought to address in the Mental Disorder Amendments. The manner in which the Crown conducts him or herself in the hearing must accord with his or her position as a Minister of Justice seeking to assist the tribunal in its determination of the appropriate disposition for the individual accused before it.

A definition of the public interest that includes respect for the rights and interests of the accused is mandated by the new legislation dealing with mental disorder. The "least onerous, least restrictive" principle that is affirmed in the Code must animate the position of the Crown in disposition hearings. An impartial role for the Crown is the proper one from a legal perspective. There is a duty imposed upon the Crown to present all evidence before a Review Board in a neutral manner.

Moreover, Crown counsel must take a balanced and non-discriminatory approach to the disposition of the accused found NCR. Procedural safeguards and statutory prescriptions are not enough to ensure that mentally disordered offenders are treated with respect and humanity. In addition to following the requirements of the Mental Disorder Amendments, Crown Attorneys must bring to the fulfillment of their responsibilities an attitude in keeping with the spirit of the legislation.

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86 Ibid. at 37.