Risk in Review: A Qualitative Investigation of *Winko* Criteria Interpretation in British Columbia Review Board Hearings

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Abstract

This thesis provided up-to-date findings on the practices of the British Columbia Review Board, the governing body that oversees disposition decisions for individuals who are found not criminally responsible by reason of mental disorder (NCRMD). Compared with an earlier study, this work gathered information on factors the Board includes in its decision making process, allowing for comparison to decisions made after substantial changes to Canada's *Criminal Code* provisions surrounding NCR accused. A content analysis was performed on 24 written decisions, revealing that an individual's mental illness and associated history, their medication compliance and insight, and their index offence were most frequently listed among justifications for a given decision.

Overall, the findings imply that the Board is consistent in its decision making and follows *Code* mandate when it comes to balancing public safety and individual liberty, but may not be considering risk factors most strongly related to recidivism amongst NCR accused.

Keywords: NCRMD; Winko; Review Board; Bill C-14; risk assessment; significant threat

Dedication

This graduate thesis is dedicated to my mother and father, Gail Relkov and Daniel Curtis. It is through your caring and endearing support that I felt the comfort to pursue my goals and have thus reached this academic achievement in my life. Through every career pursuit, I am continually motivated by the desire to make you proud. Thank you.

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List of Acronyms

BCRB	British Columbia Review Board
CAPP	Comprehensive Assessment of Psychopathic Personality
FPH	Forensic Psychiatric Hospital
HCR-20	Historical-Clinical-Risk Management-20
HCR-20^{V3}	Historical-Clinical-Risk Management-20, Version 3
LSI-R	Level of Service Inventory-Revised
NCR	Not Criminally Responsible
NCRMD	Not Criminally Responsible by Reason of Mental Disorder
NGRI	Not Guilty by Reason of Insanity
ORB	Ontario Review Board
PCL-R	Psychopathy Checklist-Revised
PCL:SV	Psychopathy Checklist: Screening Version
PCL:YV	Psychopathy Checklist: Youth Version
SAPROF	Structured Assessment of Protective Factors for Violence Risk
SVO	Serious Violent Offence
START	Short-Term Appraisal of Risk and Treatability
SFU	Simon Fraser University
SPJ	Structured Professional Judgment
UST	Unfit to Stand Trial
VRAG	Violence Risk Appraisal Guide

Glossary

Not Criminally Responsible by Reason of Mental Disorder	In Canada, the legal designation given to individuals who have been deemed to be not criminally responsible for committing a criminal offence as a result of the influence of mental disorder(s). An NCRMD designation is not synonymous with an acquittal, and should not be treated as such.

Chapter 1.

Introduction

1.1. Bill C-14

On July 11th, 2014, Bill C-14, formally titled *An Act to Amend the Canadian Criminal Code and National Defence Act (Mental Disorder)* went into effect across Canada, substantially altering the country's *Criminal Code* provisions that relate to the mental disorder defence. Proponents of the legislation claim that Bill C-14 will enhance the important goal of public safety by strengthening the *Code* and creating more restrictive conditions for offenders who receive the disposition of not criminally responsible by reason of mental disorder (NCRMD) (Government of Canada, 2014). Although the changes are several, there are three major changes that are of direct relevance to judicial oversight of NCR offenders.

The first of these changes is the creation of a "high-risk" category of NCR accused persons. In accordance with s. 672.64(1) of the *Code*, an offender can now be labeled a "high-risk" NCR accused if the Court "is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person" or "…is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person" (*Criminal Code,* s. 672.64(1)). The *Code* further stipulates that high-risk NCR individuals must be detained within a psychiatric hospital, and cannot receive unescorted absences into the community; escorted absences may only be granted for medical reasons (*Criminal Code,* s. 672.64(3)). Further, periods between Review Board hearings for high-risk NCR accused may be extended up to three years (*Criminal Code,* s. 672.81(1.31)), an extension of the two-year maximum reserved for regular NCR

accused. A high-risk designation may only be revoked by a superior court that has received a referral from a Review Board (*Criminal Code,* s. 672.84(3)).

Secondly, Bill C-14 amends the *Code* by significantly altering the wording that pertains to how provincial and territorial Review Boards assign dispositions to NCR accused. Prior to Bill C-14, the *Code* directed Boards to make the "least onerous and least restrictive" disposition with respect to the competing goals of public safety, the accused's mental condition, other needs of the accused, and their potential re-integration into society; with the enactment of Bill C-14, the phrase "least onerous and least restrictive" has been replaced by the phrase "necessary and appropriate in the circumstances" (*Criminal Code,* s. 672.54). Outgoing Justice Minister Peter MacKay touted this change as one that increases the legislation's clarity and reflected case law in the Supreme Court of Canada (Parliament of Canada, 2014).

A third major change involves codification and expansion of what can be interpreted as a "significant threat to the safety of the public" as it is described in s. 672.54 – under the newly added s. 672.5401, a significant threat can be a significant risk to physical or psychological well-being "…resulting from conduct that is criminal in nature but not necessarily violent" (*Criminal Code,* s. 672.5401). Stated plainly, this amendment now gives Review Boards explicit power to detain NCR accused who have committed a non-violent offence; thus, individuals charged with less serious offences may possibly be detained in a hospital setting for prolonged periods.

Parliament's notable concern over the issue of mental disordered offenders and their threat to public safety has not developed within a political or social vacuum; the impetus for the new legislation comes in the wake of three isolated, yet high-profile incidents involving mentally disordered individuals who committed extreme acts of violence, and whose stories and subsequent trial proceedings were highly sensationalized by media coverage. The first case was that of Allan Schoenborn in 2008, where the accused murdered his three young children in Merritt, British Columbia, under the delusional belief they were suffering serious sexual and physical abuse at the hands of his ex-wife's current partner (The Canadian Press, 2015). The second case involved Vincent Li who, on July 30th, 2008, attacked and decapitated a fellow passenger

(Tim McLean) on a Greyhound Bus in Manitoba while suffering from a state of extreme psychosis (The Canadian Press, 2014a). The third case is that of Guy Turcotte[1], a Quebec doctor who repeatedly stabbed his two estranged children to death in February 2009, but was found to have no recollection of the events; he subsequently attempted to commit suicide by consuming window washer fluid (Canadian Press, 2014b). In each case, all three men admitted their guilt but were found NCRMD by the respective trial judges and ordered to reside at forensic hospitals. The verdicts in all three cases elicited considerable outrage from the victim's families, as well as the wider public, who saw them as escaping justice. Subsequently, these individuals have been the subject of media frenzies when the possibility of expanded liberty has been discussed around the time of their annual review board hearings.

It is probable that under the new *Code* legislation, all three of these men would be found to be high-risk accused by the courts; their offences were undoubtedly horrific and could potentially satisfy the "brutal nature" criterion that forms part of s. 672.64(1)(b) of the *Code*. As a result, they would see greater restrictions on their liberty, such that they would be mandated to reside within a psychiatric hospital without any leave privileges, unless the court were to revoke the high-risk accused designation at a Review Board's recommendation.

Despite these incidents, Bill C-14's enactment has met with skepticism and opposition, particularly from members of Canada's forensic mental health community, including lawyers and psychiatrists who work in the area. Most notably, the creation of the high-risk NCRMD category has been censured by professionals in forensic mental health who claim it will further criminalize and stigmatize mental illness (Simpson, 2014). Crocker, Nicholls, Charette and Cote's (2014) research on BC, Ontario, and Quebec Review Boards also noted that at NCR accused's current status is largely indicative of their future liberty status, despite the possible relevance of other factors; a similar effect could occur with high-risk NCR accused, who will now be detained for lengthy periods without new hearings. Additionally, Peay (1981) found that non-medical members of

[1] It is important to note that Turcotte's NCRMD verdict has been set aside and he is currently awaiting a new trial.

mental health tribunals in England and Wales (which operate very similarly to Canada's Review Boards) often subscribe to inaccurate stereotypes of mentally disordered offenders. Others have speculated that the category's creation will increase the number of individuals with mental illness in the prison system, as defence lawyers will avoid raising the NCRMD defence out of fear it will lead to the high-risk designation, which may result in longer detention for the individual than if they were to receive a guilty verdict (Parliament of Canada, 2013; Fitzpatrick, 2013). Ironically, this may hinder public safety because these individuals will not receive proper treatment while incarcerated and thus not have their violence risk properly addressed upon release.

The high-risk category has also been questioned on constitutional grounds. In *R. v. Owen* (2003), the Supreme Court of Canada determined that detention of NCRMD should only occur in the interest of protecting public safety; section 672.64(1)(b) permits courts to designate an individual as a high-risk NCRMD essentially on the basis of their index offence[2], which punishes the offender for their criminal act instead of addressing future violence risk (Grantham, 2014); this contravenes the very purpose of the NCRMD verdict, which is returned in order to serve the twin goals of public safety and offender rehabilitation (*Winko v. British Columbia*, 1999). Grantham (2014) also anticipates constitutional issues with section 672.81(1.31), which allows for the extension disposition review periods for up to 36 months for high-risk NCR individuals[3]; because these individuals could see improvement in their mental condition during this time and no longer pose a threat to the public, their detention would become arbitrary and thus violate Section 9 of the *Charter*.

Section 672.5401 also warrants concern. This new provision allows Review Boards to label an individual a significant risk on the basis of non-violent criminal behaviour; the small amount of literature on predicting specific types of non-violent behaviour has not demonstrated predictive efficacy of tools that measure these outcomes (e.g., O'Shea & Dickens, 2014). Secondly, this redefinition of significant risk runs counter to the binding interpretation in *Winko* (1999), wherein it was defined as

[2] The criteria under s. 672.64(1)(b) are comparable to those listed under s. 753(1)(a)(iii) of the *Criminal Code*, which sets out criteria for designation of an offender as a "dangerous offender".

[3] This can only occur upon mutual consent of the Attorney General and the accused's counsel.

concrete risk of serious physical or psychological harm. This means that the Review Board cannot use significant risk of trivial harm nor trivial risk of significant harm as grounds for placing restrictions on individual liberty. It is not clear how the majority of *Code* offences could generate a risk that fits this definition, and no explanation has been given within the text of Bill C-14 or its drafters[4].

There is also concern regarding the wording change in s. 672.54 regarding disposition decisions. Prior to Bill C-14, when considering all of the relevant factors, Review Boards were directed to make a decision that was the least onerous and least restrictive to the accused (Grantham, 2014). Even when the accused *was* found to pose a significant risk (and thus remain under jurisdiction of the Review Board), Review Boards were required to set out the least restrictive conditions within that disposition (*Penetanguishene Mental Health Centre v. Ontario,* 2004*; Pinet v. St. Thomas,* 2004). Now, the phrase "least onerous and least restrictive" has been replaced with "necessary and appropriate in the circumstances", a change that Justice Minister MacKay claims is motivated by needs for clarity (Parliament of Canada, 2014). However, it cannot be argued that these phrases are equivalent in meaning. In fact, clarity may be reduced, as the new legislation does not provide a definition of what may be considered necessary or appropriate, or when a disposition is necessary but not appropriate, and *vice versa*. While the wording suggests more flexibility in respect to board decision making, it also enables Review Boards to make decisions that are not the least restrictive and thus unduly impinge on the accused's liberty (Grantham, 2014).

Alongside the constitutional issues surrounding Bill C-14 are challenges that the legislation does not give due consideration to prevailing evidence on mentally disordered offenders or their management. For one, concerns that NCR offenders are disproportionately violent is not supported by the literature; a 2013 study of NCR offenders in Quebec, Ontario, and British Columbia found that less than 10% of an

[4] It is also unclear as to why Parliament has chosen to emphasize that this includes persons under the age 18, who one would naturally assume is included in a definition of "members of the public".

NCRMD sample had committed a serious violent offence (SVO)[5]; after three years, only 7.3% of the sample had violently re-offended (Crocker, Seto, Nicholls, & Cote, 2013)[6]. Similarly, a longitudinal study of the Ontario Review Board has revealed that the proportion of serious violent offences is low and has even decreased in recent years (Simpson, Penney, Seto, Crocker, Nicholls, & Darby, 2014). These figures suggest that the risk posed by NCR accused is overstated, and any risk that exists is currently being adequately managed by Review Board tribunals.

The concern that mentally disordered offenders who commit especially violent or 'brutal' crimes pose a greater security risk is also unsupported by empirical evidence. Although review board and court precedents for the most part demonstrate a correlation between offence severity and detention length (e.g., Silver, 1995; Callahan & Silver, 1998b; Hassan, 2010), research has not demonstrated a link between offence severity and future violence (Bonta, Law, & Hanson, 1998; Monahan et al., 2001). From a legislative standpoint, Bill C-14's focus on index offence characteristics is understandable, but still does not address the fact that offence severity is not a metric that should guide Review Board management given its absence as an indicator of future violence.

Research on management of NCRMD populations also puts Bill C-14's necessity into question, as this literature suggests that Review Boards are placing sufficient emphasis on public safety and are not overly lenient on NCR accused. Previous research in British Columbia found that only 2.5% of NCR accused received an absolute discharge at their initial hearing (Livingston, Wilson, Tien, & Bond, 2003). Grant's examination of the BC Review Board found similar results: Out of 112 initial hearings, only one individual received an absolute discharge. Further, although conditional discharges were granted in 75 hearings, residence at the province's Forensic Psychiatric

[5] A serious violent offence (SVO) is defined as homicide, attempted murder, or sexual assault (Crocker et al., 2013).

[6] Although the National Trajectory Project is comprehensive research, one must be cautious of the likelihood that Quebec's inclusion skews the data. As the study indicates, individuals in Quebec are found NCRMD at a rate of almost five times higher than in the provinces of Ontario and British Columbia, suggesting that the defence is raised more often, and used for a wider variety of criminal offences, which would dilute the prevalence of SVOs in the sample (Crocker et al., 2013).

Hospital was given as a mandatory condition in 44% of these cases (1997). Data from the Ontario Review Board are similar: Only 4.3% of all individuals from 2006 until 2012 were granted an absolute discharge within one year of their initial hearing (Simpson et al., 2014). A report from the National Trajectory Project found that 82.4% of a sample of individuals who had committed SVOs were detained at their first hearing, and 33% were still in hospital custody at the end of the study period (Crocker et al., 2013). Research on a sample of Quebec Review Board hearings found that 9.4% of individuals were granted an absolute discharge upon their initial hearing (Crocker, Braithwaite, Cote, Nicholls, & Seto, 2011). Bill C-14's more punitive custody provisions may unduly compromise individual liberty rights in the name of public safety, which research suggests is already being adequately considered by courts and Review Boards.

With Bill C-14 now implemented into Canadian law, the judicial management of NCR accused is at a crucial turning point. The new provisions depart from the principles of fundamental justice that have been firmly upheld since the enactment of Bill C-30 in 1992 and the creation of Part XX.1 of the *Criminal Code*. The rules for adjudication of NCR accused, both codified and informal, have been shaped through constitutional challenge as they relate to sections 7 and 9 of the *Charter of Rights and Freedoms*. The guiding philosophy behind Canada's mental disorder provisions is characterized by the belief that NCR accused are victims of their illness and are fundamentally incapable of appreciating the gravity of their actions; curtailing their liberty must only be done in the interest of public protection, not individual sanction. The entire legal framework established by the Part XX.1 is based on the recognition that NCR individuals be "treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation...[the] NCR accused is not to be punished" (*Winko v. British Columbia*, 1999, para. 42).

1.2. Goals of the Research

With Canada's *Criminal Code* mental disorder provisions having undergone significant alteration, a valuable opportunity now exists to gather detailed insight into the methods Review Boards have used to determine whether an NCR accused represents a "significant risk" as articulated by Justice McLachlin in *Winko v. British Columbia* (1999,

para. 57). Following *Winko*, Boards are tasked with reaching a definitive conclusion that an NCR accused poses a significant risk to the public; any uncertainty must result in an absolute discharge for the accused (Desmarais, Hucker, Brink, & De Freitas, 2008). This requirement ensures that Review Boards are indeed assigning the least onerous and least restrictive disposition possible in each circumstance. Although Justice McLachlin's directive still stands, Bill C-14 has introduced two changes that can alter the procedures Review Boards use to determine whether an individual represents a significant risk[7]. Firstly, it is now explicitly listed in the *Code* that any type of criminal behaviour can be interpreted as posing a significant risk. Secondly, Review Boards are no longer tasked with making a decision that is the least onerous and least restrictive, but one that is necessary and appropriate; the implications of this change have been discussed above.

Their decision making powers having been considerably broadened, it is now imperative that in-depth research on Review Boards take place in order to gather a detailed understanding of their decision making processes up until the enactment of Bill C-14. Although past research has been valuable in providing understanding of how Review Boards operate on a larger scale (what decisions they make, and what factors are related with various dispositions), scant literature exists on examining how Review Boards are interpreting the legal criteria that regulate their decision making ability; Lindsay Broderick's (2006) thesis research is the only known Canadian study to employ a qualitative approach to investigating Review Board decision making practices. Without detailed knowledge (e.g., how Review Boards determine that an individual is a significant risk, how they justify a disposition as the least onerous/least restrictive), there can be no meaningful understanding of how the new laws will affect their decision making process and subsequently, disposition outcomes for NCR accused persons.

This study represents a determination to develop such a body of literature. Employing a qualitative content analysis, this study examines a sample of published initial disposition decisions of the British Columbia Review Board from January 1st, 2005

[7] Although the *Code* grants the trial court the ability to render a disposition for NCR accused, research (e.g. Livingston et al., 2003; Crocker et al., 2013) finds that they commonly defer to Review Boards on this matter.

up until July 10th, 2014 (the day before Bill C-14 became law); this period was chosen to avoid overlap with the Broderick (2006) study, which examined cases from 1992 until 2004. Whereas past research (e.g. Grant, 1997; Balachandra, Swaminath, & Litman, 2004; Desmarais et al., 2008) has examined factors that influence Review Board decision making and the relationships they have to various dispositional outcomes, to the best of our knowledge, this study is only the second to empirically examine the actual text of the reasons for Review Board decisions, as they are written by members of the Board. The first was undertaken by Broderick (2006), whose content analysis of British Columbia Review Board disposition reports (and interviews of tribunal members) looked closely at the broad effect of *Winko* on Board decision-making, how the Board applied the concept of a "significant risk to the public" as it is read in s. 672.54(a) of the *Criminal Code*, as well as measuring the frequency with which various factors were mentioned in the written dispositions. This research expands on the previous work by looking at more recent dispositions, to gain a more up-to-date understanding of the present decision-making trends in Review Board hearings, which have now been substantially affected by new legislation.

1.2.1. The Research Questions

- How has the British Columbia Review Board been applying the *Winko* "significant risk" criteria from 2005 until 2014? Is a formula used, or is the process idiosyncratic?

- How is this process affected by index offence category, disposition and period?

- How have the frequencies of Broderick's (2006) identified risk factors changed in prevalence over time? Specifically, are risk assessment tools being mentioned more frequently than before?

This study aimed to expand on the findings of Broderick (2006), particularly with respect to how the Board interprets the concept of a "significant threat"[8] to the safety of the public. The first question is a very broad one that will be answered through an

[8] It is important to remember that, even with Bill C-14 in effect, the *Winko* maxim that a definitive conclusion that an individual is a significant threat must be reached in order to warrant jurisdiction over that individual still stands.

overview of the entire dataset itself – although it is not expected that any two hearings for two NCR accused will be identical, it is possible to observe – through the written reports – whether determinations of risk follow a typical format, such as assessing information in a formulaic way (e.g., starting the hearing with a discussion of the index offence, then reading a clinical report). This question was of interest because Bill C-14 has changed the mandate that forces Review Boards to make the "least onerous and least restrictive disposition" with respect to an NCR accused's liberty to making a disposition that is "necessary and appropriate in the circumstances". Presumably, this will broaden Review Board discretion, but this can only be confirmed by attaining a baseline of current Board procedure.

Further, it was of interest to gauge whether this process is affected by three key factors: The nature of the index offence, the year of the hearing, and the disposition rendered. Researchers note that index offence severity is a predictor of detention length (e.g. Silver, 1995; Callahan & Silver, 1998a) in tribunal decision making, and with Bill C-14's passing, *Code* legislation now expressly permits Courts to use index offence severity to classify NCR accused. Temporal trends may also factor into this process – for example, hearings proximal to Bill C-14's passing may be more characteristic of the legislation than those that are more distant. Some commentaries have argued that changes to Canadian criminal legislation have functioned as endorsements or official approvals of gradual changes in court or Review Board behaviour, such as with Bill C-30 or the *Winko* ruling (Livingston et al., 2003; Verdun-Jones, 2000). The consideration of disposition owes to Gigerenzer's (2014) model of defensive decision making and risk aversion, which claims that decision makers (particularly health professionals) will act in overly cautious (but sometimes ineffective and harmful) ways to claim that all precautions were taken when an adverse event occurs, and thus avoid blame. Relating this concept to the research, the expectation would be that the Review Board will be more thorough (and thus produce longer reports) for decisions carrying a higher potential of adverse outcomes (i.e., absolute discharges).

Lastly, there was interest in examining what factors the Board considered when making disposition decisions, and how these had changed or stayed the same compared with Broderick's (2006) research; the same quantitative coding scheme

employed in her study was used here to make the comparison[9]. More specifically, there was interest in examining the prominence of risk assessment instrument information (i.e. scores from risk assessment tools such as the PCL-R or HCR-20) among other factors that the Board considers when making decisions, and whether the newest developments in risk assessment have been adopted into practice. Although measuring these factors holistically helps provide insight into how Review Boards come to a decision as to whether an individual poses a significant risk, they are important on their own as their presence (or lack thereof) indicates whether Review Board members consider risk factors that have consistent empirical support.

1.3. Overview

Chapter 2 focuses on the legal context with which the study exists. First, a brief history of the insanity defence in Canada is provided, including the important transitions that took place before the passage of Bill C-30 in 1992 and the subsequent enactment of Canada's modern mental health laws. This is followed by a comprehensive description of Canada's Review Board system, with specific detail given to the Review Board system in British Columbia. The chapter concludes with a history of seminal Review Board cases, whose eventual legal challenges have come to shape the scope of Review Board jurisdiction.

Chapter 3 functions as the literature review for the thesis, and is broken into three sections of empirical research: Statistics on the processing of NCR accused and Canada's forensic mental health system; the body of literature examining the development of forensic risk assessment, alongside current research on the effectiveness of various theoretical approaches, and; research on the decision making process of mental health tribunals, both in Canada and internationally.

[9] Described in more detail in the methods section, the quantitative coding scheme was adopted from the Broderick (2006) research and involved recording the mention of certain keywords that refer to empirically-supported risk factors.

Chapter 4 provides detailed insight into the methodological choices made by the researcher to best examine the data to achieve the goals of the study. This section involves a restatement of the goals of the research and then explains the sampling process used, followed by a description of the analytic techniques that were used.

Chapter 5 presents the main findings from the qualitative and quantitative research, namely, the content analysis and the subsequent frequency analyses that were conducted.

Chapter 6 contains a detailed analysis and discussion of the research findings. The findings are compared with the Broderick (2006) research, as well as being explained in the context of prevailing trends in forensic mental health, and the new *Criminal Code* legislation brought into effect by Bill C-14. Specific attention is given to the decision making process of British Columbia Review Board, by examining the factors they listed when giving their reasons for disposition.

Chapter 7 concludes the research by summarizing the main findings of the study and discussing their implications. A brief discussion of limitations is presented, and future opportunities for research in the field are listed.

Chapter 2.

Legal Context

2.1. Introduction

This section details the legal environment – as it pertains to adjudication of mentally disordered accused persons – that has developed in Canada within its provinces and territories. For historical context, the section begins with a brief overview of the history of mentally disordered accused with Canada, dating back to before Confederation. Second, there is a short description of the legal challenge that led to Bill C-30 and the enactment of federal legislation within the *Criminal Code* that formally empowers each provincial and territorial Review Boards. The third section details Review Boards and the mental health tribunal system in Canada; specific attention is given to the role of the British Columbia Review Board, the quasi-judicial body that oversees all NCR accused in the province, along with its relationship to the Forensic Psychiatric Hospital (FPH) in Coquitlam, the province's only forensic psychiatric hospital. The chapter concludes with a discussion of landmark legal cases concerning NCR accused that have directly affected Review Board decision making.

2.2. The History of the Insanity Defence in Canada

Throughout legal history in Canada and elsewhere, mentally disordered accused individuals have occupied an awkward space in criminological discourse. Experts have been unable to classify them as either wholly ill or undoubtedly malicious, which creates a formidable challenge of finding the best judicial response for their behaviour and condition (Webb & Harris, 1999). Further, responses to this question have often been coloured by pre-eminent viewpoints on the nature of mental illness.

As will be explored below in further detail, mental health Review Boards have been the primary adjudicators of mentally disordered accused in Canada for just over 20 years. Prior to 1992 and the enactment of Bill C-30, legal provisions for NCR accused had been largely unchanged since 1892, when the *Criminal Code* was first made a part of Canadian law (Balachandra et al., 2004). Although the term *not guilty by reason of insanity* (NGRI) was formally recognized with the *Code*'s enactment, the use of the insanity defence pre-dates Confederation (Moran, 2014). Operating under English common law provisions, Canadian courts regularly applied the *M'Naghten* Rules to ascertain whether a defendant's criminal responsibility had been negated by mental dysfunction (Verdun-Jones, 1979).

The *M'Naghten* Rules were created in response to the English case of Daniel M'Naghten, an individual who had been charged with murdering Edward Drummond, the secretary of then Prime Minister Robert Peel; M'Naghten shot Drummond under the mistaken belief that he was Peel, his intended target (Verdun-Jones, 1979). At his trial, M'Naghten was eventually acquitted on the acknowledgement that, while he had the mental capacity to know what he was doing was wrong, he was suffering from an illness that stripped him of the ability to control his actions (Walker, 1968). Even though M'Naghten spent the rest of his life in psychiatric custody, there was public outcry in response to the trial; the *M'Naghten* Rules were created to assuage such outrage and ensure that similar individuals would not escape criminal liability in the future (Verdun-Jones, 1979). Responding to the House of Lords' queries about the nature of mental illness and criminal responsibility, Justice Tindal expressed that an individual may be excused from criminal liability when they suffered from a "disease of the mind, leading to a defect of reason, which has the effect of that the accused *did not know the nature and quality of their act, or that it was wrong* (emphasis added)" (Oosterhuis & Loughnan, 2014, p. 4).

As Verdun-Jones (1979) notes, the *M'Naghten Rules* were considerably influential in legal jurisdictions that followed a common law doctrine. One of the most notable applications of the Rules in Canada came in the trial of Louis Riel – the insanity defence failed for Riel because it was determined that although he certainly suffered from a disease of the mind, there was no evidence that he had difficulty distinguishing

right from wrong (Verdun-Jones, 1979). As a result, he was found guilty of treason and eventually hanged (Moran, 2014).

The *M'Naghten* Rules would continue to influence Canadian court cases up until 1892, at which time the *Canadian Criminal Code* was given Royal Assent, becoming law a year later (Verdun-Jones, 1979). Section 11 of the *Code*, although based on the *M'Naghten* Rules, modified them significantly:

> 1. No person should be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, such an extent to render him *incapable of appreciating* (emphasis added) the nature and quality of the act or omission, and of knowing that such act or omission was wrong.
>
> 2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.
>
> 3. Everyone shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved (Verdun-Jones, 1979, p. 17-18)

The *Code* introduced a substantial change as it substituted "know" with "appreciate" in regard to awareness of one's actions (Moran, 2014). This change was not merely cosmetic, as to "appreciate" something is to involve higher-order cognition such as rational and procedural thinking. Justice Stephen[10] argued that appreciation involves "an estimate of the nature and consequences of [one's] act…" (Cross, 1978). As a result, the insanity defence had been considerably broadened and applicable to more cases where the mental capacity of the defendant was in question.

These provisions covered the substance of the insanity defence; once given the NGRI verdict, accused faced conditions that, by today's standards, were considerably arcane. Under law, an NGRI accused could be held indefinitely "at the pleasure of the

[10] Justice Stephen inadvertently shaped Canada's criminal law: His draft for a codified criminal law was not used in England or Wales, but instead formed the basis for the 1892 *Criminal Code*.

lieutenant governor" of the province of jurisdiction (Verdun-Jones, 1994). Although a 1969 provision allowed for the appointment of advisory boards (predecessors to today's Review Boards), this was at the discretion of the lieutenant governor and rarely done; further, NGRI had no legal means of appealing their detention under this system (Grantham, 2014).

In the 100 years between the creation of the *Code* and the introduction of Bill C-30, Canada's mental disorder laws were not changed in any meaningful way, save for technical changes that took place in 1906, 1927, and 1954 (Verdun-Jones, 1979). It was not until the historic case of *R. v. Swain* that the insanity defence would be significantly altered – so much so that the very name of the defence would change.

2.3. Contemporary Protocol for NCR Accused

This section details the case of *R. v. Swain* and the subsequent enactment of Bill C-30 in 1992, which fundamentally altered the substantive mental disorder defence and the adjudication process for mentally disordered offenders. Although the decisions in all of the cases below have come to affect Review Board decision making, the discussion of *Swain* and Bill C-30 are kept separate for their unique impact on mental disorder law.

2.3.1. *R. v. Swain*

The case of *R. v. Swain* (1991) would fundamentally change the course of mental disorder law in Canada. Owen Swain had been charged with assault and aggravated assault for attacking his wife and children under the influence of religious delusions that led him to believe his actions were protecting his family from demonic forces. A testament to the cumbersome nature of the NGRI verdict, Swain's defence counsel argued against the Crown's assertion that Swain be found not guilty by reason of insanity (Broderick, 2006). However, Swain was indeed found NGRI and ordered to be detained at a psychiatric facility[11], from which he was later released upon

[11] Prior to Bill C-30, s. 614(2) of the *Code* provided for the automatic and immediate detention of all NGRI accused persons.

improvement of his mental condition (Broderick, 2006). In 1991, Swain challenged the ruling – because he had recovered by the time he was found NGRI, he argued that the indeterminate detention regime made a broad assumption of dangerousness that violated his *Charter* rights guaranteed to him under sections 7 and 9 (Broderick, 2006).

The Supreme Court agreed with Swain, affirming his challenge; while conceding that Parliament has the right to protect the public from dangerous individuals, section 614(2) was overbroad in such a pursuit and that less restrictive measures could suffice if they were attuned to the present condition of NGRI accused (Verdun-Jones, 1994). Clearly, section 614(2) of the *Code* violated sections 7 and 9 of the *Charter* and could not be saved by section 1, and thus had to be corrected. Although it had the power to declare the section null and void, the Supreme Court avoided making this decision for it would have led to the immediate release of all NGRI accused, some of whom may have presented a real danger to the public; instead, the Supreme Court directed Parliament to revise the law, which gave rise to Bill C-30 (Verdun-Jones, 1994).

2.3.2. Bill C-30

Bill C-30 was enacted in February 1992, and it introduced major changes to Canada's mental disorder laws, which aimed to address long-standing criticisms of the mental disorder regime by providing more procedural safeguards for mentally disordered accused while minimizing restrictions on their liberty (Davis, 1994)[12].

Firstly, Review Boards were granted formal review powers, being upgraded from their advisory role (Broderick, 2006). The new amendments also gave these boards the power to render one of three dispositions: Absolute discharge, conditional discharge, or hospital custody order; disposition decisions would be informed by the question as to whether the NCR accused posed a significant threat to public safety (Verdun-Jones, 1994). More detail on the jurisdictional power of Review Boards will be given below, but

[12] It should also be noted that Bill C-30 affected provisions regarding fitness to stand trial, but are not discussed given their distal relevance to the topic of this thesis.

for now it is sufficient to state that Bill C-30 transformed Review Boards into the primary gatekeepers of NCR accused.

Secondly, the name of the verdict was changed from “not guilty by reason of insanity” (NGRI) to not “criminally responsible by reason of mental disorder” (NCRMD). This effectively changed understanding of the accused’s role in the offence; the verdict (as explained by s. 672.34 of the *Code*) emphasizes that the accused did in fact commit the act or omission but was not criminally responsible at that time. As it was later re-affirmed in the *Winko* decision, this change in terminology emphasized that the verdict is in a special category separate from guilt or acquittal, and those who receive it should be held responsible in a different manner than those who are not under the influence of a mental disorder when committing a criminal offence (Desmarais et al., 2008). The change was perceived by some to be an effort to reduce stigma, who argued that the term “mental disorder” is less emotionally coloured than “insanity” (Wilson, 1992). Below are the text passages of s. 16 of the *Criminal Code* before and after Bill C-30:

> 16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.
>
> (2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission was wrong.
>
> (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused the person to believe in the existence of a state of things that, if indeed, would have justified or excused the act or omission of that person. (*Criminal Code*, 1985, s. 16)

With the passing of Bill C-30, s. 16 now reads:

> 16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. (*Criminal Code,* 1991, s. 16)

As alluded to in the *R. v. Swain* case, the NGRI defence was avoided when possible owing to its ominous nature: As Broderick (2006) indicates, indefinite detention might result even if the index offences were minor in nature. However, as will be shown in more detail later, Bill C-30 affected usage of the mental disorder defence in several Canadian jurisdictions.

Bill C-30 also added formal provisions for Review Board establishment and operation to the *Code*. Of primary relevance here is section 672.54, which specifies the procedures that boards must use to determine an NCR accused's level of detention. This is where the concept of "significant risk" has become crucially important: A Review Board's continued jurisdiction over an NCR accused turns on whether they deem that individual to be a significant risk to the safety of the public. Prior to Bill C-14, s. 672.54 read as follows:

> Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

How Review Boards interpret and apply the concept of a significant risk is of central interest to this study. Later sections detail how subsequent legal events have affected

the scope of Review Board practice and how they adjudicate NCR accused, including the recent amendments added by Bill C-14.

2.4. Canada's Review Boards: Structure and Procedure

Since 1992, mental health review boards have been designated as the primary decision makers with respect to the disposition of NCR accused. Acting as administrative tribunals with specialized expertise in mental health, they are the physical manifestation of Canada's intersection between criminal justice and mental health (Carver & Langlois-Klassen, 2006). Therefore, understanding how they balance the competing needs of public safety and individual liberty are central to the research objectives of this thesis. As will be seen at the end of this chapter, their governance and the scope of their power has been affected by several landmark cases involving NCR accused. This section is devoted to describing their composition and practice.

The *Criminal Code* stipulates that each province and territory must have its own board, and consist of at least five members (*Criminal Code*, 1985, s. 672.38). At least one member must be a psychiatrist who is licensed to practice in the province or territory question; if only one member of the board is a practicing psychiatrist, then at least one other member must be licensed to practice psychology or medicine in that same province (*Criminal Code*, 1985, s. 672.39). Review Boards must be chaired by a judge (sitting or retired) or lawyer who has the qualifications for appointment to the judiciary at the Federal Court, Superior Court, or District Court levels (*Criminal Code*, 1985, s. 672.4(1)). Hearings must be chaired by a panel of three members, including the chairperson, a psychiatrist, and one other member (*Criminal Code*, 1985, s. 672.41(1)).

Review Board decisions are decided by a simple majority of panel members (*Criminal Code*, 1985, s. 672.42); further, Review Boards are granted the ability to draft their own rules governing procedure and practice, so long as they are approved by the lieutenant governor of the province or territory in question (*Criminal Code*, 1985, s. 672.44(1)). This same lieutenant governor appoints individuals to be members of the board (*Criminal Code*, 1985, s. 672.38). Procedurally, Review Boards are meant to follow an inquisitorial as opposed to an adversarial regime, meaning that they must

exercise due diligence in finding sufficient evidence both for and against a certain decision (i.e., reasons for and against restricting an NCR accused's liberty) (*Winko v. British Columbia*, 1999).

Review Boards are vested with the power to make disposition decisions once an UST or NCRMD verdict is reached by a court; although courts can make these dispositions themselves, research shows that they nearly always defer to Review Boards (Livingston et al., 2003; Crocker et al., 2013). If a court makes an initial disposition other than an absolute discharge, the Review Board must hold a hearing to review this disposition within 90 days (*Criminal Code*, 1985, s. 672.47(3)). Should the court render no disposition, the board must make its own disposition within 45 days; in exceptional circumstances, this period can be extended up to 90 days (*Criminal Code*, 1985, s. 672.47(1); s. 672.47(2)). Traditionally, Review Boards must conduct annual reviews of all dispositions made (other than absolute discharges) (*Criminal Code*, 1985, s. 672.81(1)), but there are circumstances that allow for extensions up to 24 months (*Criminal Code*, 1985, s. 672.81(1.1), s. 672.81(1.2)). It will be seen later that Bill C-14 has added special review provisions for high-risk NCR accused.

2.4.1. The British Columbia Review Board

As stated above, the British Columbia Review Board (BCRB) is formally empowered by s. 672.38 of the *Code*. The BCRB is headquartered in Vancouver, British Columbia, and usually holds hearings at its downtown offices or at the FPH in Coquitlam, but hearings can take place elsewhere if the individual does not live in the Lower Mainland (British Columbia Review Board, 2005b). At present, the BCRB has 21 members (BCRB, 2005a); in addition to the qualifications stipulated by the *Criminal Code*, the board sets its own guidelines for membership. These include, but are not limited to, a preference for expert understanding of the *Criminal Code*, forensic criminology and risk assessment, mental health law, and British Columbia's cultural and ethnic diversity (BCRB, 2005d).

In addition to the mandate set out in section 672.38, the BCRB considers itself obliged to follow the policy objectives of Section XX.1 of the *Code*, as outlined by Justice

McLachlin in *Winko*. These objectives include the protection of the public while treating NCR accused in a fair and appropriate manner by according them their constitutional rights when they offend the law (1999, paras. 21, 22, & 30). Further, the BCRB sets out guidelines that regulate conduct, including proper procedures related to the Board's authority, accountability, hearing requirements, evidence, decision making, chairperson obligations, and conflicts of interest (BCRB, 2005c).

The Forensic Psychiatric Hospital (FPH)

Individuals who are given a hospital custody order reside at the Forensic Psychiatric Hospital in Coquitlam, British Columbia's lone forensic psychiatric facility[13]; there are six regional clinics located in Kamloops, Nanaimo, Prince George, Surrey, Vancouver, and Victoria, as well as satellite clinics located in 10 other municipalities. These facilities are responsible for the treatment and supervision of NCR accused persons who have been given a conditional discharge and are located in the area (BC Mental Health and Substance Use Services, 2013b).

The FPH is licensed by the Lieutenant Governor in accordance with s. 5 of the *BC Mental Health* Act (1996). Currently, the FPH has 190 beds, designated for individuals who have been deemed UST or NCRMD by the court or for individuals transferred from correctional facilities for the purpose of assessment or treatment (*BC Mental Health Act,* 1996, s. 29). As mentioned, it is one of the two main locations where Review Board hearings are held. Assessments are prepared on site in co-ordination with a treating psychiatrist, the accused's case manager, and a social worker; these assessments are used to inform Review Board decision making on whether the individual poses a significant risk to the safety of the public (BC Mental Health and Substance Use Services, 2013a).

[13] By comparison, Ontario has nine facilities and Quebec has five; in total, there are 25 hospitals nationwide.

2.5. Legal Cases, Pre- and Post-*Winko*

This section outlines Review Board hearings in various Canadian jurisdictions which, upon further appeal or legal challenge, have come to define the scope of the Review Board's jurisdiction and the extent of its decision making power. The period covers a range of 12 years from 1992 to 2006; as will be seen, some of the post-1999 cases revisited issues that were deliberated in pre-1999 cases, but their interpretation was fundamentally altered by the rulings handed down by the Supreme Court in *Winko*.

2.5.1. *Peckham v. Ontario*

The case of *R. v. Peckham* (1994) revolved primarily around the Review Board's consideration of the accused's mental condition when making dispositions under 672.54. The appellant had been found NGRI on a charge of attempted murder that occurred in 1981. His counsel, Paul Burstein, argued that the Review Board's consideration of the accused's mental disorder must occur in two stages: Firstly, it must be examined whether the individual in question still in fact suffered from the mental disorder that was operative at the time of the offence and thus negated criminal responsibility. Drawing on the decision in *Foucha v. Louisiana* (1992), he argued that, if no such finding was made, a custody order could not be sustained, as doing so would contravene the principles of fundamental justice (*R. v. Peckham,* 1994).

However, Burstein's contentions were rejected. Speaking on behalf of the Ontario Court of Appeal, Justice Doherty claimed that s. 672.54 directs the Review Board to consider the accused's *present* mental condition – which *may* include whether or not the individual still suffers from the operative diagnosis – as part of its determination whether the individual poses a significant threat to the safety of the public:

> Nothing in the language suggests that the board must first decide whether the label attached to the accused's mental condition for the purposes of determining whether he could be held criminally responsible for his acts remains his operative diagnosis. Instead, the section contemplates a consideration of the accused's mental condition at the time he or she is before the board. The original diagnosis along with the psychiatric information referable to the accused's mental state since the finding of not criminally responsible on account of mental disorder must be considered

> in arriving at a conclusion with respect to the present mental condition of the accused. That conclusion in turn plays a central role in the board's determination of the appropriate order (*R. v. Peckham*, 1994, para. 31).

Furthermore, Justice Doherty asserted that even if Burstein's contentions held true, they would not apply to the appellant given that clinical assessments demonstrated that his mental illness, namely his paranoid schizophrenia and antisocial personality disorder, were still present and operative, thus warranting dismissal of the appeal (*R. v. Peckham*, 1994). This was later re-affirmed in the post-*Winko* case of *R. v. Wodajio* (2005), where the Manitoba Court of Appeal determined that an NCR accused can pose a significant risk on the basis of their current mental condition, whether or not it is related to the mental illness that existed at the time of the offence.

2.5.2. *Winko v. British Columbia*

The pivotal case of *Winko* (1999) has come to be the guiding precedent by which Review Boards make disposition decisions for NCR accused. How its interpretation is affected by implementation of Bill C-14 remains to be seen and will not be better understood until a substantive amount of hearings are held under the new regime. Continuing in the spirit of Broderick's (2006) research, this study uses in-depth and up-to-date information as to how Review Boards are currently applying the criteria listed in *Winko*.

Joseph Winko was found NGRI in 1983 after being charged with attacking two individuals with a knife while affected by delusions; he was subsequently diagnosed with paranoid schizophrenia (Broderick, 2006). As a result of the verdict, Winko came under the jurisdiction of the forensic mental health system in British Columbia, and spent the majority of the next ten years in psychiatric custody. He was granted a conditional discharge in 1995, but appealed this decision on the basis that he had not acted violently since his index offence twelve years prior; continued detention, he argued, would violate his *Charter* rights under s. 7 and s. 15(1). Further, he contended that Part XX.1 contained an inherent presumption of dangerousness that the accused had to disprove (Grant, 2000). On June 17th, 1999, the Supreme Court ultimately dismissed his appeal on the basis that s. 672.54 did not contravene the *Charter*, affirming that with Bill C-30,

Parliament had created a treatment-oriented regime that respected both the interests of public safety and the liberty rights of the accused (*Winko v. British Columbia*, 1999). While the Court was unanimous in setting aside the appeal, the bench split 7:2 on a separate issue, this being the interpretation of the "significant risk" criterion contained in s. 672.54 *Criminal Code* (Broderick, 2006). Reversing the decision in *Orlowski* (1992)[14], the majority concurred that a Review Board may only impose restrictions on an NCR accused's liberty upon a definitive finding that they pose a significant risk to the safety of the public; *any* uncertainty must result in an absolute discharge (*Winko v. British Columbia*, 1999). Furthermore, it took the initiative to define "significant risk":

> The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold (*Winko v. British Columbia*, 1999, para. 57).

Citing *Chambers* (1997), the Court upheld the notion that the behaviour creating the risk must be criminal in nature. It also affirmed that there is no onus on the accused to establish that they are not dangerous; rather, the onus is on the Review Board that they are. To start with the default assumption that NCR accused pose a significant risk unless proven otherwise would lend to the stereotype that all mentally ill persons are dangerous (Grant, 2000). Thus, the only constitutional justification for depriving an NCR accused of his or her liberty is an affirmative finding that they are a significant threat to public safety.

In summary, *Winko* (1999) significantly affected the scope of Review Board practice by placing a higher onus on them to assess whether individuals under their jurisdiction posed a significant risk to the public. The effects of the Supreme Court's decision in *Winko* were quickly seen, as the related criterion of significant risk and the definition of harm were deliberated in *Campagna* (1999). And as will be seen, the *Winko*

[14] In *Orlowski* (1992), the British Columbia Court of Appeal had ruled that uncertainty pertaining to whether an individual posed a "significant threat" could justify restriction of their liberty; Review Boards were not required to come to a definitive conclusion on this matter.

case had a profound and immediate impact on Review Board practice with respect to absolute discharges.

2.5.3. *R. v. Owen*

In *R. v. Owen* (2003), the standard of "significant risk" was again at issue in a case that reached the Supreme Court. The accused was Terry Owen, who in 1978 had been found NGRI for a charge of second-degree murder. At the time of the killing, the accused was in a substance-induced psychotic state; Owen was subsequently diagnosed with antisocial personality disorder (*R. v. Owen*, 2003).

According to the case summary, Owen spent several years detained in various mental health facilities and was placed on a system of gradual re-release into the community, until incurring multiple criminal charges in 1987, including possession of a weapon. He was returned to a forensic facility upon serving his correctional sentence, where another gradual attempt to re-integrate him into the community took place, but largely failed because of his violent behaviour and drug use (*R. v. Owen*, 2003). At a Review Board hearing in 2000, the tribunal decided that hospital custody was the most appropriate placement for Owen, because it would enable the hospital to accurately respond to volatile changes in his violence risk that were brought on by his substance use (*R. v. Owen*, 2003). Owen appealed this decision, claiming that it violated s. 672.54 of the *Code*; specifically, it did not reflect the section's mandate to make the least onerous and least restrictive disposition in the circumstances. The Ontario Court of Appeal heard Owen's case and overturned the Review Board's detention order; at the hearing, it did not accept admission of new evidence – which involved Owen assaulting a fellow patient since his custody order – and did not provide reasons for such action (*R. v. Owen*, 2003).

However, the case was further appealed to the Supreme Court of Canada, and it ruled that the Court of Appeal had made an error in law under the *Code,* which requires a Court of Appeal to consider any evidence that is on record before the appellate hearing (*Criminal Code,* s. 672.73(1)). In their eyes, the Board had made the correct decision because, while Owen was not in a psychosis that formed the substance of the

index offence, s. 672.54 directs the Board to make a decision that takes into account the "safety of the public, *the mental condition of the accused* (emphasis added), the reintegration of the accused into society and the other needs of the accused…" (*Criminal Code*, 1985, s. 672.54). The Supreme Court contended that the term "mental condition" covered a broader base than simply whether or not the accused was sufficiently cognizant of their actions. Owen's behaviour, especially that which he had displayed since the custody order, warranted the inference that he was in a mental state that indicated he was a significant risk to the public; as a result, the Supreme Court restored his custody order, returning him to hospital (*R. v. Owen*, 2003).

2.5.4. *Penetanguishene Mental Health Centre v. Ontario*

As mentioned previously, *R. v. Pinet* (1995) had established that Review Boards only had to consider the least onerous and least restrictive disposition when making one of the three dispositions contained in the three subsections of s. 672.54, but two cases decided in 2004 departed from this principle, a shift that was likely catalyzed by the landmark rulings in *Winko* and *Owen*.

The first was *Penetanguishene Mental Health Centre v. Ontario* (2004). The subject of the case, Pertti Tulikorpi, was found NCRMD stemming from a 1991 assault with a weapon charge. He had a long documented history of mental illness, including a diagnosis of paranoid schizophrenia, accompanied by a detailed criminal history dating back to at least 1986 (*Penetanguishene Mental Health Centre v. Ontario*, 2004). After his verdict, he spent time in medium- and then maximum-security facilities based on the behaviour that preceded his Review Board hearings. At Mr. Tulikorpi's 2000 hearing, the Ontario Review Board ordered that he be transferred to Whitby Mental Health Centre, a medium-security facility, citing that it was the least onerous and least restrictive disposition available to him; both the director of Oak Ridge (where Tulikorpi was presently residing) and Whitby appealed the decision (*Penetanguishene Mental Health Centre v. Ontario*, 2004). At the hearing in 2001, the Ontario Court of Appeal affirmed the principle established in *R. v. Pinet* (1995), in that the Review Board only needed to apply the "least onerous and least restrictive" criteria when making one of the three dispositions listed in s. 672.54; this being said, the Appeal Court was of the view

that it was not necessary for the Board to consider the principle when deciding the type of custody for Mr. Tulikorpi as it would "hamstring the Review Board in the exercise of its discretion" (*Penetanguishene Mental Health Centre v. Ontario*, 2004, para. 13). Thus, the Court returned the case back to the Board for a rehearing.

Tulikorpi appealed the decision to the Supreme Court of Canada. The Supreme Court disagreed with the Court of Appeal, stating that the decisions reached in *Winko* and *Owen* had shifted the interpretation of the *Code* in favour of Tulikorpi (*Penetanguishene Mental Health Centre v. Ontario*, 2004). In essence, because there was now additional emphasis on ensuring that the liberty rights of NCR accused were not unnecessarily violated by the *Code*, there was reason to examine the precise conditions of Review Board dispositions as to how they best balanced the four criteria set out by s. 672.54. The Supreme Court's reasoning was that, while public safety is the primary consideration when making a disposition (*Winko v. British Columbia*, 1999), it was not at issue in this case because hospital custody was the only option for the accused. Therefore, the liberty interests of the accused should have been the primary concern.

Justice Binnie, in delivering the judgment of the Court, noted that simply making a hospital order would not reflect this concern because Ontario's hospital system had three security levels which varied widely in conditions (*Penetanguishene Mental Health Centre v. Ontario*, 2004, paras. 28-31). Further, the Court noted that Justice Gonthier had, in the *Winko* ruling, affirmed that a Review Board must apply the appropriate criteria when making a disposition decision for an NCR accused and again when setting out the conditions for either a conditional discharge or custody order; Part XX.1 of the *Code* is only constitutional so long as each of its statutes adequately protect the liberty of NCR accused (1999). As a result, the Court ruled that the Review Board had not erred in its decision making, and set aside the Appeal Court's ruling (*Penetanguishene Mental Health Centre v. Ontario*, 2004).

2.5.5. *Pinet v. St. Thomas*

The companion case of *Pinet v. St. Thomas* (2004) also dealt with the issue of how the "least onerous and least restrictive" decision is to be applied by Review Boards. Michael Pinet had been detained at Oak Ridge Division of Penetanguishene Mental Health Centre, a maximum security psychiatric hospital in Ontario, since 1977, after being found NGRI on four counts of murder (*R. v. Pinet,* 1995). In 2000, the Ontario Review Board had ordered that Pinet return to Oak Ridge, the maximum-security division at Penetanguishene Mental Health Centre (Broderick, 2006). The Board determined that Pinet's condition had deteriorated, and that Oak Ridge would be more suitable given the risk he presented and the treatment needs he presented (*Pinet v. St. Thomas*, 2004). He appealed the decision on the basis that it was an error of law under s. 672.78(1)(b). The Supreme Court agreed in this respect, because, unlike the *Tulikorpi* case, the Review Board had made no reference to the concept of "least onerous and least restrictive" when justifying their decision to return Pinet to Oak Ridge (*Pinet v. St. Tomas*, 2004). Because the Court was of the opinion that the Review Board's decision would have differed if it had been "properly informed of the law and acting reasonably", it concluded the Board had made an error of law that constituted a substantial wrong, allowing them to overturn the Board's decision and grant a rehearing (*Pinet vs. St. Thomas*, 2004, para. 56).

The rulings in these two cases have answered in the affirmative that when making a disposition decision under section 672.54, Review Boards *must* make the choice that is the least onerous and least restrictive possible for the accused at every step of the process, a goal of Part XX.1 of the *Code* that was amplified by both *Winko* and *Owen*. This maxim reversed the decision in *R. v. Pinet* (1995) where the Ontario Court of Appeal had determined that Review Boards were *not* required to apply the "least onerous and least restrictive" principle to conditions within one of the three dispositions under s. 672.54. This ensures that the liberty rights of NCR accused are impeded no more than necessary, and that the regime retains its treatment focus. The tenuous status of this guarantee, in light of Bill C-14's passing, will be discussed in subsequent chapters.

2.5.6. *Mazzei v. B. C.*

The case of *Mazzei v. B. C.* determined that Review Board powers are not limited to individuals before them at board hearings; they can be binding on third parties, such as the facilities where NCR accused are held, should they be ordered to reside within a forensic hospital. In this case, the accused was Vernon Mazzei, who was found NGRI in 1986 for aggravated assault (*Mazzei v. British Columbia* (Adult Forensic Psychiatric Services), 2004). An Aboriginal man with schizophrenia and extensive brain damage owing to substance abuse, Mr. Mazzei's limited cognitive abilities caused behaviour that repeatedly led to revocation of his conditional discharge status, and he thus became a fixture within the province's forensic mental health system (*Mazzei v. British Columbia* (Adult Forensic Psychiatric Services), 2004). At a hearing in 2004, he was given a four-month custody order; the Board also specified a set of conditions, including ones that directed personnel at the Forensic Psychiatric Hospital (where Mazzei resided) to review Mazzei's clinical files and develop an integrated plan that addressed his systemic and repeated failures to function outside of an institutional setting (*Mazzei v. British Columbia* (Adult Forensic Psychiatric Services), 2004).

The contention that formed the basis of the appeal (on behalf of the Director) was that the Review Board had no authority to impose conditions on anyone other than the accused. The respondents (in this case, Mazzei and the BCRB) were of the contention that, because of the Review Board's inquisitorial nature, it required as much information as possible from both sides of a case, and detailed information from the Director fell under the scope of such a requirement (*Mazzei v. British Columbia* (Adult Forensic Psychiatric Services), 2004). The British Columbia Court of Appeal sided with the Director, but this decision was overturned by the Supreme Court of Canada in 2006, which decided that the *decision itself* (which includes third parties, such as hospitals and its personnel) the Review Board makes was also subject to conditions, not just the NCR accused (*Mazzei vs. British Columbia* (Director of Adult Forensic Psychiatric Services),

2006), with the one caveat being that the Board could not specify a form of medical treatment or order that treatment be delivered[15].

2.6. Chapter Summary

This chapter has provided the legal context that currently surrounds the British Columbia Review Board with respect to the statutory law prior to July 2014, and how the Board's (along with all other Review Boards in Canada) decision-making power has been defined through judicial interpretation of legal issues arising in a selection of cases involving NCR accused. The next chapter focuses on the state of empirical research on Review Board practices, which includes an examination of the disposition process with respect to NCR accused, and their demographic characteristics. There is also an up-to-date review of the philosophy and science behind risk assessment, which has come to dominate forensic psychiatry in the last two decades; this section will describe the more prominent risk assessment tools that are used in contemporary practice, as well as research on their effectiveness. With a full understanding of the legal and scientific environment surrounding the British Columbia Review Board, the reader will be prepared to evaluate the methods and findings that emerge from the research on recent decision making by its members.

[15] The Court arrived at this decision through a nuanced interpretation of the French version of the *Criminal Code*, which, when translated to English, gave slightly different meaning to s. 672.54.

Chapter 3.

NCR Accused Populations, Risk Assessment, and Review Board Decision Making

3.1. Introduction

As mentioned above, this chapter describes the present state of research regarding several areas related to forensic psychiatry. Drawing on both provincial and national research concerning Review Boards, the first section contains a demographic description of Canada's forensic system: Its size, characteristics, and fluctuations on a year-to-year basis. The next section focuses on the development of risk assessment as it pertains to NCR accused populations, and also closely examines the concepts of "dangerousness" and "risk" and how they have evolved over generations. Finally, the chapter contains an examination of past research that looked at both how Review Boards and other mental health tribunals make decisions regarding mentally disordered offenders, and what factors are correlated with certain types of dispositional outcomes.

3.2. The Forensic Mental Health System in Canada

Research on the demographic constitution of NCRMD populations has come from both government and non-governmental sources. Latimer and Lawrence (2006) examined data on NCRMD populations across seven jurisdictions[16] from 1992 to 2004, and found that, over the 12-year period, 6,802 individuals were found NCRMD; Quebec had the highest proportion, with nearly 50% of all NCRMD findings coming from the

[16] The provinces/territories studied were Prince Edward Island, Quebec, Ontario, Alberta, British Columbia, Nunavut, and the Yukon.

province, whereas Nunavut was the lowest with just six NCRMD findings over the study period. Although there were minor fluctuations, the number of cases diverted to the Review Board over the 12-year period more than doubled, peaking at 829 in 2003 (Latimer & Lawrence, 2006); this translates to an average rate of 1.6 diversions per 1,000 court cases[17]. The vast majority of the sample (84%) was male; the median age was 35. Aboriginals comprised just 4.2% of the sample, with nearly the exact same male/female proportional split being found among this group as the overall sample (Latimer & Lawrence, 2006). This divide is in sharp contrast to traditional correctional populations in Canada, as a recent study of Canadian correctional facilities found that Aboriginals comprise 27% of provincial and 20% of federal correctional populations respectively (Dauvergne, 2012).

A 2014 report on the Ontario Review Board (ORB) population over a 25-year span revealed demographic characteristics of ORB referrals from 1987 to 2012. Over the course of the study period, the average age of ORB referrals was 36.77, similar to the above study; likewise, the average gender composition of the sample was comparable to the Latimer and Lawrence (2006) research, as the ratio of men to women over the study period was 4:1 (Simpson et al., 2014). In this study, Aboriginals comprised 4.9% of the overall sample, again similar to the above study (Simpson et al., 2014). Overall, the vast majority of offenders had been diagnosed with a psychotic spectrum disorder (such as schizophrenia or schizoaffective disorder) (Simpson et al., 2014). This was also the case in the Crocker et al.'s (2013) research, when 68.9% of their sample had a diagnosis in the psychosis spectrum.

The authors made note of three main demographic shifts that have occurred in the ORB population over 25 years: First, the proportion of referred individuals under the age of 21 has increased; second, the ORB population has become more ethnically heterogeneous; there are greater proportions of individuals of African, Caribbean, Asian, and Middle Eastern backgrounds entering Ontario's forensic system, and third, whereas sole diagnoses of psychotic disorders were more common earlier on, recent years reveal

[17] For reasons unknown, rate data from 1992-1994 were not presented.

that co-morbid diagnoses (specifically, substance abuse) had increased over time (Simpson et al., 2014).

With regard to British Columbia, the 2013/2014 Annual Report by the British Columbia Review Board (BCRB) reveals that from 1992 to 2014, 1,635 cases were referred to the Board (British Columbia Review Board, 2014). Comparatively, the Latimer and Lawrence (2006) data for British Columbia reveal that 1,036 individuals were found NCRMD in British Columbia the 12 years for which they had data. The BCRB data would initially suggest that 599 cases individuals had been found NCRMD from 2004 until 2014, but it is important to note that the Annual Report counts admissions as a whole (including both those found NCRMD *and* UST). Unfortunately, while the Annual Report contains detailed demographic information for the 2013-2014 year, the Reports do not disclose such data for the entire date range. Although age statistics were calculated for the 289 new admissions to the BCRB in the 2013-2014 period (which ranged from April 1st, 2013 until March 1st, 2014), they were merely divided between those under and above the age of 18, which does not provide meaningful insight into the typical age of mentally disordered offenders in the province (British Columbia Review Board, 2014).

Jamie Livingston and colleagues' (2003) follow-up research on the effects of Bill C-30 in British Columbia provides more in-depth information on the demographic constitution of Review Board referrals in British Columbia. The study captured referrals ranging from February 1992 to February 1998, which were the first six years after Bill C-30 came into effect. Of the 276 individuals found NCRMD, 85.5% were men, and the average age was 36 – again, these numbers are comparable to the research discussed above (Livingston et al., 2003). Nine percent of the sample of was Aboriginal, which is noticeably higher than the figures reported in both the Latimer and Lawrence (2006) and Simpson et al. (2014) research. A total of 62.3% of the sample were unmarried, and 51.1% had no biological children, while only 17% had obtained any post-secondary education and only 5.7% were employed at the time of their index offence (Livingston et al., 2003). Other data (e.g. Desmarais et al., 2008; Crocker et al., 2011) reveal similarities with respect to age, marital status, education and socioeconomic background. Together, these numbers suggest that the average Review Board referral

tends to be white, under 40, single, unemployed, poor, and modestly educated. These findings have implications for service delivery to this population as a means of creating better prevention strategies, as well as treatment outcomes.

Available research on the criminological profile of NCR accused provides information on the common offending patterns in mentally disordered individuals. Livingston and others (2003) noted that 63% of their sample had prior contact with the criminal justice system; 15.4% had been convicted of 10 or more offences. With regard to the index offence that led to their NCRMD designation, assault was the most serious offence for 45.5% of the sample, whereas murder/attempted murder was the most serious charge for 10.5% (Livingston et al., 2003). In their study of *Winko* and its effect on the rate of absolute discharges, Desmarais and colleagues (2008) found that, in their sample of NCR accused[18], 39.7% had been charged with assault, and 15.2% had been charged with homicide. Research examining the Quebec Review Board reveals similar numbers: 45% of the sample was charged with assault, and 17.7% of the sample was charged with homicide. Regarding criminal history, there was an even split among first-time and repeat offenders (Crocker et al., 2011). The 2013 report from the National Trajectory Project reinforces these data. Examining a sample of 2,670 NCR accused in British Columbia, Ontario and Quebec, Crocker and colleagues (2013) found that just 8.1% of the group had committed an SVO as their index offence[19].

The Ontario Review Board study revealed that over the past 25 years, an increasing number of ORB referrals were charged with violent offences (e.g. assault), but the proportion of referrals with serious violent offence charges had decreased (Simpson et al., 2014). The findings with respect to criminal history are comparable to other research (e.g. Crocker et al., 2011), in that referrals with previous convictions averaged 52% over the study period.

Contrary to popular belief, the vast majority of NCR accused have not committed a serious crime; collectively, the research above suggests that less than one in five NCR

[18] The sample consisted of 592 NCR accused across British Columbia, Ontario, and Quebec.

[19] It is important to note that the sample is strongly influenced by the Quebec data; Quebec has been a notable outlier in various types of research with NCR accused.

accused have committed an SVO, with some individual studies showing that this number is less than one in 10 (e.g. Crocker et al., 2013). These numbers are further amplified when compared to pre-1992 figures; Hodgins, Webster and Paquet (1991) found that nearly 50% of NGRI acquittees had been charged with murder or attempted murder. This suggests that over time, NCR offenders have become *less* violent, or that the NCRMD defence has been more successful for a wider range of offence categories. Regardless, data does not support the stereotype that all NCR accused have committed violent crimes.

3.3. Forensic Risk Assessment

Berger and Luckmann (1966) have notably argued that dangerousness is not a concept reflective of an objective reality; rather, it is a socially constructed label used by the powerful at the expense of the powerless, and therefore its parameters shift based on prevailing societal interests. Advancing this power dynamic further, Hewitt (2008) contends that labelling someone "dangerous" functions to capture the entirety of their behaviours and place them on some kind of measurable scale that ranks them as less or more evocative of the concept. Accepting this sociological perspective on dangerousness has important theoretical consequences, because it allows for a conception of dangerousness that is based on situational factors, rather than dispositional factors that are fixed to any one individual. Adherents to this perspective argue that dangerousness is not a discrete characteristic that exists in a vacuum, a belief that dominated risk assessment until roughly the 1980s (Rose, 1998). So when someone is labeled as dangerous, or deemed to pose a risk, questions must be asked about this designation: Is a child sex offender dangerous in a situation where no children are present, or is a violent offender who suffers from substance-induced hallucinations dangerous when sober? Monahan (1981) notes that operationalization of dangerousness and risk has become evidently a particularly complicated task for professionals, resulting in the development of an equally sophisticated science to help complete this task.

In the past two decades, forensic risk assessment practice has proliferated both in Canada and worldwide. Singh and Fazel (2010) have estimated that no less than 120

risk assessment tools exist for practitioner use; understandably, this proliferation has created a challenge for clinicians and other professionals who wish to select the best tool for day-to-day use (Singh et al., 2014). Risk assessment tools are used in a variety of settings, including bail hearings, civil commitment decisions, and correctional intakes (Storey, Campbell, & Hart, 2013), and are thus used and interpreted by a variety of professionals in both criminal justice and mental health. As Monahan (1997) notes, Canada's influence on both forensic psychiatry and psychology has been great, largely in part due to its role as birthplace to some of the most prominent risk assessment tools, such as the Psychopathy Checklist-Revised (PCL-R; Hare, 1991), the Historical Clinical Risk Management-20 (HCR-20; Webster, Eaves, Douglas, & Wintrup, 1995), and the Violence Risk Appraisal Guide (VRAG; Harris, Rice & Quinsey, 1993). Similar to other countries, Canadian practitioners must respect their surrounding legal contexts that emerge through various statutes and legislation at both the national and regional levels. For example, forensic risk assessment may operate differently in British Columbia and Alberta, where federal *Criminal Code* legislation interacts with distinct provincial mental health statutes. Ostensibly, risk assessment tools represent the most scientifically rigorous form of insight into predicting violence and managing violent individuals, and are thus relevant to this project insofar as they inform decision making for members of mental health tribunals.

3.3.1. Risk Assessment Form and Typology

Although development of risk assessment practice has accelerated in the past two decades, professionals from various disciplines have recognized its importance for the better portion of the 20th century. For instance, Meehl (1954) first identified the burgeoning schism between strictly clinical and statistically-based actuarial approaches of violence risk appraisal, which is now a divide that influences classification of risk assessment tools; Skeem and Monahan (2011) contend that this strict dichotomy does not accurately represent the vast array of tools now available, arguing that a continuum is a better characterization. Under this conceptualization completely unstructured clinical judgment lies on one end of the continuum, with purely actuarial approaches located on the other.

Although it emerged as the *de facto* method of assessing potentially violent individuals, plain, unstructured clinical judgment is widely held to be a wholly inadequate means of predicting violent behaviour; on average, this form of judgment is only accurate one-third of the time (Monahan, 1981). Other research has shown that clinicians are no better than school teachers in making decisions about violent individuals, and in fact do not even rely on their own expertise in unaided judgment scenarios (Quinsey & Ambtman, 1979). Lidz, Mulvey, and Gardner (1993) found that, while clinicians were better at predicting violence and more serious violence in group scenarios, their judgments lacked sufficient specificity and sensitivity to be called truly accurate. This so-called "first generation" of risk assessment has evolved into what is known as structured professional judgment (SPJ), which is a model of assessment that involves clinical judgment supplemented by one or more formal risk assessment tools, such as the HCR-20 – these tools contain clinically relevant variables that are scored for their presence or absence in an individual. A total score is generated from these ratings, which then supplements the assessor's judgment; however, in some instances, it may be that just one or two criteria are deemed to be so important that they drive a finding of high-risk by themselves. Research evaluating the predictive accuracy on SPJ tools demonstrates that this method of risk assessment has performed quite well (and will be discussed later); however, the original insufficiency of pure clinical expertise provoked a movement within forensic psychiatry to go the opposite methodological direction, which led to the proliferation of actuarial approaches.

Actuarial methods of risk assessment, such as the VRAG, represent the thrust of the second-generation of tools (Andrews, Bonta, & Wormith, 2006). These tools are characterized by mostly static risk items[20] that are empirically derived from population studies, rather than being theoretically driven (Andrews et al., 2006). For example, the risk items in the VRAG were based on a sample of over 600 mentally disordered offenders who were patients at Oak Ridge Hospital in Ontario. Their file information was carefully coded and compared with outcome data to uncover factors associated with recidivism (in this case, violent behaviour that caused the individual to be returned to the

[20] Static risk factors are items that are unchangeable aspects of an individual, such as criminal history, whereas dynamic risk factors are ones that are changeable and thus targeted in treatment and risk management, such as drug use.

hospital) (Bloom et al., 2005). This information culminated in the development of the VRAG, a 12-item scale which has been adapted to multiple settings and has been empirically substantiated as a robust predictor of violence (Andrews et al., 2006). Specific research on the VRAG will be discussed in more detail below.

Actuarial instruments operate on a basis of probability estimates for larger populations; a given score will correspond to a number that indicates that *X* out of *Y* individuals with said score will have a certain outcome. Although this may seem complex, this is the same principle with which several forecasting systems operate, such as basic weather prediction and insurance policy estimation (Skeem & Monahan, 2011). For example, if a daily weather forecast estimates a 90% chance of rain, it is effectively stating, that in the current meteorological conditions (e.g., temperature, humidity, atmospheric pressure), rainfall will occur roughly 90 times out of 100. Interestingly enough, researchers in the field have suggested modeling violence risk communication after adverse weather notification systems (Monahan & Steadman, 1996). Literature comparing actuarial methods to unstructured clinical judgment has unequivocally demonstrated support for the former (e.g., Dawes, Faust, & Meehl, 1989; Borum, Otto, & Golding, 1993; Andrews et al., 2006).

However, actuarial methods may falter in their (over)reliance on static risk factors, which are criticized for their questionable relevance to risk management (Broderick, 2006). Further, arguments have been made that actuarial methods are of no use in predicting individual violence because they are based on population estimates that have wide margins of error (Hart, Cooke, & Michie, 2007; Cooke & Michie, 2010). There is also concern that overemphasis on static factors contained within actuarial estimates may artificially inflate an individual's risk profile, which in turn overlooks their treatment potential because static factors cannot be changed (Bonta, 2002). This concern has motivated researchers to focus on dynamic factors, and even more recently, protective factors in the search to develop comprehensive and accurate risk assessment tools. The study of *protective* or *strength* factors has been regarded as a "new frontier" in forensic mental health (de Ruiter & Nicholls, 2011). In contrast to standard risk factors, protective can be negative (the absence of a risk factor) or positive

(the presence of a positive factor) (de Ruiter & Nicholls, 2011). Examples of such protective factors could be strong family relationships, or stable employment.

Investment into the identification of protective factors goes beyond simple risk assessment and violence prediction; instead, it addresses opportunities for more comprehensive risk reduction. Indeed, the idea that simple prediction has reached a "sound barrier" has been discussed for over 30 years (Menzies, Webster, & Sepejak, 1985). These authors mentioned that correlations between predictive measures and outcome scores were rarely exceeding .40 (Menzies et al., 1985). Knowing this, others (e.g. Skeem & Monahan, 2011; Monahan & Skeem, 2014) have cautioned that a persistent focus on violence prediction will continue to produce diminishing returns, and that practitioners should look at ways to improve violence *reduction*, which is the ultimate goal from a policy perspective. Arguably, identifying and measuring dynamic variables – specifically those that reduce an individual's violence risk – is of greater importance than measuring static factors that have no practical implications for managing individuals in detention or the community. Further, it is argued that the risk assessment literature, through its focus on violence prediction, has unwittingly contributed to the stigmatization of its client population by focusing exclusively on negative factors that create elevated risk scores that have no means of being improved through treatment or intervention (de Ruiter & Nicholls, 2011). The result has been a growth of various correctional populations whose constituents are increasingly seen as unmanageable. Advocacy of a more comprehensive approach has led to the development of tools that specifically measure protective factors, such as the Short-Term Assessment of Risk and Treatability (START; Webster, Martin, Brink, Nicholls, & Middleton, 2004), Structured Assessment of Protective Factors for Violence Risk (SAPROF; Vogel, de Ruiter, Bouman, & de Vries Robbe, 2009), and the Comprehensive Assessment of Psychopathic Personality (CAPP; Cooke, Hart, & Logan, 2005), as well as models of risk assessment such as the Risk-Needs-Responsivity Model (RNR), which offer comprehensive service delivery through precise follow-up and attention to both risk and protective factors (Bonta, 1996). Although research is limited, early evaluations of these approaches have been favourable, as shown below.

3.3.2. Evaluation of Risk Assessment Tools

Recent research that compares various risk assessment tools – namely, actuarial against SPJ methods – on the criterion of predictive superiority has yielded negligible results (e.g., Guy, 2008; Hanson & Morton-Bourgon, 2009; Yang, Wong & Coid, 2010; Singh, Gann, & Fazel, 2011), questioning the pursuit of a "one-size fits all" risk assessment device. In a dramatic demonstration of this principle, Kroner, Mills and Morgan (2005) created a risk assessment tool made from items in other tools that were written on pieces of paper and randomly drawn from a coffee can, and found that the tool predicted violence as well as other established instruments such as the LSI-R and VRAG.

In the context of the *Criminal Code* and Canada's mental disorder provisions, forensic practice that looks to evaluate only violence risk assessment would wholeheartedly ignore three of the four criteria listed in s. 672.54 that are to be considered when making disposition decisions for NCR accused. In lieu of exhaustive literature reviews to find the most empirically superior method of violence prediction, Skeem and Monahan (2011) argue that clinicians and other violence risk professionals can instead select tools based on contextual criteria rather than quality. These criteria could include the purpose of the evaluation, who (or what) is being assessed, and the evaluator's type and level of training (Lurigio & Harris, 2009). Nevertheless, it is still important to review data on relevant risk assessment tools, insofar as it can reveal the scenarios in which these tools are most commonly used, and for what populations and criterion they work most effectively. This section examines four prominent risk assessment tools – the VRAG, PCL-R, HCR-20 and START, their ability to predict violent re-offending in various offender samples, and prospects they have for accurate and efficient risk assessment.

The VRAG

The VRAG (Violence Risk Appraisal Guide) is among the oldest risk assessment tools, and has emerged as the most widely used actuarial method in forensic practice (Bloom et al., 2005). Developed on the basis of archival patient data from Penetanguishene Mental Health Centre in Ontario, the VRAG consists of twelve items

(see Appendix A) found to be correlated with violent recidivism among a sample of over 600 mentally disordered offenders (Bloom et al., 2005). Each item has two or more responses, and is differentially weighted based on the strength of its relationship with violent behaviour. These scores are then combined to give a final score. According to current classification, an individual's score will correspond to one of nine risk categories, with Category 1 indicating the lowest risk for violent recidivism and Category 9 indicating the highest risk; this risk is expressed in probability for violent recidivism at seven and 10 years respectively. For instance, an individual with a Category 9 score has a 100% probability of re-offending at both periods (Quinsey, Harris, Rice, & Cormier, 2006).

When used to discriminate between violent and non-violent offenders, the VRAG has demonstrated impressive accuracy. A pilot study of the VRAG compared instrument scores between one group of violent offenders who had re-offended and one that had not, and found an effect size of .76, meaning that, drawn at random, the probability that a recidivist had a higher VRAG score than a non-recidivist was 76% (Harris et al., 1993). In a replication of the pilot study, Harris, Rice, and Cormier (2002) found an even larger effect size (.80) in their study of 467 forensic patients in Ontario. Rossegger, Endrass, Gerth, and Singh (2014) completed a replication of the original study using a forensic cohort in Switzerland, finding an effect size of .72, which suggests that the VRAG's predictive ability extends beyond North American sample populations. Lastly, other research has demonstrated the VRAG's ability to complement other risk assessment tools in context-specific scenarios, such as predicting domestic abuse (e.g., Hilton, Harris, Rice, Houghton, & Eke, 2008).

However, the VRAG is not without its drawbacks and criticisms. As mentioned earlier, actuarial estimates are criticized for their inability to provide precise, individual estimates of violence risk, and the VRAG is no exception, as studies have shown that it falters when compared to other tools such as the HCR-20 (Douglas, Yeomans, & Boer, 2005). Hart and Cooke (2013) have also found that the VRAG is a poor predictor of individual violence, claiming that group estimates are very misleading in this regard. Another issue with the VRAG is that its scoring system is used to predict *any* level of violence, ranging from trivial assault to murder. Hypothetically, two individuals could score in Category 9 and have identical probabilities of violently re-offending, but the

nature of their offending could vary widely in terms of severity. The implications here are great, for actuarial assessments (and other risk assessment tools) are quite literally employed in life and death scenarios (Hart & Cooke, 2013). In keeping with the discussion on Review Boards, it may be that a high score on a risk assessment instrument is used to justify continued detention for an NCR accused, despite the possibility that the nature of the violence predicted does not actually meet the "significant risk" criterion seen in *Winko* (1999). Although the VRAG has been demonstrated as a successful prediction tool in group scenarios, caution is required to predict individual instances of violence[21].

The PCL-R

Developed by renowned psychopathy researcher Dr. Robert Hare, the PCL (Psychopathy Checklist) has emerged as one of the most widely used and publicized risk assessment tools in psychological and psychiatric practice. In addition to the current main version, the Psychopathy Checklist-Revised, 2nd Edition (PCL-R: 2nd Edition; Hare, 2003), there is also a screening version (PSL:SV; Hart, Cox, & Hare, 1995), and youth version (PCL: YV; Forth, Kosson, & Hare, 2003), which is used for individuals under the age of 18. Although it is a form of structured professional judgment, and as such, the scores generated from a PCL-R assessment do not correlate to a probability of violent behaviour, in practice, the PCL-R is often treated like an actuarial instrument. The PCL contains 20 items which are scored as 0 (not present), 1 (possibly present), or 2 (definitely present), for a maximum score of 40. Based on the model used by the evaluator, the 20 items can be categorized into two main factors: Affective/interpersonal and antisocial/criminal lifestyle, or four facets: Affective, antisocial lifestyle, interpersonal relationships, and criminal history (Hare, 2003). The full PCL-R questionnaire can be viewed in Appendix B.

Hare (1998) notes that the PCL-R is only a diagnostic tool and has been validated only for forensic adult populations in correctional settings, and that serious

[21] It should also be noted that the VRAG places great emphasis on the individual's PCL-R score, which has its own set of critiques.

consequences can emerge from its misuse[22]. For example, some clinicians may score an individual on the basis of file information alone, which Hare argues will lead to inflated estimates of item presence; instead, he stresses obtaining information from several "consistent pieces of evidence to support a particular score for an item" (Hare, 1998, p. 107).

That being said, a body of literature exists to support the PCL-R's ability to predict violence in various population samples. Serin and Amos (1995) measured the relationship between the PCL-R and recidivism in a sample of 300 male offenders. Using a survival analysis, they found a positive, linear relationship between instrument scores and violent recidivism. Further, multiple regression analysis revealed that the PCL-R predicted both general and violent recidivism with statistical significance (Serin & Amos, 1995), leading the authors to suggest that PCL-R scores may be useful to clinicians as a means of "anchoring" their level of risk (p. 235). In their meta-analysis, Salekin, Rogers, and Sewell (1996) found that both the original and revised versions of the PCL were able to predict general and violent recidivism in a number of forensic samples, albeit being uncertain about the generalizability of their findings. They cautioned that, because the samples were almost exclusively comprised of white males, application to minority populations would be limited (Salekin et al., 1996). Additionally, newer studies have shown that, while the PCL-R outperforms the VRAG in predicting violent recidivism (Hemphill, Hare, & Wong, 1998), it is surpassed by the HCR-20 in this respect (Douglas, Ogloff, & Hart, 2003; Douglas, Ogloff, Nicholls, & Grant, 1999; Douglas et al., 2005). Altogether, such a finding is not surprising, given that the HCR-20 (discussed below) taps into a wider range of lifestyle factors that are related to violence risk.

The HCR-20

The HCR-20 (Historical Clinical Risk Scale-20), now in its third version (Douglas, Hart, Webster, & Belfrage, 2013), is a structured professional judgment tool developed in

[22] Despite this, Hare claims that the PCL-R is a robust predictor of violence. See Hare, R. D., Clark, D., Grann, M., & Thornton, D. (2000). Psychopathy and the predictive validity of the PCL-R: An international perspective. *Behavioural Sciences and the Law, 18*(5), 623-645.

British Columbia. As its name suggests, the HCR-20 is comprised of three scales. The historical scale contains 10 items that pertain to the history of the individual such as with violence and substance abuse. The clinical scale contains five items, such as responsivity to treatment, and insight into behaviour. The risk scale also contains five items, and tap into malleable lifestyle factors, such as current living situation, and status of interpersonal relationships. Similar to the PCL-R, these items are scored as 0 (no evidence of presence of item), 1 (evidence suggests that item is present) or 2 (sufficient evidence that the item is certainly present) (Douglas et al., 2013)[23]; for Version 3, these have now been modified to read as not present, possibly present, and definitively present, respectively (Douglas, 2014). The newest edition, Version 3, is intended to be a wholly comprehensive risk assessment instrument that allows users to not only measure the presence of the 20 risk factors, but to assess their relevance on a case-by-case basis (Mental Health, Law, and Policy Institute, 2013). The full list of items in the HCR-20 (V3) can be seen in Appendix C[24].

In her graduate thesis, Guy (2008) noted that over 50 empirical studies have been conducted using the HCR-20. Although the HCR-20 was developed with mentally disordered offenders in mind (Webster, Eaves, Douglas, & Wintrup, 1997), research has shown that it is successful with regular correctional populations – Douglas and Webster (1999) retroactively applied the HCR-20 to a group of federally-sentenced offenders and found that higher scores on the HCR-20 were correlated with higher scores on measures of institutional violence[25]. Michel and colleagues (2013) recently examined the HCR-20's predictive ability in a sample of men with schizophrenia who were living in the community; whereas the total score significantly predicted violence (over a two-year period), the authors also found that high scores on each of the three subscales independently predicted violence. However, other research (e.g. Gray, Taylor, & Snowden, 2008; Pedersen; Ramussen, & Elsass, 2012; Vojt, Thomson, & Marshall,

[23] Note the key difference: The HCR-20's outcome can be determined by a score on a single item, whereas the PCL-R focuses on the total score.

[24] For an excellent summary on the differences between the HCR-20 V2 and V3, and on the assessment scheme of the HCR-20 as a whole, see Douglas, K. (2014).

[25] However, there is one caveat: These individuals were chosen on the basis of their referral to a Regional Health Centre of the Correctional Service of Canada, which treat offenders who require mental health services (Douglas & Webster, 1999, p. 7)

2013) shows one or more of the HCR-20's subscales were ineffective at informing clinicians of future violence. This conflicting research suggests that practitioners should exercise caution in relying on one subscale to inform their judgment.

Much like actuarial methods, the SPJ model has come under criticism, with the HCR-20 being no exception. Quinsey and colleagues (2006) fault the HCR-20 and other SPJ tools for not producing numerical risk estimates, which obscures precision. Another limitation is that the HCR-20 has not been tested adequately in non-white or female populations to ascertain how these characteristics affect its association with violence (Douglas & Reeves, 2010). This fact is important, for there is evidence to suggest that the risk factors measured by the HCR-20 (such as psychopathy) operate differently in both minority groups and women (Cooke, Kosson, & Michie, 2001).

The START

The START (Short-Term Assessment of Risk and Treatability) is a relatively recent risk assessment tool and is a prominent manifestation of the shift towards recognizing the role of protective factors in risk management. Proponents of this method emphasize not only the relevance of dynamic factors in risk assessment, but the protective factors which, depending on their status, can increase or decrease risk (de Ruiter & Nicholls, 2011). Further, the focus of tools such as the START is to address acute or short-term changes in risk, rather than trying to predict violence over long periods of time, which are not immediately relevant to mental health or correctional policy (Nicholls et al., 2006).

The START was developed at the FPH in British Columbia, and is a scheme that is intended to structure a comprehensive risk assessment that includes treatment plans, progress evaluation, and a judgment of the person's risk (to themselves and others) (Webster et al., 2004). The scale contains 20 items that are doubly measured: The evaluator not only scores any risks (labeled as vulnerabilities) pertaining to that item, but strengths as well. Nicholls (2010) identifies the possibility for risk and protective factors to exist simultaneously, even on the same item. For example, on the substance use item, an individual may present vulnerabilities in that they associate with drug-using peers, but present strengths in the form of acknowledging the influence of drug-using

peers on their own behaviour. These scores are then used to inform the evaluator of the individual's level of risk for violence, self-harm, suicide, unauthorized leave, self-neglect, substance abuse, and victimization (Nicholls et al., 2006).

Research on the START is promising, albeit limited. In one study, high strength scores were related to inpatient progress at the FPH (Nicholls, Desmarais, & Brink, 2009), and other research has demonstrated that the START predicts reduced aggression when the overall score on the strength subscale is higher than the score on the risk subscale (Wilson, Desmarais, Nicholls, & Brink, 2010). In addition to these findings, a user satisfaction study found that mental health professionals from the areas of psychiatry, nursing, and social work endorsed the START for its ease and quickness of use; respondents needed an average of only eight minutes to complete the assessment (Webster et al., 2004).

Whereas research has shown that START scores have been able to predict inpatient progress (or lack thereof), this ability has largely been limited to violence and/or aggression. O'Shea and Dickens (2014) conducted a meta-analysis of nine available studies on the START (including the two mentioned above), and found that overall, the tool's predictive ability was limited to violence and aggression; there were no significant associations with the other outcomes, such as self-harm, suicide, and absenteeism. They also found a strong negative correlation between the strength and vulnerability subscales, suggesting that measuring them both may be redundant (O'Shea & Dickens, 2014). Although further research is surely forthcoming, at the time it may be best to focus on how to use the START to manage violence and aggression risk within inpatient institutions.

3.4. Research on Tribunal Decision Making

3.4.1. Factors Associated with Dispositional Outcome

With few exceptions (e.g. Peay, 1981; Peay 1989), much of the original research on dispositional outcomes took place in the 1990s. Researchers have looked at a number of demographic, psychological, criminal, and contextual variables in hopes to

identify which factors most strongly correlate with dispositional outcomes. Callahan and Silver (1998a) looked at mental health tribunals in four US states, and found that several factors, including higher education, employment, female gender, marriage, a Caucasian background, and a less severe index offence were predictive of receiving conditional discharge.

The link between offence severity and dispositional outcome is strong, as several studies demonstrate that more severe index offences are predictive of more punitive dispositional outcomes in various American and Canadian jurisdictions (Braff, Arvanites, & Steadman, 1983; Harris, Rice, & Cormier, 1991; Silver, 1995; Callahan & Silver, 1998a; Crocker et al., 2011; Crocker et al., 2013; Crocker et al., 2014); a positive relationship between detention length and criminal history also exists (Callahan & Silver, 1998a/1998b; Manguno-Mire, Thompson, Bertman-Pate, Burnett, & Thompson, 2007). Although criminal history has been shown to predict recidivism (Webster, Douglas, Eaves, & Hart, 1997; Quinsey, Harris, Rice, & Cormier, 1998; Lund, Hofvander, Forsman, Anckarsater, & Nilsson, 2013), existing evidence has demonstrated that offence severity does *not* predict violent or general recidivism (Bonta, Law, & Hanson, 1998; Monahan et al., 2001). Taking legislative precedent into consideration, Bill C-14's high-risk NCR accused category and its surrounding provision certainly make sense; however, empirical evidence conflicts with this line of reasoning.

The relationship between mental disorder and disposition status has also been examined, albeit in limited aspects. Some studies have found that mental illness type is not associated with release decisions (e.g., Grant, 1997; Crocker et al., 2011), but others have found this relationship (Crocker, et al., 2014). For example, Crocker and colleagues (2014) found that having a psychotic or personality disorder was predictive of more restrictive dispositions, whereas having a mood disorder was predictive of less restrictive dispositions; however, the results were not consistent among individual comparisons (e.g., conditional discharge vs. detention and absolute discharge vs. detention). Callahan and Silver's (1998a) study revealed that in two US States (New York and Maryland), a primary diagnosis of schizophrenia reduced the likelihood of conditional release. Manguno-Mire and colleagues' (2007) study of a Louisiana forensic hospital revealed that NGRI acquittees on conditional release had lower average PCL-R

scores than those kept in remand, suggesting that the presence of psychopathy influenced conditional release decisions; indeed, regression analyses confirmed that the likelihood of higher (i.e., more restrictive) review panel categorization increased as a function of higher PCL-R scores among participants. Similarly, individuals with personality disorders (DSM diagnosis) were more highly represented in the remand group (Manguno-Mire et al., 2007). In the context of research demonstrating the PCL-R's ability to predict violence in forensic populations, these results are not surprising; further, newer research in the Louisiana forensic mental health system has revealed that, compared to other diagnoses, personality disorders are indicative of failure on conditional release (Manguno-Mire, Coffman, DeLand, Thompson Jr., & Myers, 2014).

Again, however, an important issue is whether mental illness (or symptomology), much like offence severity, has any empirical link to violent criminal behaviour. Thus far, the research has been largely inconclusive in this respect. Some studies demonstrate that persons with mental disorder (PMI) are at a slightly increased risk for violence or criminal behaviour (Hodgins, 1995; Silver, 2006); many others have failed to find this relationship (Bonta et al., 1998[26]; Monahan et al., 2001; Junginger, Claypoole, Laygo, & Cristiani, 2006; Peterson, Skeem, Hart, Vidal, & Keith, 2010; Peterson, Skeem, Kennealy, Bray, & Zvonkovic, 2014), and others who have found it only in the context of co-occurring substance abuse disorders (Elbogen, & Johnson, 2009; Fazel, Langstrom, Hjern, Grann, & Lichtenstein, 2009; Balyakina et al., 2014). Given the fact that co-occurring substance abuse disorders are on the rise among forensic populations (Desmarais et al., 2008; Simpson et al., 2014), it would seem that the presence of mental illness alone is not a reliable criterion upon which to base release decisions.

From a risk management perspective, the so-called "clinical model" of risk assessment (reducing violence risk by reducing mental health symptoms) has come under great scrutiny (Bonta, Blais, & Wilson, 2014); one meta-analysis found that reducing mental health symptoms had no effect on reducing criminal recidivism across 26 studies (Morgan, Flora, Kroner, Mills, Varghese, & Steffan, 2012). Additionally, given

[26] In this particular study, researchers found that the presence of a mental disorder was *inversely* related to both general and violent recidivism.

findings that the majority of MDOs are motivated by the same reasons to commit crime as their healthy counterparts (Bonta et al., 1998; Monahan et al., 2001), tribunals would be wise to avoid focusing too heavily on clinical indicators to inform a determination whether an individual poses a threat to public safety, despite the fact that targeting these symptoms may meet other criteria (for example, under 672.54 in the *Criminal Code*, the need to consider the mental condition of the accused, or their potential re-integration into society). Summarily, surveying research on the link between mental disorder and violence and how mental health tribunals make use of this knowledge will inform current expectations in regard to this study: Given past findings, we would expect that the presence of severe mental illness will influence the BCRB to favour more punitive dispositions for NCR accused.

3.4.2. How Review Boards Make Decisions

Research on tribunal practice is multi-faceted: One can examine the factors associated with the types of decisions they make, but equally important research questions are to ask: "How do Review Boards or other mental health tribunals make their decisions? What information do they use? How does this process vary across jurisdictions?" To an extent, research examining factors that influence dispositional outcomes for NCR accused *is* research on the process of decision making, because these are factors that boards or tribunals consider relevant to detention or release. However, the process can be taken one step further to investigate how these decision makers select and interpret various pieces of information (e.g., clinical files, risk assessment reports, expert opinion). These are some of the questions that extant research has attempted to answer, in order to better understand the relationship between science and practice of risk management in forensic mental health settings.

Broderick's (2006) thesis research on the British Columbia Review Board contained a two-tiered qualitative/quantitative investigation of Board reports, and interviews with sitting members. The main objective of the research was to investigate the effect of the *Winko* decision on how the BCRB interpreted the "significant risk" criterion that was clearly defined in the reading of the case, and how various factors (measured through frequency counts) constituted these appraisals. Across 36 decisions

from three periods (pre-, during, and post-*Winko*), she found that the variables "risk/threat" "substance use" and "mental illness history" were the most frequently mentioned – together, these word tags made up 42.9% of total references for variables she had chosen. Within the "risk/threat" category, the term "significant threat" was mentioned most frequently, and this increased after the *Winko* decision. Interestingly, substance abuse was mentioned *less* frequently after *Winko*, despite the fact that co-morbid disorders have become more common among Canada's NCR accused population (Desmarais et al., 2008; Crocker et al., 2013; Simpson et al., 2014). Overall, clinical factors were mentioned nearly twice as often as legal factors. It was also found that the interpretation of "significant risk" differed by professional training: Lawyers were more likely to rely on *Winko* to guide their interpretation, whereas clinicians were inclined to consider the probability of future violence in their assessment (Broderick, 2006).

Crocker and colleagues (2011) studied the Quebec Review Board to measure whether risk assessment advances had impacted decision-making processes. Observing nearly 100 files, there was evidence that review boards were making decisions informed by risk assessment instruments, particularly measures related to dynamic, clinical variables such as those found on the HCR-20. Given that these variables are ones that can be most readily targeted and changed, these results are encouraging. Actuarial estimates were weakly related to disposition decisions, which is another encouraging finding, because actuarial instruments are generally built upon historical factors aimed at predicting violence in the long-term, which is not constructive when examining an individual's proximal risk to re-offend. However, the authors cautioned that the generalizability of the study is low, acknowledging Quebec's idiosyncratic forensic mental health system.

Cote, Crocker, Nicholls, and Seto (2012) conducted a study in which they examined the use of the HCR-20 in clinical reports and Review Board hearings, to gauge to what extent clinically-relevant risk variables were being discussed and considered in practical scenarios. Results showed that agreement values (that is, concordance in mentioning of scale items across clinical reports, hearings, and reasons for disposition) ranged from low to moderate for all but two items from the historical scale (previous violence and presence of major mental illness), suggesting that risk items were

not consistently integrated into practice despite their empirical support in the literature. Such findings were earlier demonstrated by Hilton and Simmons (2001) who showed that clinicians' assessments of risk were weakly associated with scores on the VRAG, yet more strongly associated with empirically irrelevant factors, such as physical attractiveness. Similarly, McKee, Harris, and Rice (2007) found a higher association between VRAG scores and clinical recommendations, but again noted the same valuing of factors unrelated to violent recidivism – in fact, some factors were *inversely* related to violent recidivism (McKee et al., 2007, p. 499). Taken together, these findings indicate that integration is lagging behind empirical advances in risk assessment. To bridge this gap, commentary has called for the establishment of formal guidelines that aid clinicians and case managers in selecting items that form the basis of their recommendations to review boards and mental health tribunals (McDermott, Scott, Busse, Andrade, Zozaya, & Quanbeck, 2008).

A recent study on review boards in Canada's three largest provinces has examined the impact of these structured assessments on decision-making processes (Wilson, Crocker, Nicholls, Charette, & Seto, 2015). Examining the involvement of the HCR-20 and the VRAG in over 6,700 hearings, researchers found that as a whole, the two instruments were sparsely used (appearing in 8% and 9% of all cases, respectively). Although some items on each of the two instruments were mentioned significantly – and varied with respect to gender and index severity – overall, less than half of the items were included in either expert reports or written review board decisions (Wilson et al., 2015). In summarizing, the authors caution this lack of integration, for many of the items have empirical support with regard to successful risk management and re-integration; they argue that basing decisions on factors not supported by the risk assessment literature creates the possibility that review boards are adjudicating individuals in ways that do not best meet the considerations of public safety, the accused's mental condition, or re-integration into society, which the *Code* mandates as the principal objectives of Canada's Review Boards.

3.5. Chapter Summary

The above literature has done well to describe the current research on the factors that are associated with disposition type, and the factors decision makers consider relevant when making these decisions. At a glance, current research suggests that too much emphasis is placed on factors that at most, are not consistently associated with either violent or criminal recidivism. The focus now turns to more in-depth research that examines – in light of what is presently known about review board decision making – how decision makers determine that the factors influencing their decisions are the ones that are most relevant to overall appraisals of an NCR accused's level of risk. A detailed analysis may further elucidate the reasons why risk factors that lack empirical support are integrated into risk assessment practice. This will be achieved by performing a content analysis that undertakes qualitative examination of Review Board hearing transcripts themselves.

Chapter 4.

Methodology

4.1. Introduction

This chapter presents the methodology undertaken to complete the qualitative analysis of the British Columbia Review Board data. It begins with a detailed restatement of the research objectives and how they relate to the literature, followed by an explanation of how the study attempts to complete those objectives. This is followed by a detailed explanation of the methods used in the study, from design structure, data collection, and type(s) of analysis. Also included in the chapter is a brief discussion some of the study's expectations, with respect to what was found in Broderick's (2006) study, present research on Review Board decision making processes, and general theoretical perspectives on the nature of decision making in complex scenarios.

4.2. Goals of the Research

The main objective of this study was to provide an updated examination of British Columbia Review Board decision making with regard to dispositional hearings for NCR accused. As Canada's mental disorder laws have recently undergone significant change, there was incentive to supply the literature with a so-called "baseline" of existing practices that can be usefully compared against decisions which fall under the scope of the new legislation.

Using Broderick's (2006) research as a guiding framework, the study employed a qualitative content analysis of 24 written decision reports of BCRB Review hearings from January 1st, 2005, until July 10th, 2014. The Broderick data ranged from 1992 to 2004, and were collected with the goal of assessing the impact of the *Winko* case on the

Board's decision-making process. Here, the main objective is to assess how the *Winko* criteria are presently being applied, so that any changes owing to Bill C-14's implementation may be contrasted with current practice. Alongside this main objective, there was interest in gauging how the *Winko* criteria were manifested in hearings of varying characteristics, such as index offence type, type of disposition given, and period. There was also quantitative measurement (as seen in the Broderick research) to compare and contrast the risk factors mentioned in the hearings from the 2006 dataset with the hearings from this dataset.

4.2.1. The Research Questions

- How has the British Columbia Review Board been applying the *Winko* "significant risk" criteria from 2005 until 2014? Is a formula used, or is the process idiosyncratic?
- How is this process affected by index offence category, disposition and period?
- How have the frequencies of Broderick's (2006) identified risk factors changed in prevalence over time? Specifically, are risk assessment tools being mentioned more frequently than before?

4.3. Research Design

The methodological design of the study involved a qualitative content analysis of written British Columbia Review Board decisions from a period of January 1st, 2005, until July 10, 2014. A total of 24 written decisions covering 12 different index offences (resulting in two hearings per offence) were selected. The cases were selected from the *LexisNexus*® *Quicklaw*® database, an online resource that archives various categories of legal decisions for use by both professionals and researchers.

4.3.1. Method

As mentioned, this study follows in the line of Broderick (2006) by using a qualitative content analysis to systematically examine the written decisions. Content analysis is a broad-spanning method of analyzing written, verbal, or visual messages or

communication (Cole, 1988). It can be further described as a "systematic and objective means of describing and quantifying phenomena" (Elo & Kyngas, 2008, p. 108). In this case, the "content" are written communications in the form of BCRB decisions, that have been transcribed in electronic format and analyzed using QSR *NVivo 10*©, a software program designed for qualitative data analysis.

Overall, the analysis included 24 written reports of initial BCRB hearings; these 24 cases covered a broad range of 12 offence categories that ranged from committing an indecent act, to murder. Ideally, the cases were to be evenly selected from a period that ranged from January 1st, 2005 up until July 10th, 2014 inclusive (the day prior to Bill C-14 taking effect) but this was not possible for two reasons: One, the Quicklaw® database only has published entries up to April 30th, 2014, and; two, the analytic strategy (discussed below) prevented a completely uniform distribution of cases due to the real world limitations involving the temporal occurrence of some of the index offences. Table 4.1 displays the 12 categories of index offences along with the temporal distribution of each case.

Table 4.1 List of Index Offences and Temporal Distributions

Index Offence	Year(s) of Hearings for Offence
Murder	2008; 2010
Attempted Murder	2009; 2011
Sexual Assault	2005; 2011
Aggravated Assault	2009; 2012
Assault	2007; 2012
Uttering Threats	2005; 2010
Break & Enter	2006; 2013
Theft	2006; 2011
Robbery	2008; 2012
Dangerous Driving	2007; 2009
Arson	2005; 2012
Indecent Act	2007; 2009

One of the study's research objectives was to compare and contrast how the BCRB applied the "significant risk" criterion across different dispositions that it made;

accordingly, the goal was to achieve a balanced distribution of the three dispositions (custody order, conditional discharge, absolute discharge). In total, there were 10 custody orders, eight conditional discharges, and six absolute discharges. This distribution is the opposite of that seen in the Broderick (2006) study, but it should be noted that the researcher collected data with the goal of obtaining cases where the Board was considering an absolute discharge. Given available data on the frequency of absolute discharges (e.g., Grant, 1997; Livingston et al., 2003), a rate of 25% is higher than average, but it is difficult to generalize given that the sample was not randomly selected.

4.3.2. Sampling Procedure

This study used a purposive sampling design (also known as purposeful sampling), a type of nonprobability sampling technique wherein the researcher selects data from the "target population on the basis of their fit with the purposes of the study and specific inclusion and exclusion criteria" (Daniel, 2012, p. 87). This sampling method was the most appropriate for obvious reasons: Random selection of the data would not suffice – because it would not be possible to ensure that the desired offence categories would be adequately represented, nor would it be possible to ensure that a wide date range was covered. As Daniel (2012) notes, there are four major styles of purposive sampling that can be utilized for varying research goals, each of which are based on a central principle: Central tendency, variability, theory, and personal judgment. This study utilized elements of the first two: Although diversity (heterogeneity via variance sampling) was used in selecting for a broad range of offence categories, an attempt to include "average" or "typical" instances of hearings that contained these index offences was executed by assigning each offence a number from 1 through 12, and then using a random number generator to determine which offence would be inserted into the *QuickLaw* search filter.

Once a list of all cases containing instances in which the word string was mentioned (e.g., "sexual assault") was populated, I went through the cases in chronological order until reaching a case that was an initial hearing under s. 642.47(1) of

the *Criminal Code* and the offence of interest was the most severe index offence[27]; the process was continued until each offence category was selected for once, before being repeated. The criterion of the offence being the most severe index offence was used because existing research demonstrates that index offence severity influences the decision making process (e.g., Callahan & Silver, 1998a; 1998b).

Because there were roughly nine-and-half years of data to select from (thus preventing selection of an equal number of cases from each year), the general rule of thumb was to select two cases from each calendar year before moving on to the next year; the years 2005, 2008, 2011, and 2014 were targeted for three cases, chosen because they were the quarter intervals of the data set. However, as alluded to above, this distribution was not obtainable because the pattern and procedure generated by the random number generator did not align with real world instances of certain offences. For instance, when I began to search for the second hearing with uttering threats as the index offence, the date range had been narrowed down to 2011 onward, but there were no new hearings that came under the BCRB's jurisdiction wherein uttering threats was the most severe index offence for the NCR accused. In this instance, the first available case was found by searching the results in reverse chronological order, to find an initial hearing that was nearest to the desired date. Although this was required for a handful of cases, I was not concerned about the transferability of the data because there is no present research to suggest that – in the absence of precedent-setting[28] cases, such as *Winko* – that Review Board decision making drastically changed within this period, nor is there literature to suggest that the time of year in which a hearing occurs has an effect on the decision making process.

One note should be made about the sampling process: I was not able to determine whether the *QuickLaw* database contained all British Columbia Review Board hearings that have taken place since 1992, or even since the time range that served as

[27] It should be noted that due to real-world limitations, this procedure could not be achieved in one instance.

[28] By this, it is meant that although there may have been high-profile cases that garnered media attention (e.g. Allan Schoenborn), none occurred that dramatically altered legislative interpretation.

the parameters for the study. This is worth noting because it is possible that certain cases that do not meet certain criteria are not uploaded for public access, and are thus qualitatively different from the available selection of Board hearings.

4.3.3. Analysis

Once the 24 cases were collected, they were uploaded into QSR *NVivo 10*© software, located on my personal computer. As discussed, NVivo is a program specifically designed for qualitative research analysis that provides researchers an efficient way of organizing and analyzing qualitative materials, such as newspaper articles, legislative documents, journal entries, interview transcripts, or video footage.

In addition to pursuing the larger, overreaching research questions set out earlier in this chapter, a coding scheme was created, based on Broderick's (2006) set of variables, slightly modified on the basis of researcher preference. For example, whereas Broderick (2006) separately coded references to the accused's length of time in the forensic system, all references were included as references under mental health history variable for this research. Similarly, upon collapsing the variables into fewer categories, references to occupation (past or present) and recreation (past or present) were collapsed as "Community Status", while the accused's future plans and available resources (related to living and finance) were collapsed as "Plans & Resources"; Broderick (2006) had categorized all four under "Community Involvement". For full detail on constituency of the collapsed variable categories, see Appendix D.

Because the variables were not coded by other researchers (thus reducing an opportunity to measure reliability), the criteria for determining a reference were designed to be objective as possible. Thus, a reference was recorded as being any explicit mention of a word or phrase that was related to the category in question. For example, in the category "Relationships", a reference was counted when the Board report made mention of the NCR accused having a brother (and thus used the word "brother"); however, mentions of words related to a category that occurred in the same sentence were counted as one reference; if the written report mentioned that the accused had

"One younger brother, one younger sister, and a wife and children", this was counted as one reference because these statements reflected the Board's consideration of the accused's interpersonal ties as a whole.

While identifying these risk factors individually is useful in determining the factors that receive the most attention from the Board, collectively they are instrumental in determining how the Board members come to their final assessment as to whether or not an individual is a significant risk to the public. This is why the variables were then collapsed into roughly the same categories used in the 2006 study. The quantitative coding took place in two steps: First, all 24 cases were coded in a Microsoft Excel® spreadsheet before being uploaded to IBM *SPSS* 23 software. SPSS is an analytic software program capable of performing complex statistical analysis on very large datasets. Here, its purpose was merely to compare the cases systematically on three measures: Year (divided into two periods: 2005-2009 and 2010-2014), Index Offence (divided into violent and non-violent offences) and Disposition (divided into Custody Order, Conditional Discharge, and Absolute Discharge). By conducting these analyses, I could examine whether certain factors were mentioned more frequently at different times[29], as a result of what index offence the individual committed, or what disposition the Board gave to the NCR accused (possibly indicating the influence of considering certain factors over others, regardless of their true relevance to the accused's violence risk. For the Year and Index Offence measures, an independent samples *t*-test was performed, and a one-way ANOVA was performed for the Disposition measure because there were three groups.

4.4. Chapter Summary

This chapter has restated the objectives of the research and detailed and explained the methodology used to complete those objectives. The next chapter

[29] For example, the frequency with which the index offence is referenced may vary by period due to the influence of high profile cases such as with Vincent Li, where the brutal nature of the index offence received significant public attention.

contains a comprehensive summary of the research findings that emerged from the qualitative and quantitative analyses.

Chapter 5.

Results

5.1. Introduction

This study was a qualitative content analysis that followed in the steps of Broderick's (2006) to further understand the decision making processes of the British Columbia Review Board in terms of how they apply the significant threat criteria outlined in 672.54 and whose application was further exemplified in the historic *Winko* (1999) case. This section details the results of the content analysis, divided into two sections; first, the quantitative analyses using the variable counts that were lifted from the content analysis is presented, followed by an in-depth look at the text of the reasons for decision themselves.

5.2. Descriptive Statistics

Five of the 24 hearings involved a female NCR accused; the other 19 were male[30]. The average age for the dataset was 38.79 (*SD* = 13.09), and the range was 22 to 62 years. Seven of the NCR accused were residing in the community at the time of their hearing, whereas the other 17 were remanded in forensic custody for assessment following their arrest for the index offence. As mentioned, a total of 10 hearings resulted in a custody order, eight in a conditional discharge, and six in an absolute discharge. There was no discernable pattern among offence types: For example, one of the two NCR accused charged with murder (the most serious offence) was given a conditional

[30] Recall that the Latimer and Lawrence (2006) and Simpson et al. (2014) studies found comparable proportions of NCR accused men and women in their samples.

discharge, but one of the two NCR accused charged with uttering threats (a much less serious offence) was given a custody order. The average written disposition length was 27.38 (*SD* = 12.12) paragraphs, with a range of 11 to 61, but no obvious relationship between decision length and offence category emerged. More specifically, the average length (in words) of the Board's reasons for disposition was 388.04 (*SD* = 202.76), ranging from 146 words to 1103 words; once more, no relationship could be seen between offence category and the length of the Board's reasons for disposition.

An overview of the data revealed one interesting surface pattern, such that the hearings that resulted in custody orders were disproportionately represented among the younger NCR accused. Using a median split to divide the sample into two groups – accused 38 and younger and accused 39 and older[31] – showed that only one NCR accused in the latter group received a custody order; the other nine custody orders were given to individuals in the first group. To gauge the statistical significance of this finding, disposition status was collapsed into a binomial variable, with "0" representing absolute and conditional discharges and "1" representing custody orders and compared between the two age groups. An independent samples *t*-test revealed that the groups were significantly different ($F = 2.09$, $p < 0.01$), such that accused receiving some form of discharge were significantly older ($M = 45.93$, $SD = 11.98$) than those receiving a custody order ($M = 28.80$, $SD = 7.73$).

5.3. Variable Frequencies

Variable frequencies were calculated both in the form of references to each individual variable and with respect to their collapsed categories. Overall, 2,374 references to the variables were coded for the research. Of primary interest was the "Risk/Threat" category, as the main goal of the research was to examine how Review Board panels were operationalizing an NCR accused's risk as a function of making disposition decisions. Overall, this category represented 14.7% of all references, and was the third most referenced variable. More specifically, the term "Significant Threat"

[31] This division was not arbitrary; the mean age was 38.79 and the median age was 39.

comprised 33.9% of all references in this category. The most frequently referenced category was “Mental Illness & Illness History”; this variable comprised 24.9% of all references, which was nearly one-quarter of all references. By contrast, Broderick (2006) found that only 8.9% of all references were for this category in her sample.

The second-most frequently referenced variable was “Relationships/Support”, which comprised 16.2% of all references; this variable only comprised 5.5% of all references within the 2006 study. However, this may be the result of different methodological approaches with regard to definition of “Relationships”. For this study, all references to a family member or close friend were coded, rather than just references that specifically mentioned the nature of a relationship to a certain family member.

References to issues with substance abuse, or lack thereof, comprised 6.5% of all references. References in this category included, but were not limited to, mentions of the accused’s drug abuse history, the specific types of drugs they used/abused, and whether or not they had received specific counseling for their addiction. For example:

> Dr. McKibbin has assigned a diagnosis of schizoaffective disorder, polysubstance abuse disorder, and on AXIS II personality disorder NOS. It is Dr. McKibbin's plan to progress the accused through less secure units of this hospital, to periodically test him for the ingestion of illicit substances and possibly refer him for drug and alcohol treatment. (*Wickwire*, 2006, para. 9)

This percentage is a noticeable decline from the Broderick (2006) study, wherein references to substance abuse comprised 10.1% of all references and were the second-most referenced variable behind the significant threat variable. The implications of this finding, given the recent research on the prevalence of substance abuse among mentally ill offenders, will be discussed below.

One of the most striking contrasts was the explicit references to the *Winko* criteria between the two studies. Whereas Broderick (2006) found that references to the *Winko* criteria made up 3.1% of all references in her study, they comprised just 0.2% of all references in the present study; in fact, the case was only referenced by name a total of four times; further, the references only contained a yes/no determination of whether the individual met the *Winko* criteria, not what they were:

> Accordingly, albeit somewhat reluctantly, we concluded that in law this individual does not meet the *Winko* threshold for our ongoing jurisdiction over him and is accordingly discharged absolutely. (*Wickwire*, 2006, p. 15)

Risk assessment instruments were seldom mentioned. Although the phrase "risk assessment" appeared in 18 of 24 hearing reports, scoring on specific instruments such as the PCL-R or HCR-20 was only referenced a total of three times across all 24 hearings. The inclusion of the phrase "risk assessment" was often vague, in that it was unclear whether this referred to an instrument or just a clinical opinion. For example, one decision simply read: "Dr. Levy's risk assessment reveals that there are few factors suggesting Mr. Mueller presents a risk of future violence" (*Mueller,* 2009, para. 8). One decision did reference the topic of clinical variables and risk variables, which suggests that the HCR-20 (which has three scales for historical, clinical, and risk variables) was used in this scenario (*Weber,* 2012). Nonetheless, regardless of their actual usage by clinicians or any case managers, explicit attention to risk assessment tools was not apparent in the written reports. The full percentage breakdown of each variable, alongside their corresponding percentages in the Broderick study, is found in Table 5.1.

Table 5.1 Variable Breakdowns and Comparisons

Variable	References in Broderick (2006)	% of Total References	References in Current Study	% of Total References
Risk/Threat	580	23.90%	348	14.66%
Index Offence	119	4.90%	207	8.72%
Medication Compliance	177	7.30%	127	5.35%
Mental Health/History	216	8.90%	592	24.94%
Hospital Behaviour	60	2.50%	58	2.44%
Community Behaviour	157	6.50%	129	5.43%
Substance Use	246	10.10%	154	6.49%
Relationships/Support	134	5.50%	385	16.22%
Social Skills	24	1.00%	12	0.51%
Community Status	71	2.90%	40	1.68%
Mental State	201	8.30%	168	7.10%
Winko	76	3.10%	4	0.17%
Other Case Law	65	2.70%	0	0.00%

Self-Harming Behaviour	41	1.70%	19	0.80%
Re-Integration	N/A	N/A	52	2.19%
Insight Into Illness	98	4.00%	70	2.95%
Victim Impact Statements	3	0.10%	6	0.25%
Risk Assessment	0	0.00%	3	0.13%
Totals	2426	100.00%	2374	100.00%

Note: As mentioned, there were slight differences in categorization of the collapsed variables between the current study and the Broderick research, which may have accounted for minor differences in certain categories. Please consult Appendix D for full details of the collapsing process.

5.4. *t*-Test and ANOVA Results

As mentioned in the analysis section of the methodology chapter, there was interest in gauging how reports differed on the basis of three overarching characteristics: Offence type (non-violent versus violent); disposition type (absolute discharge, conditional discharge, and custody order); and year (January 1st, 2005 to February 28th, 2009 and March 1st, 2009 to July 10th, 2014). The mean frequency of each variable was calculated across all 24 decisions, and then organized according to the year they took place, the index offence with which the accused was charged, and the disposition they were given by the Board.

There were no firm expectations regarding the direction or pattern of results, but the analyses were conducted in the interest of maintaining the explorative character of the study, and thus investigate any *prima facie* relationships. For example, one proposed difference would be the frequency with which the index offence was mentioned in the two periods, with the frequency being higher in the latter due to the fact that the Schoenborn, Li, and Turcotte cases – which featured particularly horrific index offences – took place in 2008 and 2009. As a result, the Board may be more sensitive to the characteristics of the index offence and thus mention it more often.

5.4.1. Offence Type

Before presenting data from the three statistical analyses, one caveat about the dataset must be mentioned. For both independent samples *t*-tests and one-way ANOVA

functions, there are certain assumptions that the data must "pass" in order to be interpreted properly (Laerd Statistics, 2013). One of these assumptions, the homogeneity of variance, posits that the variance should be equal within each sample population. As measured by the Levene's statistic, the homogeneity of variance assumption was violated for 17 variables across the three analyses. This may be a consequence of the small sample size, as the two independent *t*-tests compared two groups of 12 items, whereas the ANOVA compared groups of 10, 8, and 6 respectively. Small samples can often dilute statistical significance by producing large variances; indeed there were several cases where the standard deviation of a variable's reference frequency approached or even exceeded the mean. Nonetheless, the analyses are useful insofar that they provide a visual representation of the mean differences between groups.

Overall, the independent samples *t*-test analysis revealed no significant difference in variable reference frequency between individuals charged with violent offences versus non-violent offences. However, the descriptive analysis revealed some variables with large mean differences. For example, there were almost twice as many references to the accused's status/behaviour in the community among the violent offences group (M = 2.17, SD = 2.37) as compared to the non-violent group (M = 1.17, SD = 1.03). The same was true for references to the accused's relationships/support, where references among the violent offences group (M = 22.08, SD = 33.88) almost doubled those in the non-violent group (M = 11.00, SD = 8.34). Although the homogeneity of variance assumption was violated for the community status/behaviour variable, this variable came closest to reaching statistical significance.

5.4.2. Period

Although the analyses for the period data revealed several violations of the homogeneity of variance, similar to the index offence analyses, there was one difference that was statistically significant: References to the *Winko* decision were significantly higher in the early period (M = 0.33, SD = 0.49); in fact, all four references to the *Winko* decision occurred in cases that occurred before 2009. However, the practical

significance of this finding is muted by the fact that the volume of responses was so low, thus rendering the difference from zero of little value.

Another interesting finding pertains to references to substance abuse. Although the finding did not reach statistical significance, the average number of references to substance abuse problems in the first period (M = 8.08, SD = 6.91) were approaching double the number of references within the second period (M = 4.75, SD = 4.75).

5.4.3. Disposition Status

Given that one-way ANOVA analyses compare the means of three or more groups instead of two, the results are typically more complex and require more precise interpretation. A one-way ANOVA not only tests whether significant differences exist amongst the groups, but it can also explore the differences in means between each group.

After performing a one-way ANOVA to gauge the difference in variable references among decisions resulting in absolute discharges, conditional discharges, and custody orders, two significant results emerged. A difference in references to hospital behaviour existed amongst the groups (F = 74.50, p < 0.05); a Tukey's HSD post-hoc test reveals that significant differences existed between the absolute discharge and custody order group, and the conditional discharge and custody order group. Indeed, examination of the group means revealed that references to hospital behaviour were over four times more frequent amongst custody orders (M = 4.50, SD = 3.14) than conditional discharges (M = 1.00, SD = 1.20) or absolute discharges (M = 0.83, SD = 0.98). This finding makes intuitive sense; Review Boards would obviously pay more attention to an accused's hospital behaviour if they intend to order them to reside within a hospital.

The other significant difference occurred with respect to references to the reintegration variable (F = 24.1, p < 0.05); post-hoc tests reveal that this was driven by a significant difference between the absolute discharge and conditional discharge group. Examination of the means for each group reveals that there were over three times as many references to the reintegration variable in the absolute discharge group (M = 3.83,

SD = 1.72) when compared to the conditional discharge group (*M* = 1.25, *SD* = 1.39), and just over two times as many references when compared to the custody order group (*M* = 1.90, *SD* = 1.79). From a practical standpoint, such a finding is again intuitive: a Review Board would obviously closely consider an accused's resources and post-release plans as a barometer for whether they should be discharged absolutely or under supervision.

Although the result was not statistically significant, references to the accused's behaviour in the community occurred twice as frequently in hearings that resulted in conditional discharges (*M* = 6.13, *SD* = 5.94) and custody orders (*M* = 6.40, *SD* = 6.00) as hearings that resulted in absolute discharges (M = 2.67, *SD* = 1.37). Similar to the issue with the analyses for the independent samples *t*-tests, it is likely that statistical significance was negatively impacted by the inflated standard deviations. Examination of the mean differences amongst the groups for the other variables reveals two clear reasons why they did not reach statistical significance: The mean difference in variable references did not exceed 1 in many cases (e.g., references to insight into illness), or there was a nonlinear pattern (e.g., references to the accused's mental state).

The findings from these data should be interpreted with caution due to the limited sample size. Because of statistical conventions regarding the significance level (set at 0.05) for this study, it is plausible that the significant results that emerged from the data occurred merely by chance. As such, the results should not be given inferential weight but seen as a way to view the results of the study from a different perspective.

5.5. The Decision-Making Process

While identifying the similarities and differences in Review Board identification of factors related to violence risk was a major focus of the present study, the main objective was to gather up-to-date information on how the BCRB applies section 672.54 and the *Winko* criteria, as well as the reasons supporting their rationale to make a disposition for NCR accused. This goal was accomplished by taking note of the format that written reasons took (e.g., were they listed in a specific order or displayed in a disorganized fashion), and identifying what factors – regardless of their reference frequency in the

entire document – were most commonly listed when the Board was specifically justifying their decision.

The most frequently discussed factor amongst the reasons for decisions was the category of mental illness and history. Nineteen of the 24 dispositions referenced either the accused's psychiatric history (e.g., past hospital admissions, psychotic episodes, etc.) or the severity of their mental illness as it related to current impact on the accused's mental state. Such examples included consideration of the severity of the illness or the frequency of symptoms, or how many times the accused had been hospitalized, or how long they had suffered from the illness. Conversely, the accused's criminal history was only mentioned in four of the 24 hearings.

Alongside mental illness and history, the categories of medication compliance and insight into illness were the most frequently mentioned factors amongst reasons for a given NCR accused's disposition; these included both positive and negative references to these categories. At least one of these factors was mentioned in 19 of 24 reports, and both were mentioned in 10 of 24 reports. Furthermore, an ability to demonstrate insight to one's illness and/or successful compliance with medication seemed to be necessary (albeit possibly insufficient) criteria for more lenient dispositions: Two of the six hearings that resulted in absolute discharges did not reference these two factors, suggesting they were not an issue for the accused, and the other four discussed the accused's ability to comply with medication[32]. These findings are not unexpected, given that medication compliance and insight were each referenced in 23 of the 24 hearings.

The seriousness of the index offence was mentioned in the reasons for disposition in 10 of the 24 hearings. All but one of the 10 hearings resulted in the Board continuing their jurisdiction over the accused, either by custody order or conditional discharge. In the one case that resulted in an absolute discharge, the Board discussed the index offence's seriousness in the context of it being uncharacteristic of the accused's behaviour pattern:

[32] Two of these hearings did not mention the issue of insight into illness when rendering their decision, whereas the other two listed the accused's high level of insight.

> …we are of the view that the offences which took place could have imported considerable harm and contained danger towards others. However, we are reminded that while the index offence and its seriousness is one of the considerations that we can take into account, [it] is not at the end of the day dispositive of future significant threat. (*Wallis,* 2005, para. 32)

Although references to relationships comprised 16.20% of all references in the reports, reference to this variable in reasons for disposition was proportionately lower; only two cases contained references to the accused's relationships when rendering a disposition. This disparity may be explained by the fact that one hearing, *Guthrie* (2008), contained 31.69% of all references to relationships and support available to the accused; in this case, the accused had been living in the community under total supervision of his family, and thus the issue of support and familial monitoring was frequently discussed. The Board rendered a conditional discharge believing that this support and supervision would continue unabated. This noted lack of attention contrasted largely with the findings in Broderick (2006), whose interview respondents noted that familial/community support was of great relevance to the accused's release.

Most importantly, how did the Board apply s. 672.54 of the *Code* and the concept of "significant threat"? Unsurprisingly, the Board considered the relevance of the factors mentioned above in relation to whether or not the accused posed a significant threat to the safety of the public, such that this was the first question the Board asked themselves when turning to a disposition. Recall that section 672.54 (as worded prior to Bill C-14) directs Review Boards to consider (in order), the "safety of the public, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused…" (*Criminal Code*, s. 672.54). Furthermore, the direction to consider the safety of the public is narrow; if the Board finds that the accused does not pose a significant threat to the safety of the public – or, following the *Winko* (1999) ruling – is any amount uncertain to the accused's level of threat, then they must be discharged absolutely. Section 672.54 is structured to have the Board first consider whether or not the accused is a significant threat (and their subsequent eligibility for an absolute discharge); in the case that the accused *is* a significant threat to the safety of the public, the Board is then directed to consider the relevance of the above four factors. Prior to

Bill C-14, Boards had to assign the disposition that was the least onerous and least restrictive possible that also respected these circumstances.

The data suggest that this is exactly how the British Columbia Review Board makes decisions on a case-by-case basis. With the exception of one case, the Board based its decision on whether or not the individual posed a significant threat to the safety of the public. In 10 of the reports, the Board first explicitly listed the provisions set out by 672.54, and then applied them to the circumstances of the accused in question; fourteen reports included the need to make the least onerous and least restrictive disposition in the circumstances[33]. Ironically, in the six hearings that resulted in absolute discharges, the Board made no reference to 672.54 *or* the need to make the least onerous and least restrictive disposition compatible with their circumstances, and yet these individuals were granted the least onerous and least restrictive disposition available to all NCR accused.

In the one exception when the Board did not appear to properly apply section 672.54, the accused had been charged with uttering threats. The Board did not primarily consider whether the accused posed a significant threat to the safety of the public. Although references to future violence and safety were made by various parties at the hearing, they were not contextualized in the language of section 672.54 or the *Winko* decision. In providing its rationale, the Board stated:

> It became quite clear to us that either as a result of his own behavioural discontrol, or other contextual reasons, Mr. Nigh has unfortunately exhausted his welcome from mental health resources in the Terrace community at least for the time being. We were persuaded that on the basis of his current mental condition, his prospects for reintegration, as well as his acute collateral needs, he requires at least a short period of hospitalization to break his cycle of illness, admission, discharge, and inevitable relapse. (*Nigh*, 2005, para. 11)

[33] This included the 10 cases where 672.54's provisions were stated, and four cases where, after determining that the accused *was* a significant threat, the Board stated the need to make the least onerous and least restrictive disposition in regard to a custody order or conditional discharge.

Here, it appears that the Board rendered a custody order – the most restrictive of the three general dispositions – without considering whether or not the accused posed a significant threat severe enough to warrant such a disposition, but in the interests of convenience given that the accused had a history of failure with mental health resources in his immediate community.

5.6. Chapter Summary

This chapter presented the results from the both the qualitative and quantitative analyses conducted for this study. The variable references were examined first, followed by an examination of how the references changed in frequency as a function of certain contexts. This was then followed by qualitative analysis of the BCRB's decision-making process itself, to examine what factors they explicitly consider when making their decision. The following chapter presents the analysis and discussion of the findings as they relate to extant literature on tribunal decision making, and violence risk assessment.

Chapter 6.

Analysis and Discussion

6.1. Introduction

This chapter contains a detailed analysis of the results seen in Chapter 5, and discusses them in the context of extant research surrounding mental health tribunal practices and the prevailing literature on risk assessment and management. The chapter first presents an examination of the data on the reference frequencies to the variables that correspond to prominent risk factors in the literature, and how they have changed and stayed the same from the Broderick study. This section is integrated with a discussion of the results obtained using the independent *t*-test and ANOVA procedures, to gauge whether variable references changed as a function of offence type, period, or the disposition given to the NCR accused. The chapter concludes with a discussion of the findings on the decision making process itself, wherein the BCRB listed what factors influenced the disposition they gave the NCR accused.

6.2. Prevalent Risk Factors

6.2.1. Mental Illness and Mental Health History

As mentioned in Chapter 5, the accused's mental illness and mental health history were the most commonly referenced category, comprising 24.9% of all references. This collapsed variable contained references to the accused's responsivity to treatment, the nature of their mental illness and attached symptomology, the presence of psychopathy, the presence of a personality disorder, periods of psychosocial maladjustment in youth, prior appearances before a Review Board, and their general

psychiatric history, which included references to their length in the forensic system, past psychotic episodes, and experiences with hospitalization, commitment, or certification under mental health legislation. The prominence of this variable owed largely to references to the accused's mental illness, which comprised 57.1% of all references within the category. References to the accused's mental health history did not significantly differ as a function of period, offence type, or disposition type; examination of the means of these groups revealed small or non-existent differences. These findings suggest that the BCRB does not differentially attend to an accused's mental illness and mental health history on the basis of their index offence or that doing so may increase the likelihood of a certain (i.e., more restrictive) disposition. Further, references to this category did not vary by period, suggesting that an accused's mental health history has not received greater attention in the years since 2005. However, the fact that references to mental illness and mental health history only comprised 8.9% of all references in the Broderick research (ranging from 1992-2004) indicates that the BCRB has invested greater attention in these factors over time. One possible reason for this increase is that Board members have increased expertise about the nature of major mental illnesses and how they operate, which leads to their more frequent mention. The other reason could be simply due to coding differences between the present study and the 2006 research; the total number of references in this study amounted to 2,374, whereas in the previous study the total number was 2,426, despite the fact that the dataset included 12 more cases. However, the fact that not all references to the variable categories were higher in the present study suggests that the difference can be attributed to other factors.

The influence of an accused's mental illness on mental health tribunal decision making – as it relates to certain dispositional outcomes – has only been recently examined. Grant (1997) and Crocker and colleagues (2011) both found that mental illness type is not predictive of an NCR accused receiving a certain disposition. However, Crocker and colleagues (2014) found limited support for certain associations: Psychotic disorders and personality disorders were linked to more restrictive dispositions, whereas mood disorders (such as bipolar disorder) were associated with less restrictive dispositions. Although statistical analyses were not performed in the present study due to the small sample size, the findings here appear to concur with most

recent research: Eight of the 10 custody orders were given to NCR accused who had a primary diagnosis of schizoaffective disorder or schizophrenia, and only two were given to NCR accused who had a mood disorder. While noting that there were more NCR accused whose primary diagnosis was a psychotic disorder (fifteen) than a bipolar disorder (nine), violent and non-violent index offences were almost identically distributed across the two groups, suggesting that the person's mental disorder is considered more relevant when making a disposition. However, this fact may be outweighed in situations where the Board pays specific attention to the nature of the accused's index offence; recall from Chapter 5 that in the 10 cases in which the index offence was mentioned in the reasons for disposition, only one individual received an absolute discharge. So while the constellation of factors associated with an NCR accused's mental illness and psychiatric history (e.g., symptomology, hospitalization frequency) do not appear to correlate with certain disposition types, the types of mental disorders themselves may play a role, an expected finding given the extant literature on tribunal decision making.

Unfortunately, the relationship between major mental illness and violence has not been thoroughly substantiated in the literature. Although some research (e.g. Hodgins, 1995, Silver, 2006) suggests that mental disorder has a unique relationship to violent or criminal behaviour, more studies have emerged that fail to find this link (Bonta et al., 1998; Monahan et al., 2001, Junginger et al., 2006; Peterson et al., 2010, Peterson et al., 2014). Peterson and colleagues (2014) found that only *four percent* of the crimes in their sample were directly motivated by the offender's psychosis. These authors argue that while there are certainly a small subset of offenders who commit so called "insane" crimes, the vast majority are motivated to engage in criminal behaviour as the result of general, rather than clinical, risk factors. Research on recidivism amongst mentally disordered offenders (e.g., Callahan & Silver, 1998b; Monson, Gunnin, Fogel, & Kyle, 2001) has also demonstrated the predictive superiority of general risk factors over clinical risk factors. This evidence, combined with systematic reviews (e.g. Morgan et al., 2012) that question the efficacy of the clinical model of risk management (i.e., reducing mental illness symptomology to reduce violence risk), suggests that the BCRB should avoid basing its rationale too heavily on clinical factors when determining NCR accused's fate.

6.2.2. Social Support

The second most-discussed risk factor pertained to the accused's relationships and the level of support they had from them in the community. This category accounted for 16.2% of all references; however, it is important to remember that one case accounted for almost one-third of all references to this category. When this case was removed, this figured dropped to 12.1%. Likewise, references to this category differed amongst disposition type, between periods, and between violent and non-violent offences, but these differences became negligible when the outlying case was removed. Thus, it does not appear that the Board applies greater scrutiny to the nature of an accused's relationships with friends and family in the community or level of social support, and these factors do not have implications for an accused's liberty. Even with the outlier removed, however, there were still more than double the references to this category than in the Broderick (2006) study. Again, the possibility exists that this difference is owed to methodology.

Newer research that attends to protective factors has promoted the importance of social support in successful risk management. Proponents of risk reduction suggest that involvement in healthy social networks may discourage recidivism amongst mentally disordered offenders (de Ruiter & Nicholls, 2011). Prosocial relationships have long featured in criminological theories on what factors discourage criminal behaviour across all types of offenders, such as social learning and social control frameworks (Ullrich & Coid, 2011). Indeed, there is empirical support for this relationship: Riordan, Haque, and Humphreys (2006) examined factors related to success on conditional discharge, and found that acquittees who lacked social support networks were five times as likely to fail on their release. Furthermore, individuals who had social housing in place were more likely to receive an absolute discharge. Social support has also been implicated in successful completion of mental health court (MHC) programs (Ray, 2014).

6.2.3. Risk/Threat

The third most-referenced category was the "Risk/Threat" category, which accounted for 14.7% of all references in the reports. The variable "Significant Threat" accounted for the greatest proportion of references within this category. Given that it is

the *Code*-mandated duty of Review Boards to determine whether an NCR accused is a *significant* threat to the safety of the public in order to determine if any sanctions must be placed on their liberty, the prevalence of this factor is expected, and an indication that Boards are keeping mindful of the *Winko* criteria, even if they are not explicitly acknowledging the provisions flowing from the decision. This prevalence translated into the variable's prominence among reasons for decision: Recall that before all else, the Board considered the question whether the accused posed a significant threat to the safety of the public in all but one case when justifying their reasons for decision. Public protection represents the first arm of the chief policy objectives of Part XX.1 of the *Criminal Code* that were re-affirmed in *Winko*, so it is not surprising to see the BCRB consistently consider the public's safety as the first priority.

6.2.4. Substance Use

Surprisingly, references to substance abuse were proportionately lower than in the Broderick (2006) study. Likewise, the Board sparsely considered substance abuse when rendering a disposition of the accused, as it was only mentioned in four cases; only one of these four cases clearly indicated that the accused had been abusing drugs proximal to the index offence. This finding was unexpected for two reasons. First, available research demonstrating the impact of substance abuse on mentally disordered offenders regarding to violent behaviour and recidivism, and second, the fact that over half (13) of the cases documented that the accused had a history of substance abuse.

Recent research has elucidated the key role that substance abuse (and co-morbid substance abuse disorders) plays in mediating violence amongst mentally disordered offenders. For example, studies have found that mentally disordered offenders are only more likely than their healthy counterparts to commit violence when engaged in ongoing substance abuse (Elbogen, & Johnson, 2009; Fazel et al., 2009; Balyakina et al., 2014). Further, substance abuse has been widely established as a risk factor that predicts criminal conduct among general offender populations (Bonta et al., 1998). Knowing this, one would have expected the BCRB to connect an accused's (violent) criminal behaviour to any ongoing substance abuse, or at least consider the possibility that substance use increased their risk for violent behaviour.

Research with other mental health tribunals has demonstrated that substance abuse has negative implications for an offender's liberty. Monson and colleagues (2001) found that substance abuse was one of the factors that predicted revocation of conditional release for a sample of insanity acquittees. This finding has been repeated by newer research that shows that individuals with a substance abuse disorder were more likely to suffer an incident on conditional release and thus be returned to custody (Manguno-Mire et al., 2014).

Existing literature on substance abuse amongst MDO populations and its implications for violence and recidivism create the expectation that the BCRB would pay greater attention to this issue; while the Board documented an NCR accused's substance abuse history when one existed, they otherwise did not place great importance on its role in the accused's criminal behaviour. Unfortunately, it was not clear from the analysis whether this was simply due to Board members not considering this relationship, or whether substance abuse did not play a contributing role to the accused's criminal behaviour. Studies show that substance abuse amongst mentally disordered offenders is on the rise (e.g., Desmarais et al., 2008; Simpson et al., 2014), which suggests that the BRCB and other Review Boards in Canada will hold hearings for an increasing number of NCR accused who have substance abuse disorders. Thus, Board expertise on the role substance abuse should be developed to address this issue.

6.2.5. Index Offence

References to the accused's index offence have nearly doubled since the time of the Broderick (2006) research, accounting for close to 9% of all references in the present study. This increase cannot be attributed to the seriousness of the offences themselves, as the sample of cases chosen included a wide range of offence types that ranged from relatively minor offences (e.g., indecent exposure) to the most serious (i.e., murder). Further, analyses revealed that references to the accused's index offence did not differ significantly between violent and non-violent offences, nor periods – possibly indicating that the high-profile cases that occurred in 2009 did not have an impact on BCRB practice. Overall, this increased prevalence could suggest that the new *Code* provisions for high-risk NCR accused (wherein Courts can make a finding that an accused is high-

risk on the basis of the index offence) are affirming changing trends in Review Board practice rather than levying new laws that are largely discordant with how they currently function. This possibility is similar to commentary on the *Winko* decision itself, which suggested that – given the lack of long-lasting effects of the legislation – that the decision has merely affirmed support for the way Review Boards have adjudicated NCR accused (Verdun-Jones, 2000; Walter, 2005).

6.2.6. The *Winko* Decision

The most striking finding from the research was the noted reduction in references to the *Winko* decision. Whereas Broderick (2006) found that references to the *Winko* decision accounted for 3.1% of all references (76 total), they only accounted for 0.2% of all references (four total) in this study. References to *Winko* are not merely cosmetic; the BCRB is charged with making affirmative findings that an NCR accused poses a significant threat to the safety of the public; any uncertainty regarding an NCR accused's violence risk is automatic grounds for an absolute discharge. Of interest was whether the Boards referred to any of the *Winko* criteria without using the case name; no references were made to the fact that the finding must be conclusive, and only one reference was made to Justice McLachlin's definition of "significant threat".

The fact that the BCRB is not explicitly referring to the *Winko* ruling does not necessarily mean that they are restricting an NCR accused's liberty on inconclusive evidence. For example, when rendering the decision, the Board often used words and phrases like "clearly" and "no difficulty in concluding" when discussing their finding of an NCR accused posing a significant threat to the public – in no case did the Board exercise jurisdiction over an accused when uncertainty was present. It is possible that the BCRB has gradually internalized the *Winko* decision, and acting on its directives has become an unconscious process.

Nonetheless, one of the goals of the study was to assess how the BCRB is currently interpreting the *Winko* criteria so that future research may assess how Bill C-14's implementation has affected decision making; remember that Review Boards are no longer directed to make the "least onerous and least restrictive" disposition, but the one

that is “necessary and appropriate in the circumstances”. As mentioned earlier, an emerging reality may be that Bill C-14 will function to solidify prevailing practices of Canada’s Review Boards, rather than altering them entirely. However, it is wise to remain cognizant of the fact that this study was only conducted on cases from British Columbia, and may not be representative of the practices of the Review Board system as a whole.

That being said, the goal of this research was to provide *in-depth* insight to Review Board decision making, which would be difficult to obtain in a nationwide study. Therefore, it is important to value the detail afforded by such in-depth research, and having confidence that comparable findings could be achieved in a similarly-designed study of Review Boards in other jurisdictions (e.g., Ontario or Alberta).

6.3. The Decision-Making Process

Research on the decision making process itself (i.e., analyzing the text wherein the Board formally discussed its reasons for disposition) revealed that the most frequently referenced risk factors were not necessarily the ones that the Board considered most relevant to rendering a disposition for the NCR accused at the hearing.

Clinical factors dominated references contained within the section where the Board listed its reasoning for a given disposition. The two most referenced categories were mental illness and psychiatric history, and medication compliance and insight into one’s illness (combined here) – nineteen decisions listed one or both of these factors when considering the accused’s disposition. In some cases, the Board saw these risk factors as linked: NCR accused who had little or no insight into their illness would inevitably deteriorate because they did not think they required medication and would thus refrain from taking it. Respondents in Broderick’s (2006) study revealed that these issues were of similar importance in making release decisions; additionally, Peay’s (1989) research in England and Wales demonstrates that these countries’ mental health tribunals consistently found that medication compliance and insight into illness were major factors in guiding decision-making. In other contexts, medication

compliance/treatment and insight have been linked to success on conditional release (Viljoen, Nicholls, Greaves, de Ruiter, & Brink, 2011, Ray, 2014).

However, research directly linking medication compliance and insight into illness with recidivism is lacking, insofar as they may be related to symptom management. Emergent evidence suggests that a clinical approach (e.g., treating disorders, ensuring medication compliance) reduces symptoms but does not reduce recidivism (Morgan et al., 2012). This has led others to suggest that mental illness and its associated symptomology do not drive criminal or otherwise violent behaviour (e.g., Bonta et al., 2014), with others suggesting that this is only the case for a small subset of MDOs (Peterson et al., 2014). These authors suggest using risk assessment tools and approaches that include a wide range of risk factors, such as those correlated with recidivism in general offender populations. One explanation for the BCRB's emphasis on clinical factors is the increasing complexity of the psychological profile of Canada's Review Board clientele population noted by Simpson and colleagues (2014). Board members may be noticing this trend and overemphasizing its relevance to criminal recidivism, notwithstanding its implications for therapeutic outcomes.

On this note, it would appear prudent for Review Boards to actively incorporate evidence from leading risk assessment instruments, such as the HCR-20, into their reports. However, such integration did not occur. Whereas the phrase "risk assessment" appeared in 10 hearing reports, the names of actual risk assessment tools only appeared in two cases; there was no mention of these instruments in the sections wherein the Board discussed its reasons for its decision. Noting similar infrequency within her own research, Broderick (2006) asked interview respondents to clarify how they assessed risk, and found that clinicians preferred to use an idiosyncratic approach wherein formal risk assessment tools were used based on their suitability. As the literature review demonstrated, formal risk assessments have consistently outperformed clinical judgment on the criterion of actively predicting violence, and thus it is discouraging to see them used sparingly. Nevertheless, this finding is consistent with available research in Canada that demonstrates the gap between research and practice in clinical and forensic contexts (Cote et al., 2012; Crocker et al, 2014).

As mentioned, the seriousness of the index offence was discussed in the reasons for disposition in 10 of the 24 cases. In nine of these cases, the accused was given a conditional discharge or custody order, which suggests that when the Board discussed the index offence during its deliberation process, it was more likely to extend its jurisdiction over the accused. Several studies have shown that mental health tribunals across multiple jurisdictions place importance on index offence severity (Braff et al., 1983; Silver, 1995; Callahan & Silver, 1998b; Livingston et al., 2003; Crocker et al., 2011; Crocker et al., 2014), despite the fact that research on criminal recidivism demonstrates no link between index offence severity and future criminal behaviour (Bonta et al., 1998; Bonta et al., 2014). Broderick's (2006) interview respondents suggested that severe index offences warrant more restrictive dispositions because they demonstrate that the accused is capable of more extreme behaviour. However, extremely violent index offences (such as the Vincent Li case) are not reliable indicators of future behaviour, because they often occur under a rare set of circumstances where the accused does not possess the necessary *mens rea* for the offence (in this case, an extreme episode of untreated psychosis). Once again, the addition of section 672.64(1)(b) can be viewed as officially permitting Courts to classify NCR accused on the basis of their index offence, a practice occurring at the quasi-judicial level, at least in British Columbia.

By contrast, an NCR accused's criminal history was only mentioned in the reasons for disposition in four reports, despite a criminal history existing for 11 of the NCR accused. While criminal history is a static risk factor that is, by definition, unresponsive to change, it was interesting to see that the BCRB paid little attention to one of the most established risk factors in the literature on criminal recidivism. Bonta and colleagues (1998) historic meta-analysis established criminal history variables as the best predictors of violent recidivism in MDOs; this finding has been re-affirmed in subsequent research (e.g., Manguno-Mire et al., 2007; Manguno-Mire et al., 2014; Bonta et al., 2014). Appropriately, forensic decision-makers have taken note of this relationship. As mentioned in the review of the literature, criminal history is also a strong predictor of detention within forensic systems (Braff et al., 1983; Harris, et al., 1991; Silver, 1995; Callahan & Silver, 1998a; Crocker et al., 2011; Crocker et al., 2013;

Crocker et al., 2014), which casts the current research as an outlier in terms of legislative practice.

When examining how the BCRB applied the criteria contained within section 672.54 of the *Criminal Code* to determine whether the accused presented a significant threat to the safety of the public, it was abundantly clear that the Board adhered to *Code* provisions in all but one case. As mentioned in Chapter 5, the Board first considered whether the individual posed a significant threat to the safety of the public; in the event that the Board found this to be true, they continued to follow *Code* legislation to satisfaction, supporting claims by Simpson (2014a; 2014b) and Grantham (2014) that Review Boards are adequately balancing the dual interests of Part XX.1 of the *Criminal Code*. Specifically, the BCRB explicitly referenced 672.54 and its need to independently assess whether the individual posed a significant threat to the safety of the public in 10 cases, while noting the need to make the least onerous and least restrictive disposition possible in 14 cases. The BCRB was more likely to restrict an NCR accused's liberty when it mentioned the need not to do so if possible. The six hearings where individuals received an absolute discharge made no mention of either section 672.54 *or* the need to make the least restrictive decision in the circumstances[34].

Although it is re-assuring to see that the BCRB is adamant about following *Code* mandate when it comes to its decision making process, this reality has concerning implications for practice under the new law. The most obvious one is that given its strict adherence to policy, the BCRB will now be expected to make disposition decisions that do not reflect the least onerous and least restrictive disposition (as this provision has been replaced), and instead make disposition decisions that unnecessarily restrict an NCR accused's liberty because it is found to be "necessary and appropriate" in the circumstances. In other words, decisions similar to the outlying case in these data –

[34] On a related note, this, combined with the fact that no relationship existed between the length of decision (in words) and the type of disposition an accused received, would seem to reject Gigerenzer's (2014) model of risk aversion defensive decision making, which claims that professionals, especially in the field of health, will act overly cautious to avoid claims that not enough precautions were taken if an adverse event occurs. Applying this model, one would expect reports of hearings that resulted in an absolute discharge to be longer, because Board members would exercise more scrutiny and breadth in order to be as certain as possible that the accused did *not* pose a significant threat of the safety of the public.

when the Board did not apply section 672.54 or base its decision on whether the accused was a significant threat – may become more frequent.

This reality, in tandem with the finding that the Board's mindfulness of the *Winko* decision (and its philosophical implications) have decreased, may be indicative of a growing precedent that supports Bill C-14's modifications to the *Criminal Code*, despite the legislation being based on political rather than empirical concerns. The findings from the research indicate that the BCRB's decision making often clashed with existing data on MDO recidivism, and Bill C-14 may push the Board further away from decisions that have empirical support. Nonetheless, this divergence has not had severe consequences for public safety: Crocker and colleagues' (2013) finding that the Review Boards of British Columbia, Ontario, and Quebec are taking due care to protect society from even the most dangerous NCR accused under their jurisdiction. However, the alternative may be that given the low recidivism rate, the Board is *over*-emphasizing public safety by restricting liberty on the basis of risk factors that do not predict violent recidivism.

6.4. Chapter Summary

This chapter provided a detailed discussion of the results presented in Chapter 5, and attempted to explain them or relate them to existing scientific and legislative research on NCR recidivism and mental health tribunal decision making respectively. The final chapter will summarize the major implications of the research findings, followed by a discussion of their limitations, and recommendations for future research.

Chapter 7.

Conclusions and Future Directions

7.1. Introduction

The primary aim of this study was to gather up-to-date information of the decision making process of the British Columbia Review Board so that research on Review Board decision making in the post-Bill C-14 era may be more clearly understood. Following in the footsteps of Broderick (2006), who first examined the BCRB under similar circumstances to investigate the impact of the *Winko* decision (1999) on decision making practice, this study examined three components: How the Board was interpreting the concept of "significant threat" to the safety of the public, as per 672.54(a) of the *Criminal Code*; second, how this interpretation varied by offence type, period, and disposition rendered; and last, observing the frequency with which empirically-supported risk factors were mentioned in the reports, and comparing and contrasting these data with the Broderick findings.

7.2. Summary

This study revealed that several findings from the Broderick (2006) study have changed substantially. The content analysis revealed that references to accused's index offence, their mental illness and psychiatric history, and relationships and support increased, whereas references to all other variables decreased. When considering a disposition, an accused's index offence, their mental illness/history, medication compliance, and insight into their illness were the most commonly referenced factors, suggesting that the BCRB places great weight on the accused's index offence and a subset of clinical factors when determining whether the NCR accused poses a significant

threat to the safety of the public. Inclusion of the index offence in the BCRB's reasons for decision was indicative of a more restrictive disposition, as only one of the individuals whose report mentioned their index offence as relevant to the decision process received an absolute discharge. Despite their empirical support, formal risk assessment tools were scarcely mentioned or integrated into reports.

Overall, there was little evidence to suggest that the BCRB differentially attends to certain risk factors on the basis of the accused's index offence or what decision they rendered. Similarly, the year of the hearing did not affect references to any of the variables. Keeping issues with statistical power in mind, it would appear that the substance of Board hearings are not influenced by pre-existing factors (i.e., the index offence), and do not unfold differently on the basis of the final decision. If the number of references to several risk factors *were* different on the basis of the disposition the Board made, that could imply the Board was entering the hearing having already come to a decision (for example, if the Board panel was leaning towards giving an absolute discharge, it may include more detail about the accused's behaviour in the community in the report). Rather, it appears that the Board fulfilled its duty as an impartial tribunal that made a decision best fitted to the evidence.

The decision making process was very uniform, and in accordance with section 672.54 of the *Criminal Code*. With the exception of one hearing, the Board stressed its need to discern whether the individual was a significant threat to the safety of the public before considering any other factors. If the Board found that accused was not a significant threat to the safety of the public, they received an absolute discharge; if they determined that, on the balance of the evidence, the accused did pose a significant threat to the safety of the public, they then determined the least onerous and least restrictive disposition available to the accused in the given circumstances. As a whole, there is no indication that the BCRB is failing to follow its mandate, which is to balance the twin goals of public protection and individual liberty.

Overall, it appears that the Board considers clinical factors, such as the current status of an accused's mental illness and the accused's level of cognizance and subsequent management – via insight and medication compliance – to be of high

importance, as these factors were among the most frequently mentioned within the reasons for decision and the reports as a whole. Additionally, the Boards appear to be paying more attention to the accused's index offence; references to this factor have nearly doubled from the time of the Broderick (2006) research. Emphasis on these factors is incongruent with available research on what factors are most highly associated with recidivism amongst MDOs. As such, future research should focus on why Review Board members focus on clinical factors, which have come under recent criticism as ineffective targets in risk reduction approaches.

7.3. Limitations

Just as was noted in Broderick (2006), the generalizability of this study is limited to the province of British Columbia. Comparative research (e.g., Crocker et al., 2013) on the Review Boards of Canada's three largest provinces – Ontario, Quebec, and British Columbia – have revealed that important differences exist in regard to the processing of NCR accused, and it would be thus unwise to assume that the decision making process is identical across all three jurisdictions. Similarly, the small sample size (24) was not chosen to be representative of all BCRB decisions, nor was it randomly drawn. However, purposive sampling was employed to establish a sample that contained a wide array of offences (ranging in level of severity), as well as covering the entire timespan from where the Broderick research concluded. Still, the sample's size and purposive nature greatly limited the ability to perform meaningful statistical analysis, as was indicated in Chapter 5.

Absolute objectivity is an issue in any research context, but it can become more prominent in qualitative research settings where interpretation and narrative construction can play major roles in presentation of the data. While keeping mindful of the words of Hilary Putnam (1990), who stressed that there is "[no] such thing as a God's-eye view, a view that is the one true objective account". Keeping this in mind, I exercised caution and attention when reviewing the data to ensure that the references I counted accurately represented that category.

It is also important to recognize that, although the data used in this research were reports on British Columbia Review Board decisions, they are as such only reports and do not firmly examine the decision-making process itself. That is, these reports do not capture the Board members' reasons for discussing each case the way they did, nor do they properly detail how the Boards' decide to weigh certain risk factors over others, or why certain risk factors may relevant in some cases, but not in others. For example, analyzing two reports where the referral client has a substance abuse problem cannot tell us *how* or *why* the Board chose to consider the problem as being relevant to the accused's future risk for recidivism. It is for this reason that research involving direct observation of Review Board hearings would better reveal the processes by which Board members assess how the complex, interacting set of lifestyle, demographic, contextual, and dispositional characteristics of a referral client determine whether or not that individual is a significant threat to the safety of the public, as defined under Canadian law.

In the same breath, it is important to mention that this research concerns dispositional outcomes for NCR accused in British Columbia, a population which may represent a specifically defined subgroup of mentally disordered offenders. For example, Hodgins (1995) argues that a dichotomy exists between those who exhibit antisocial behaviour patterns from an early age and experience mental illness concurrently (early starters), and those who are largely abstinent from criminal behaviour until developing a major mental illness (late starters); it is these latter individuals whose mental disorders are directly related to their criminal behaviour. Because the legal criteria for the NCRMD verdict in Canada stipulate that an individual must be suffering from a mental disorder at the time of the offence which impaired their ability to appreciate what they were doing, or to appreciate that doing so was wrong. In other words, the *Criminal Code* stipulates that the accused's mental disorder must be causally related to the offence for the verdict to succeed. It is thus possible that the Board recognizes these realities, explaining its strong focus on clinical risk factors in the reports.

7.4. Future Directions

This study aimed to gain insightful data on Review Board practice in British Columbia now that the country's mental health laws have undergone substantial changes. Although research examining Review Board hearings in the post-Bill C-14 landscape would be of high value, at this point such a move would be premature given that the legislation took effect approximately just one year ago, thus, the passage of more time is necessary for future research to have a substantial sample size with which the findings of the present study and that of Broderick (2006) may be compared. Additionally, it would be wise to conduct interviews with mental health and legal professionals (i.e., defence lawyers) who work with NCR accused, to collect their perspectives on the frontline effects of the new legislation.

As far as I am aware, the Broderick (2006) study and the present study are the only two existing qualitative investigations of Review Boards in Canada. As such, it is prudent to collect data from other provinces, such as Ontario, Quebec, and even Alberta, to compare how their respective Boards operate when faced with different NCRMD populations and forensic mental health systems. For example: Whereas British Columbia only has one forensic hospital (the FPH), Ontario has several facilities that cascade across three security levels. Thus, custody orders (and even conditional discharges) could vary widely in their implications for an NCR accused's liberty. The most ideal scenario would involve qualitative research that includes observation of the actual hearings themselves; to date, no research on Review Boards has been permitted to report at this level.

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Appendix A.

Violence Risk Appraisal Guide (VRAG) Items

1. **Lived with both biological parents to age 16 (except for death of parent)**

   Score no if the offender did not live continuously with both biological parents until age 16, except if one or both parents died. In the case of parent death, score as for yes.

   Yes [-2]

   No [3]

   This item cannot be scored due to lack of information

2. **Elementary school maladjustment**

   (up to and including Grade 8)

   No problems [-1]

   Slight or moderate discipline or attendance problems [2]

   Severe (i.e., frequent or serious) behaviour or attendance problems (e.g., truancy or disruptive behaviour that persisted over several years or resulted in expulsion) [5]

   This item cannot be scored due to lack of information

3. **History of alcohol problems**

   Allot one point for each of the following: alcohol abuse in biological parent, teenage alcohol problem, adult alcohol problem, alcohol involved in a prior offense, alcohol involved in the index offense.

   0 points [-1]

   1 or 2 points [0]

   3 points [1]

   4 or 5 points [2]

   This item cannot be scored due to lack of information

4. **Marital status**

   (at time of index offence)

   Ever married (or lived common law in the same home for at least 6 months) [-2]

   Never married

This item cannot be scored due to lack of information

5. Criminal history score for convictions and charges for nonviolent offences prior to the index offence

(from the Cormier-Lang system)

Score of 0 [-2]

Score of 1 or 2 [0]

Score of 3 or above [3]

This item cannot be scored due to lack of information

6. Failure on prior conditional release

(includes parole violation or revocation, breach of or failure to comply with recognizance or probation, bail violation, and any new charges, including the index offence, while on a conditional release)

No [0]

Yes [3]

This item cannot be scored due to lack of information

7. Age at index offence

(at most recent birthday)

>= 39 [-5]

34-38 [-2]

28-33 [-1]

27 [0]

<=26 [2]

This item cannot be scored due to lack of information

8. Victim injury

(index offence only; most serious injury is scored)

Death [-2]

Hospitalized [0]

Treated and released [1]

None or slight (includes no victim) [2]

This item cannot be scored due to lack of information

9. Any female victim

(for index offence)

Yes [-1]

No (includes no victim) [1]

This item cannot be scored due to lack of information

10. Meets DSM-III criteria for any personality disorder

No [-2]

Yes [3]

This item cannot be scored due to lack of information

Substituted using DSM-IV or other DSM revision for diagnosis of personality disorder

11. Meets DSM-III criteria for schizophrenia

No [-3]

Yes [1]

This item cannot be scored due to lack of information

Substituted using DSM-IV or other DSM revision for diagnosis of personality disorder

12. Hare Psychopathy Checklist-Revised score

(PCL-R; Hare, 1991)

<= 4 [-5]

5-9 [-3]

10-14 [-1]

15-24 [0]

25-34 [4]

>=34 [12]

Childhood and Adolescent Taxon Scale (CATS)

0-1 [-3]

2-3 [0]

4 [2]

>=5 [3]

This item cannot be scored due to lack of information

Substituted using PCL:SV, **Note:** the PCL-YV can also be used and does NOT count as a substitute

Appendix B.

Psychopathy Checklist-Revised (PCL-R)

(All items are scored as 0 = not present; 1 = possibly present; 2 = definitely present)

Factor 1

Glibness/superficial charm

Grandiose sense of self-worth

Need for stimulation/proneness to boredom

Pathological lying

Cunning/manipulative

Lack of remorse or guilt

Shallow affect

Callous/lack of empathy

Factor 2

Parasitic lifestyle

Poor behavioural controls

Promiscuous sexual behaviour

Early behaviour problems

Lack of realistic long-term goals

Impulsivity

Irresponsibility

Failure to accept responsibility for own actions

Many short term marital relationships

Juvenile delinquency

Revocation of conditional release

Criminal versatility

Appendix C.

Historical Clinical Risk Management-20, Version 3

(All items read as not present, possibly present, and present)

Historical Scale

H1. Violence

H2. Other Antisocial Behaviour

H3. Relationships

H4. Employment

H5. Substance Use

H6. Major Mental Disorder

H7. Personality Disorder

H8. Traumatic Experiences

H9. Violent Attitudes

H10. Treatment or Supervision Response

OC-H Other Considerations

Clinical Scale

C1. Insight

C2. Violent Ideation or Intent

C3. Symptoms of Major mental Disorder

C4. Instability

C5. Treatment or Supervision Response

OC-C Other Considerations

Risk Management Scale

R1. Professional Services and Plans

R2. Living Situation

R3. Personal Support

R4. Treatment or Supervision Response

R5. Stress or Coping

OC-R Other Considerations

Appendix D.

List of Collapsed Variable Categories

Risk/Threat

-Contained all references to of one's risk to others; their violence history; their age at the time of their first violence offence; the protection of public threat; the concept of significant threat; their criminal history, and; their past weapon use

Index Offence

-Contained all references to the accused's index offence

Medication Compliance

-Contained all references to the accused's compliance/non-compliance with medication

Mental Illness & History

-Contained all references to the accused's mental illness; their mental health history; presence of psychopathy; presence of personality disorders; early maladjustment; the number of times they have appeared before a Review Board, and; how long they have been in the forensic system

Hospital Behaviours

-Contained all references to the accused's incidents with re-hospitalization; the granting/removal of hospital privileges; their behaviour as observed by hospital staff; instances of mandatory seclusion, and; any unauthorized leaves of absence

Community Behaviours

Contained all references to the accused's conduct, their impulsivity, their adherence to rules, and; supervision status (if any)

Substance Use

-Contained all references to the accused's past/present use of drugs and alcohol

Relationships & Support

-Contained all references to the accused's relationships, and; social support in the community

Social Skills & Attitudes

-Contained all references to the accused's social skills (including coping), and; attitudes

Community Status

-Contained all references to the accused's occupational history, and; their involvement in recreational activity

Mental State

-Contained all references to mental state; emotional state; self-care, and; experience with stress/stressors

Winko

-Contained all references to the 1999 *Winko* Supreme Court case

Other Case Law

-Contained all references to other legal cases

Self-Harming Behaviours

-Contained all references to suicide attempts; self-harming behaviour, and; self-neglecting behaviour

Re-Integration

-Contained all references to the accused's material resources, and; their plans upon release

Insight into Illness

-Contained all references to the accused's insight into their mental illness

Victim Impact Statement

-Contained all reference to the usage of Victim Impact Statements at the hearing

Risk Assessment Instruments

-Contained all references to a formal risk instrument being used, such as the HCR-20