

Psychiatric Gating of Sexual Offenders under Ontario's *Mental Health Act*: Illegality, Charter Conflicts & Abuse of Process

The physical and psychological harm that can be caused by sexual violence is incalculable, but so too is the social harm caused by sacrificing the fundamental rights of a minority of individuals in order to expeditiously satisfy the concerns of the majority.¹

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The paper examines psychiatric gating in Canada-i.e. the practice of certifying offenders for involuntary admission into a psychiatric hospital under civil mental health legislation on their impending release from a correctional facility. The author first argues that the psychiatric gating of sexual offenders does not comport with the legal requisites or philosophical objectives of civil commitment under Ontario's *Mental Health Act*. Second, the author argues that psychiatric gating is fraught with possible violations of ss. 7 & 12 of the Charter and constitutes an abuse of process because the practice in effect achieves the same indeterminate detention as designation under the dangerous offender provisions of the Criminal Code without the procedural and substantive safeguards that the courts have deemed necessary for the indeterminate sentences to survive Charter scrutiny. In making out the arguments the author engages in a detailed discussion of the civil commitment provisions in Ontario with reference to the parallel provisions in other provinces, and explores the limited Canadian jurisprudence on psychiatric gating.

L'article examine la question du blocage psychiatrique au Canada, c'est-à-dire la pratique du certificat d'admission en cure obligatoire dans un hôpital psychiatrique de délinquantes ou délinquants en vertu des dispositions civiles sur la santé mentale lors de leur libération imminente d'un établissement correctionnel. L'auteur argumente, dans un premier temps, que le blocage psychiatrique de délinquantes et de délinquants sexuels n'est pas en harmonie avec les exigences légales et les objectifs philosophiques de l'internement en vertu de la Loi sur la santé mentale de l'Ontario. Deuxièmement, l'auteur soutient que le blocage psychiatrique risque de constituer une violation des articles 7 et 12 de la Charte et un abus de procédure, car cette pratique aboutit à une incarcération indéterminée de même nature que celle prévue dans le Code criminel pour les contrevenantes et contrevenants dangereux, mais sans les protections procédurales et de fond que les tribunaux jugent nécessaires pour que les sentences indéterminées survivent à un examen en vertu de la Charte. Développant sa thèse, l'auteur étudie en profondeur les mesures d'internement en Ontario; il fait le parallèle avec les dispositions d'autres provinces et décortique la jurisprudence canadienne encore limitée en matière du blocage psychiatrique.

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Psychiatric Gating of Sexual Offenders under Ontario's *Mental Health Act*: Illegality, *Charter* Conflicts & Abuse of Process

The physical and psychological harm that can be caused by sexual violence is incalculable, but so too is the social harm caused by sacrificing the fundamental rights of a minority of individuals in order to expeditiously satisfy the concerns of the majority.¹

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I. INTRODUCTION

Psychiatric gating is the practice of certifying offenders for involuntary admission into a psychiatric hospital under civil mental health legislation on their impending release from a correctional facility. The process typically refers to the certification of prisoners based on a diagnosis of a sexual disorder (paraphilia) or a personality disorder, rather than a major mental illness affecting perceptual and cognitive capacities, such as schizophrenia.² This paper argues that the psychiatric gating of sexual offenders under the involuntary admission provisions of the Ontario *Mental Health Act* (*MHA*)³ does not comport with the legal requisites for admission, is fraught with potential violations of the *Canadian Charter of Rights and Freedoms*⁴ and constitutes an abuse of process.

This paper does not discuss the general merits of indefinitely detaining high-risk sexual offenders through specialized legislation—policy arguments on the best way to deal with such offenders and a consideration of the *Charter* implications of future legislation are matters for discussion in another paper. This paper merely focuses on the illegitimacy of hijacking the civil commitment procedures of the *MHA* to achieve the same end. For the present, Parliament has already set out its preferred way to deal with high-risk sexual offenders—through the dangerous and long-term offender provisions in the *Criminal Code*.⁵ If Canadian policy-makers are not satisfied with the scope of those provisions, they should duly modify or scrap them; the new statutory provisions could then be subject to open and honest *Charter* scrutiny.

1. Yukimi Henry, "Psychiatric Gating: Questioning the Civil Committal of Convicted Sex Offenders" (2001) 59 U.T. Fac. L. Rev. 229 at 250.

2. Richard D. Schneider, "Mental Disorder in the Courts: Psychiatric Gating" (1995) 16:2 Ontario Criminal Lawyers' Association Newsletter 18 at 18.

3. *Mental Health Act*, R.S.O. 1990, c. M-7, as am. by S.O. 2000, c. 9, ss. 3(1)-(6), 7(1) [*MHA*].

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

5. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 752-61 [*Criminal Code*].

Seeking to achieve the same end of indefinitely detaining high-risk sexual offenders through civil committals is disingenuous and fraught with *Charter* perils. Moreover, psychiatric gating results in a fundamental mischaracterization of the admissions criteria for civil committals under the *MHA*.

Part two of the paper begins by setting out the background for the paper's analysis. The requirements for involuntary admission under the *MHA* are first outlined, and then the two test cases in Ontario for psychiatric gating—*Starnaman v. Penetanguishene Mental Health Centre*⁶ and *Penetanguishene Mental Health Centre v. Stock*⁷—are set out in detail. This paper occasionally refers to the dangerous offender provisions in the *Criminal Code*, but in the interests of brevity the intricacies of those provisions are not discussed in any detail.

Part three of the paper argues that the criteria for involuntary admission into a psychiatric facility cannot be met by sexual offenders on the basis of a diagnosis for a paraphilia or a personality disorder, and that even if a technical satisfaction of the requisites could be accomplished, the use of civil commitment for such offenders is inconsistent with the general purpose and philosophy of involuntary admissions under the *MHA*.

Part four of the paper sets out the potential *Charter* violations in using the *MHA* for psychiatric gating, focusing specifically on sections 7 and 12 of the *Charter*. In terms of violations of section 7, this paper argues that the practice of psychiatric gating under the *MHA* violates the principles of fundamental justice, which prohibit punishment for future criminal conduct, prohibit multiple punishments for the same crime and ultimately protect against the abuse of process.

In terms of a violation of section 12, this paper argues that the indefinite detention of sexual offenders through civil commitment could constitute cruel and unusual punishment. This is because by circumventing the substantive and procedural protections that would be afforded to the offender under the dangerous offender provisions in the *Criminal Code*, the indefinite detention of offenders under the *MHA* could in some cases result in punishment that is grossly disproportionate to the index offence. Part four also considers the deleterious practical effects of permitting such an abuse of process, both to the fundamental rights of individual offenders and to public confidence in the administration of justice.

6. (1995), 24 O.R. (3d) 701, 100 C.C.C. (3d) 190 (C.A.) [*Starnaman* cited to O.R.]

7. (1994), 116 D.L.R. (4th) 550, O.J. No. 1545 (QL) (Gen. Div.) [*Stock* cited to D.L.R.].

II. SETTING THE BACKDROP

A. General Objectives of Civil Commitment

One of the inherent functions of the State is the protection of the public against dangerous individuals.⁸ This police power is administered through parallel systems: the criminal justice system that respects the autonomy of agents and protects the public by incapacitating and deterring offenders who violate the rights of others, and the civil commitment system, which is designed for persons with mental disorders whose symptoms interfere with their autonomous functioning. Civil commitment, therefore, contains two inseparable components: (i) the treatment of the disordered person in the hopes of restoring autonomous functioning, and (ii) the protection of the public through restrictions on the freedom of the mentally disordered person which are the least onerous for achieving that objective.⁹

In terms of the first component of civil commitment, treatment cannot be forced on individuals who have the legal capacity to refuse treatment: "No matter how ill a person, no matter how likely deterioration or death, it is for that person and that person alone to decide whether to accept a proposed medical treatment."¹⁰ Nevertheless, the *MHA* allows for the involuntary admission of mentally disordered individuals who present a danger to themselves or to the public but retain the legal capacity to refuse treatment.¹¹ As such, the treatment component of civil commitment should, more accurately, be described as *making treatment available* to mentally disordered persons. This distinction between treating and making treatment available in no way diminishes the importance of this component of civil commitment—civil commitment is not about warehousing dangerous, mentally disordered offenders, it is about reducing their dangerousness through a minimally intrusive restriction on their freedom replete with treatment opportunities.¹²

B. Criteria for Involuntary Admission Into a Psychiatric Hospital Under the Mental Health Act

Sections 15 and 20 of Ontario's *MHA* lay out the legal requirements for the involuntary admission of persons into psychiatric facilities. These requirements will now be outlined with reference only to the criteria relevant to the involuntary admission of sexual offenders.

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8. H. Archibald Kaiser, "Mental Disability Law" in Jocelyn Downie, Timothy Caulfield & Colleen M. Flood, eds., *Canadian Health Law and Policy*, 2nd ed. (Markham: Butterworths, 2002) 251 at 273-74.
 9. Steven I. Friedland, "On Treatment, Punishment, and the Civil Commitment of Sex Offenders" (1999) 70 U. Colo. L. Rev. 73 at 85-86; *ibid.* at 278.
 10. *Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 7, 225 D.L.R. (4th) 385, 2003 SCC 32.
 11. *MHA*, *Supra* note 3, s. 20.
 12. See *Khan v. St. Thomas Psychiatric Hospital* (1992), 7 O.R. (3d) 303 at 311, 87 D.L.R. (4th) 289 (C.A.).

The process of civil commitment begins with Form 1 certification under section 15 of the *MHA*.¹³ In Ontario, any legally qualified medical practitioner can order the temporary detention of an individual to undergo a psychiatric evaluation, provided certain criteria are met. Under subsection 15(1) of the *MHA*, the physician can order the psychiatric evaluation if he or she has reasonable cause to believe that the person has threatened or behaved violently towards another person and the physician is of the opinion that the person is suffering from a mental disorder of a nature or quality that will likely result in serious bodily harm to another person. A patient certified under Form 1 can be involuntarily detained for a period of 72 hours for observation and assessment.¹⁴ A different physician must then evaluate the person, and if the robust legal criteria are met, the physician can admit the person as an involuntary patient under section 20 of the *MHA*.

The first requisite for civil commitment, under paragraph 20(1)(c), is that the person be suffering from a mental disorder. This is broadly defined under section 1 of the *MHA* as "... any disease or disability of the mind".¹⁵ The second requirement is that the mental disease be of such a nature or quality that it will likely result in serious bodily harm to another person.¹⁶ This is the dangerousness criterion for involuntary admission, requiring that harm be likely to result *but for* the intervention of the State—under paragraph 20(5)(a) if the potentially dangerous behaviour is already being effectively controlled, the State cannot intervene through involuntary admission.¹⁷ The third requirement is often overlooked, and this is the causal-link requirement—it is not enough that the person is mentally disordered and dangerous—there must be a causal relationship between the two.¹⁸ This goes to the purposive distinction between the civil commitment process that is designed to deal with risks of public harm stemming from mental diseases and the criminal justice system that is designed to protect the public from criminal agency.

While the above criteria focus on the patient's mental state and dangerousness, the next set of requirements deals with whether it is necessary to establish an involuntary relationship between the person and a psychiatric facility. Because the objectives of civil commitment are to protect the public from dangerous, mentally disordered individuals and to provide treatment opportunities to reduce that danger, the fourth requirement is that a psychiatric facility offer treatment required by the person. Under paragraph 20(1)(a), the examining physician must release the person if he or she "... is not in need of the treatment provided in a psychiatric facility".¹⁹ By satisfying this fourth requirement, the State's legitimate interest in intervening is

13. *MHA*, *supra* note 3, Reg. 741, s. 13(1).

14. *Ibid.*, s. 15(5)(b).

15. *MHA*, *supra* note 3, s. 1.

16. *Ibid.*, s. 20(5)(a).

17. Kaiser, *supra* note 8 at 288-89.

18. *Ibid.* at 287.

19. *MHA*, *supra* note 3.

established and the only remaining issue is the extent of intervention permissible. The fifth and final requirement is that the involuntary admission be the least restrictive option required to control the risk. As per paragraphs 20(1)(b) and 20(5)(b), the examining physician cannot certify the person for involuntary admission if the person is suitable for admission as an informal or voluntary patient.

The certificate for the involuntary admission of the patient is only valid for two weeks and can thereafter be renewed by the attending physician if the patient continues to meet the criteria for involuntary admission. By the third renewal, the certificate need only be renewed every three months.²⁰ The Ontario Review Board (ORB) can review the certificate and its renewals, and the patient can also appeal the ORB's decision to the Superior Court of Justice.²¹

C. Test-Cases for Psychiatric Gating: *Starnaman and Stock*

1. *Starnaman v. Penetanguishene Mental Health Centre*

In this case considered by the Court of Appeal for Ontario, Starnaman challenged the review of an involuntary admission certificate that was upheld by the Superior Court of Justice. Starnaman had a criminal record including five sexual offences spanning over a 14-year period, several of which involved children. He was also diagnosed as a pedophile with antisocial personality traits.²²

Five days before the completion of a two-year sentence for uttering threats, a psychiatrist at a treatment centre within the penitentiary system signed a psychiatric assessment certificate. Two days before the completion of Starnaman's criminal sentence, a psychiatrist outside of the penitentiary system certified him for involuntary admission to the Penetanguishene Mental Health Centre.²³

At the Ontario Court of Appeal, the Appellant argued that the certification process was a disguised attempt to extend his incarceration and that the process amounted to *de facto* designation as a dangerous offender absent the procedural and substantive safeguards for the designation. He also argued that the involuntary admission was an attempt to circumvent the requirements for designation as a dangerous offender since his predicate offence did not allow for dangerous offender designation.²⁴

The Court of Appeal refused to address the abuse of process arguments flowing from the interaction between the criminal justice and civil commitment processes in certifying the offender; the Court was content with the fact that the certification for involuntary admission was done by a psychiatrist outside of the penal

20. MHA, *supra* note 3, ss. 20(4)(a)-(b), 20(5).

21. *Ibid.*, ss. 41(1), 48(1).

22. *Starnaman v. Penetanguishene Mental Health Centre* [1994] O.J. No. 1958 at paras. 6-8, 22 (Gen. Div.) (QL) [*Starnaman* (Gen. Div.)].

23. *Ibid.* at paras. 13-16.

24. *Starnaman*, *supra* note 6 at 704.

system, despite the fact that a corrections psychiatrist initiated the civil commitment proceedings.²⁵ The Court focused instead on whether the criteria for involuntary admission under the *MHA* were met.

The dangerousness requirement for committal was the main issue in the appeal. The Appellant argued that the assessment of his likelihood of harming others was made entirely on the basis of his diagnosis and criminal history, neither of which addressed his dangerousness at the time of the assessment. The Court disagreed, stating there was sufficient evidence to conclude that the Appellant was presently a danger to the public, adding that the certifying psychiatrist also relied on a "triggering event": the discovery, in the Appellant's prison cell, of the names and addresses of single parents in the area.²⁶ It should, however, be noted that the discovery occurred a full nine months before the assessment was ordered and that the purported triggering event was not mentioned in the psychiatrist's summary of reasons for the initial certification—the summary referred exclusively to the diagnosis and the Appellant's past criminal history.²⁷ This calls into question the role of the supposed triggering event in initiating and establishing the basis for committal. It should also be noted that the Court of Appeal declined to answer whether an application for assessment could take place based solely on a mental disorder diagnosis and past criminal history.²⁸

2. *Penetanguishene Mental Health Centre v. Stock*

Mr. Stock was a few days away from the completion of his sentence for 29 convictions involving sexual offences when he was certified for psychiatric assessment and was subsequently certified for involuntary admission into the Penetanguishene Mental Health Centre.²⁹

The certification was based on three factors: (i) the Appellant's diagnosis of pedophilia, (ii) the Appellant's inability to control his assaultive behaviour and (iii) the Appellant's refusal to continue on as a voluntary patient residing in the psychiatric hospital (Stock wanted to continue treatment as a voluntary out-patient while residing with his parents).³⁰ There was no event of clinical significance triggering the assessment in this case.

It should be noted that the diagnosis of pedophilia as a risk factor establishing his likelihood to recidivate says nothing of the particular Appellant's risk and that the supposed inability to control his assaultive behaviour could only be based on his past history, given the Appellant's incarceration for the years previous to the assessment. Furthermore, the Appellant's behaviour in prison provided nothing to indicate that he was a danger—the Appellant admitted his problem, was a part of a group of pris-

25. *Ibid.* at 704-05.

26. *Ibid.* at 703, 705.

27. *Starnaman (Gen. Div)*, *supra* note 22 at para. 22.

28. *Starnaman*, *supra* note 6 at 705.

29. *Stock*, *supra* note 7 at 551.

30. *Ibid.* at 551, 554.

oners who sought treatment at Kingston Penitentiary to the point of litigation and was willing to continue treatment in the community.³¹

Stock argued that the involuntary admission amounted to double jeopardy. The hospital cannot force treatment on competent patients, and therefore the only purpose of the commitment was deterrence and incapacitation, both of which were already considered by the Court of Appeal in determining his, by then completed, criminal sentence.³²

As in *Starnaman*, the Court circumvented the argument by refusing to consider the interaction between the criminal and civil commitment systems, relying on the differing objectives of the *Criminal Code* and *MHA* in deciding only to address the certificate's compliance with the involuntary admissions criteria in the latter Act.³³

In considering whether the dangerousness criterion was met, the Court noted that homosexual pedophiles only have a recidivism rate of 13-28% and that only 20% of offenders with the Appellant's risk score recidivate with an indictable offence after release.³⁴ As such, the Court relied primarily on the psychiatrist's in-court testimony in finding that "... Mr. Stock's mental disorder will 'likely' result in serious bodily harm to another person."³⁵

It is safe to characterize the psychiatrist's opinion as hazy at best, rather than rigorously establishing that the Appellant would likely recidivate if released:

I would say that the public safety issue would override and the person should be kept, but I'm not convinced absolutely in this case. I think it's likely that there will be a problem here with recidivism, but to what likelihood is not possible to predict with—I think sufficient accuracy in this case that I could take an absolute position in that regard. I mean that's the problem with prediction. There is a very small group of cases about which you can be absolutely certain and many more about which you can have only best estimates. This is one of those.³⁶

Nevertheless, the Court was satisfied to take the psychiatrist's best estimate of risk over the relatively low actuarial determination of risk. The Court acknowledged that the continued renewal of the certificates could amount to an indeterminate sentence, but the Appellant could have control over his release date if he chose to continue participation in treatment programs. In the end, the Court concluded that the "... interest of society in seeing that Mr. Stock is confined to a setting where treatment is immediately and continuously at hand, outweigh[s] the competing interest of Mr. Stock's liberty and any impingements on his *Charter* rights which flow from it."³⁷

31. *Ibid.* at 554.

32. *Ibid.* at 552.

33. *Ibid.*

34. *Ibid.* at 553.

35. *Ibid.*

36. *Ibid.*

37. *Ibid.* at 555.

III. INCONGRUITY OF PSYCHOSEXUAL DISORDERS WITH THE LEGAL CRITERIA AND OBJECTIVES OF CIVIL COMMITMENT UNDER THE *MENTAL HEALTH ACT*

The above psychiatric gating test cases in Ontario are illustrative of the incongruity of psychosexual disorders with the specific civil commitment criteria set out in the *MHA*. Individuals diagnosed with psychosexual disorders and/or personality disorders have difficulty meeting most of the five requirements for involuntary admission, but psychiatrists have nevertheless been willing to certify such persons, and the courts have been complicit in upholding the certificates. Commentators have criticized Canadian courts for "seldom treading upon clinical independence" in civil commitment proceedings thereby abdicating their role in guarding against the unwarranted use of the manifestly intrusive measure.³⁸ This part of the paper sets out the technical and conceptual difficulties of applying the certificates of involuntary admission to sexual offenders and thereby demonstrating that psychiatric gating cannot be carried out in compliance with the legal requisites and spirit of the *MHA*.

A. *Requisite 1—Presence of a Mental Disorder*

In a technical sense, this requirement is easy to meet under Ontario's *MHA*. This is due in part to the broad definition in the Act encompassing "any disease or disability of the mind".³⁹ This definition is far less focused than the definition contained in the statutes of other provinces—definitions which would have disqualified psychosexual and personality disorders from consideration for civil commitment. For example, the statutes in Saskatchewan, Manitoba and New Brunswick read similarly to the statute in Alberta, which defines "mental disorder" as "a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life."⁴⁰

This definition is illustrative of the types of mental disorders envisioned for civil commitment despite the broad definition in the *MHA*. Simply put, the involuntary admissions process under the *MHA* is "... clearly designed to be responsive to relatively acute, florid and/or treatable mental disorders ...".⁴¹ It is consistent with the purposive distinction between civil commitment and criminal incapacitation that the involuntary admissions regime only apply to mental disorders which result in psychotic cognition or extreme mood problems—mental disorders that distort a per-

38. Kaiser, *supra* note 8 at 292.

39. *MHA*, *supra* note 3, s. 1.

40. *Mental Health Act*, R.S.A. 2000, M-13, s. 1(g); *Mental Health Services Act*, S.S. 1984-85-86, c. M-13.1, s. 2(m); *Mental Health Act*, S.M. 1998, c. 36, C.C.S.M., c. M110, s. 1; *Mental Health Act*, R.S.N.B. 1973, c. M-10, s. 1(1).

41. Schneider, *supra* note 2 at 20.

son's perceptual, cognitive or affective reality to such an extent that his or her ability to understand legal and moral rules and to apply rational patterns of thought are compromised.⁴²

The problem with applying civil commitment to individuals diagnosed with psychosexual disorders and/or personality disorders is not a matter of the disorders being unable to reach a particular quantum of mental disturbance—the problem is that the mental disorders are of an altogether different conceptual nature than those envisioned for civil commitment. The diagnoses for these mental diseases do not set out the aetiology of the abnormal behaviour and the diagnostic criteria do not make reference to symptoms independent of the offenders' behaviour.⁴³ In other words, the diagnoses neither point to any independently observable causes (e.g. such as an organic disorder in the brain) nor do the diagnoses point to symptoms outside of the illegal behavioural patterns and sexual motives. Rather, the diagnoses *categorize* consistent patterns of abnormal human behaviour—the diagnoses are labels for particular behavioural or affective styles.⁴⁴

The focus on patterns of action rather than mental states is evident in the diagnostic criteria for pedophilia and antisocial personality disorder. The DSM-IV diagnostic criteria for pedophilia are as follows: (i) that the person has recurring sexually intense fantasies or urges over a period of at least six months involving sexual activity with prepubescent children, (ii) that the person has acted on the urges or that the urges cause marked personal distress and (iii) that the person is at least 16 years old and at least five years older than the targets of his urges.⁴⁵ It is not surprising that most recidivist child sexual abusers would fit the diagnostic criteria—the criteria are entirely comprised of the repeated illegal behaviour and the urges behind that behaviour.

Likewise, the diagnostic criteria for antisocial personality disorder focus on the deviant behaviour itself, specifically the enduring "... pattern of disregard for and violation of the rights of others ...".⁴⁶ Again, since the diagnostic criteria focus on repeated criminal behaviour, dishonesty and the lack of remorse necessarily associated with recidivist offenders, it should be expected that most repeat offenders would fit this diagnosis. Studies have confirmed this expectation in finding that as many as 58% of incarcerated felons in the United States display the diagnostic criteria for this disorder.⁴⁷

42. Stephen Morse, "Uncontrollable Urges and Irrational People" (2002) 88 Va. L. Rev. 1025 at 1037, 1046 [Morse, "Uncontrollable"].

43. Friedland, *supra* note 9 at 135.

44. Andrew Hammel, "The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts" (1995) 32 Hous. L. Rev. 775 at 803 [Hammel]; Morse, "Uncontrollable", *supra* note 36 at 1045-46.

45. American Psychiatric Association, *Diagnostic and Statistical Manual*, 4th ed. (Washington: American Psychiatric Association, 2000) at 572.

46. *Ibid.* at 706.

47. Hammel, *supra* note 44 at 809.

This is not to say that all sexual offenders could necessarily be categorized as suffering from a psychosexual disorder or a personality disorder under the DSM-IV. For example, the second of the above noted diagnostic criteria for pedophilia is that the patient has acted on the deviant sexual impulses *or* that the urges cause marked personal distress. I do not wish to be taken to suggest that clinical diagnoses of paraphilias are indistinguishable from criminal behaviour and thereby to detract from the useful distinctions made in psychiatry between patients who act on their impulses and those who do not.⁴⁸ My broader point is only that “[m]ost sex offenders suffer from some degree and form of mental disorder . . .”,⁴⁹ but these mental disorders are not the type of disorders envisioned by the civil commitment provisions of the *MHA*.

Sexual offenders may have deviant impulses, but they are cognizant of legal and moral norms, they are in touch with reality and they are able to concoct elaborate plans to satisfy their deviant impulses.⁵⁰ It is in this sense that sexual offenders are no more mentally disordered in the manner envisioned by civil commitment than other offenders who consistently act on their deviant desires. To include psychosexual and personality disorders in the *MHA*'s involuntary admissions regime collapses the purposive distinction between the civil and criminal detention systems, as it is the function of the latter to deal with behavioural criminality.⁵¹

B. *Requisite II—Dangerousness*

Certification for involuntary admission also requires that the specific mental disorder of the person be of such a nature that it is likely to result in serious bodily harm to another person.⁵² While this appeal to dangerousness may seem like a robust safeguard, the requisite is surprisingly malleable—rather than averting illegitimate commitments, the standard allows for psychiatrists and courts to justify dubious admissions by couching them in the need to protect the public.⁵³

Properly envisioned, the dangerousness criterion for civil commitment connotes an element of imminence and a high probability of serious harm rather than a speculative future possibility.⁵⁴ Unfortunately, when applied to psychiatric gating, the dangerousness requirement has been significantly relaxed, relying excessively on diagnoses of paraphilia and past history. The latter says little of the offender's current dangerousness, while the former is to a large extent derived from the latter.

This is reflected both in *Starnaman* and *Stock* where the Courts referred to the diagnoses of pedophilia and antisocial personality disorder as being indicative of the

48. William M. Burdon and Catherine A. Gallagher, “Controlling Sex-Offending Behaviour Through Incapacitation” (2002) 29:1 *Criminal Justice and Behaviour* 87 at 90.

49. *Ibid.*

50. Morse, “Uncontrollable”, *supra* note 36 at 1027.

51. Friedland, *supra* note 9 at 109.

52. *MHA*, *supra* note 3, s. 20(5)(a).

53. Kaiser, *supra* note 8 at 272.

54. Schneider, *supra* 2 at 18.

offenders' risk when taken together with their past criminal histories.⁵⁵ The Courts failed to note the relationship between the two purported risk factors and, at least in the case of *Stock*, there was an utter lack of contemporaneous evidence indicating that the offender was likely to recidivate. Furthermore, in *Stock*, the Court was cognizant of the relatively low recidivism rate for homosexual pedophiles, a range of 13-28%—certainly insufficient to establish that a diagnosis of pedophilia could be regarded as a factor establishing probable recidivism in the near future.⁵⁶

It is prudent to acknowledge that recent studies have found much higher recidivism rates for certain categories of sexual offenders, especially when the studies include self-reports of undetected sexual offences and when the studies expand the follow-up period. For example, some studies have found that 89.8-94.1% of pedophilic sex offenders recidivate within a 25-year period.⁵⁷ At the same time, these alarming rates of recidivism should be read with some caution as analyses of previously published studies, albeit using shorter follow-up periods and different measures, have yielded average sex offence recidivism rates of 13%.⁵⁸

Nevertheless, even if we assume that the recidivism rate increases dramatically when the follow-up period is expanded to 25 years, properly construed, the dangerousness criterion for committal requires an element of imminence. The above noted studies that averaged recidivism rates of 13% for sexual offenders had mean follow-up periods of six years⁵⁹—it stretches our conception of imminence to label validly the risk of sexual recidivism subsequent to such an extended period as imminent and thereby capable of satisfying the dangerousness criterion for civil commitment under the *MHA*.

Furthermore, even if we assume the high mark of recidivism for sexual offences, it should be noted that the Court decision in *Stock* upheld the civil commitment in that case, despite the low 13-28% actuarial recidivism rate *presented to the Court*. It is difficult to imagine how such a comparatively low risk rate could properly satisfy the dangerousness criterion for civil commitment under the *MHA* and justify an offender's indefinite detention in the civil mental health system—which explains the Court's reliance on the psychiatrist's subjective (and certainly less than confident) estimation of the offender's high-risk of recidivism.

It is also important to comment on the problems with relying exclusively on diagnoses of paraphilias or personality disorders to satisfy the dangerousness criterion. It should be remembered that one can conclude little about the particular offender's dangerousness from his or her membership in a diagnostic group,⁶⁰ especially

55. *Starnaman*, *supra* note 6 at 705; *Stock*, *supra* note 7 at 555.

56. *Stock*, *supra* note 7 at 553.

57. Ron Langevin *et al.*, "Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study" 46:5 *Canadian Journal of Criminology and Criminal Justice* 531 at 547.

58. *Ibid.* at 533.

59. *Ibid.* at 534.

60. Schneider, *supra* 2 at 18-19.

given the fact that the diagnostic criteria for paraphilias and personality disorders do not include any underlying symptoms (e.g. paranoia or violent hallucinations) whose mere presence could create an expectation of danger.

Lastly, the reliance of the courts on the past history of the offender in determining current dangerousness is also problematic. In psychiatric gating cases, the offender has typically been incarcerated previous to the psychiatric assessment and, as in the case of *Stock*, has not demonstrated any behavioural symptoms indicating that the offender poses a risk to the public at the time of the assessment.⁶¹ It is difficult to establish that the offender's mental disorder at the time of the assessment is "chronic and pervasive" as the Court concluded in *Stock*, where due to the period of incarceration previous to the assessment, there was a significant gap in any behavioural consequences of that disorder.⁶²

C. *Requisite III—Causal link Between the Mental Disorder and the Dangerousness*

Certification for involuntary admission under the *Mental Health Act* requires not only that the person have a mental disorder and be likely to cause serious bodily harm to another person—the danger must be due to the mental illness.⁶³

Again, given the behavioural focus of the diagnostic criteria for psychosexual and/or personality disorders, this requirement is also difficult to establish for those offenders. The fact that pedophiles have deviant desires does not mean that the offenders will act on the desires. If sexual offenders are sufficiently in touch with reality to understand legal and moral norms and, nonetheless, develop elaborate plans for satisfying their desires, they are also in sufficient control of their behaviour to not act on those desires. A diagnosis for pedophilia only indicates that the offender has deviant sexual urges and has either acted on those urges in the past or has suffered from marked personal distress as a result of those urges. Even assuming the continued presence of those urges at the time of assessment, a diagnosis of pedophilia says nothing about those urges necessarily resulting in criminal action.

This is different from the types of mental disorders that civil commitment is designed to target. Mental disorders with psychotic cognition problems or extreme mood swings could make it probable that the afflicted person will respond to those symptoms, e.g. severe paranoia, in a violent way. In contrast, it seems that pedophilia and antisocial personality disorders are simply not the sorts of disorders that could establish the causal link between the deviant desires and the injurious behaviour.

61. *Ibid.* at 19.

62. *Stock*, *supra* note 7 at 555.

63. *MHA*, *supra* note 3, s. 20(5)(a).

D. Requisite IV—Availability of Treatment Required by the Mentally Disordered Person

The *Mental Health Act* stipulates that the confined patient must be released if the person is not in need of the treatment provided in a psychiatric facility.⁶⁴ This again is consistent with the inseparability of treatment from the purpose of detainment in civil commitment—the involuntary admissions process is not intended to merely warehouse dangerous, mentally disordered persons.

However, there is scant evidence of effective treatment options for persons diagnosed with paraphilias and, in particular, for people diagnosed with personality disorders.⁶⁵ Therefore, absent effective treatment programs, the offender could not possibly be in need of treatment offered at a psychiatric facility, and the assessing psychiatrist is thereby obligated to release the person.⁶⁶

E. Requisite V—Involuntary Admission as the Least Onerous Option for Protecting the Public

There is nothing about sexual offenders making it difficult to satisfy the requirement that involuntary admission be the least onerous option consistent with protecting the public. However, the Court in *Stock* has made it virtually impossible for a mentally disordered person with a lengthy criminal history to avoid involuntary admission once dangerousness has been established.

Stock admitted the abnormality of his desires, he willingly participated in treatment and he was willing to continue treatment in the community—Stock even pursued litigation in his endeavour to obtain treatment in prison.⁶⁷ It is difficult to imagine a person demonstrating a more genuine commitment to treatment through action. It is for this reason that in denying Stock's request that he be released to continue treatment in the community, the Court was sending the message that no amount of present commitment to treatment and change would be sufficient to get past the indicia of present danger purportedly established by the offender's past criminal history.

This reluctance to look beyond past history in determining whether voluntary admission or community treatment would be appropriate is a violation of the general principle embodied in the *MHA*; the restrictions on the mentally disordered person must be the least restrictive consistent with protecting the safety of the public. It should also be noted that the recent ruling of the Supreme Court of Canada in *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* suggests that this principle is not only a statutory requirement under the *MHA* but also is likely a requisite for involuntary committals to comply with section 7 of the *Charter*.⁶⁸

64. *Ibid.*, s. 20(1)(a).

65. Hammel, *supra* note 38 at 811; Schneider, *supra* note 2 at 19.

66. Schneider, *ibid.*; Henry, *supra* note 1 at 241.

67. *Stock*, *supra* note 7 at 554.

68. [2004] 1 S.C.R. 498 at paras. 53, 54, 237 D.L.R. (4th) 1, 2004 SCC 20. See also *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 16, 175 D.L.R. (4th) 193.

F. *Philosophical Discord in the Civil Commitment of Sexual Offenders*

Psychiatric gating has expanded the use of civil commitment to a class of offenders outside of the philosophical purview of the *MHA* and, in so doing, has collapsed the distinction between penal incarceration and civil commitment.⁶⁹

There are the two ways that psychiatric gating is in discord with the fundamental objectives of civil commitment. While incarceration of dangerous offenders in the criminal justice system is primarily about retribution, deterrence and incapacitation, with a secondary focus on rehabilitation, providing an opportunity for treatment is central to incapacitation under civil commitment. As such, involuntarily admitting persons where no meaningful treatment is available shifts the civil system from one dedicated to healing to one warehousing dangerous people for preventative detention.⁷⁰

Second, even if meaningful treatment were available, a psychiatric hospital would not be the place to deliver that treatment anymore than it would be the place to deliver treatment programs for other recidivist offenders with primarily behavioural problems. Broadening the conception of "mental disorders" for the purposes of the *MHA* has absorbed offenders with behavioural problems that have always called for the police power of the criminal justice system. Merely throwing a medical label onto those patterns does not justify the shift.

The involuntary admission of sexual offenders into psychiatric hospitals is inconsistent with the objectives of civil commitment, and sexual offenders cannot fit the legal requisites for involuntary admission under the *MHA*. In the end, the medicalization of recidivist sexual offending is nothing more than legal conjuring that "wrongly justifies the unjustifiable."⁷¹

IV. PSYCHIATRIC GATING AND THE *CHARTER*

Even if civil commitment under the *MHA* could be conceptually and legally applicable to persons diagnosed with psychosexual and/or personality disorders, there are a variety of possible *Charter* violations that arise in applying the civil commitment procedures in the *MHA* to sexual offenders on their imminent release from the penal system. This paper will focus on possible violations of sections 7 and 12 of the *Charter*—the former protecting against the deprivation of liberty in violation of principles of fundamental justice, and the latter protecting against "... cruel and unusual treatment or punishment."⁷²

69. Friedland, *supra* note 9 at 112-13.

70. Michael Jonathan Grinfeld, "Sexual Predator Ruling Raises Ethical, Moral Dilemma- Supreme Court OKs Indefinite Commitment for Sex Offenders" *Psychiatric Times* (August 1997), online: *Psychiatric Times* <<http://www.psychiatrictimes.com/p970801b.html>> at 2.

71. Stephen J. Morse, "Blame and Danger: An Essay on Preventative Detention" (1996) 76 B.U.L. Rev. 113 at 141.

72. *Charter*, *supra* note 4.

I should emphasize that I am not arguing that the civil committal of sex offenders upon their impending release from prison would necessarily violate sections 7 and 12 of the *Charter*—Canadian legislators may very well be able to craft legislation achieving this end that survives constitutional scrutiny. That is a matter for discussion in another paper. The argument in this paper is that, even if we assume that the civil commitment provisions in the *MHA* can be validly used to commit offenders with psychosexual and/or personality disorders, using the *MHA* in this way would violate sections 7 and 12 of the *Charter* because psychiatric gating in effect achieves the same result as a dangerous offender designation but does not incorporate the procedural and substantive safeguards that save the dangerous offender provisions in the *Criminal Code* from violating the *Charter*.

This part of the paper begins by setting out the punitive aspects of psychiatric gating and continues by laying out the violation of established legal principles prohibiting punishment for future criminal conduct, prohibiting punishment twice for the same crime and prohibiting the abuse of process. This part of the paper also argues that the indeterminate incapacitation of sexual offenders in the civil commitment system could constitute cruel and unusual punishment in constituting a punitive sentence grossly disproportionate to the criminal activities of the offender.

A. The Punitive Features of Psychiatric Gating

In *R. v. Lyons*, the Appellant challenged the *Charter* compliance of the dangerous offender provisions in the *Criminal Code* (which allow for an indeterminate sentence for designated persons), arguing that the provisions entailed punishment for future crimes and/or punished the offender for crimes already punished.⁷³ Several of the statutory features that saved the dangerous offender provisions are absent when the *MHA* is used for the psychiatric gating of sexual offenders. However, to apply these arguments, we must first establish the punitive features of psychiatric gating lest the arguments be dismissed as they were in *Stock* by appealing to the protective and therapeutic objectives of civil commitment.⁷⁴

As discussed above, the primary objective of civil commitment is to provide treatment opportunities while detaining dangerous, mentally disordered people for the protection of the public. However, in the case of psychiatric gating, the timing of the certification for involuntary admission—days before the offenders' release—makes suspect the true intentions of the certification.⁷⁵ If the psychiatrists at the penal institutes have a genuine concern for the mental welfare of the offenders, they cannot justify delaying the purported treatment until the offenders' virtual completion of their criminal sentences. Even in *Starnaman*, where the discovery of the names

73. [1987] 2 S.C.R. 309 at 327-28, [1988] 44 D.L.R. (4th) 193 [*Lyons* cited to S.C.R.].

74. *Stock*, *supra* note 7 at 552.

75. Friedland, *supra* note 9 at 110.

and addresses of single mothers in the Appellant's cell could constitute a triggering event, the prison authorities delayed the assessment by nine months.

Moreover, even if the absence of timely psychiatric assessment and commitment constitutes a *bona fide* oversight, the realistic absence of meaningful treatment for psychosexual and personality disorders places the incapacitation of persons afflicted with those disorders in the philosophical purview of penal detention. Assuming an absence of punitive intent in the civil committal of sexual offenders, incapacitation can still be punitive in effect, since the gated offender loses "... his liberty just as swiftly and surely as a defendant in a criminal case."⁷⁶ This idea is reflected in *Morin v. National SHU Review Committee*, where the Federal Court of Appeal considered whether transferring an inmate to a maximum-security facility constitutes a quasi-criminal sanction despite the purely protective purpose of the transfer.⁷⁷ The Court held that regardless of the purpose, the effect of the increased levels of confinement is "... highly analogous to a criminal sanction."⁷⁸

In the end, the issue must move beyond semantics; merely labelling the indeterminate incapacitation as a protective, therapeutic and/or regulatory measure does not lessen its punitive consequences and does not lessen the potential violation of *Charter* principles through those effects.⁷⁹

B. Section 7—Violation of the Principle of Fundamental Justice Prohibiting Punishment for Future Criminal Conduct

In *R. v. Lyons*, the Supreme Court of Canada held that it would be a violation of section 7 of the *Charter* to sentence individuals for crimes that they have not yet committed.⁸⁰ The Court, therefore, suggested that it would be a violation of this principle of fundamental justice to subject an individual to "... a procedure in order to determine whether society would be better off if he were incarcerated indefinitely" based solely on "... fears or suspicions about his criminal proclivities."⁸¹ In that case, the Supreme Court determined that the dangerous offender provisions in the *Criminal Code* do not engage in such an exercise because an application to designate someone as a dangerous offender requires an offence of sufficient gravity such that the offence could itself warrant a lengthy or indeterminate sentence.⁸²

This discussion exposes the *Charter* vulnerability of psychiatric gating since the civil commitment process resulting in indeterminate incapacitation is applied in the

76. *The People v. Grayson* (1974), 58 Ill. 2d 260, 319 N.E. 2d 43 (Sup. Ct. Illinois) at 265.

77. [1985] 1 F.C. 3, 20 C.C.C. (3d) 123 [*Morin* cited to F.C.].

78. *Ibid.* at 35.

79. Michael Louis Corrado, "Criminal Law: Punishment and the Wild Beast of Prey: The Problem of Preventative Detention" (1996) 86 J. Crim. L. & Criminology 778 at 781.

80. *Lyons*, *supra* note 73 at 328.

81. *Ibid.*

82. *Ibid.*

absence of those strict requisites. For one, there is no limit on the sort of predicate offence that precedes the psychiatric gating of the offender, as evidenced in *Starnaman*, where the gating followed the Appellant's conviction for uttering threats—an offence which falls far short of the gravity required to allow for indeterminate incarceration under the dangerous offender provisions. Second, in psychiatric gating, the sexual offender has already received and served a sentence that a judge has deemed proportionate to the crime, and thus the indeterminate sentence cannot be said to flow from that offence. This is a problem that any future statutory regime expressly permitting psychiatric gating would have difficulties overcoming. Furthermore, absent the availability of meaningful treatment, the only realistic purpose of the civil committals is to protect the public from the offender.

In the end, the language for subjecting sexual offenders to an indeterminate sentence mirrors the purpose expressly prohibited by the Supreme Court of Canada because it violates the principle against punishment for future crimes—the preventative detention of sexual offenders based purely on a judgment that society would be better off indeterminately detaining the offenders based on fears of their criminal proclivities. The Court in *Stock* expressed its justification for upholding the psychiatric gating precisely in this way: once we eliminate the illusory justificatory reference to treatment, all we are left with is the justification that, given the Appellant's risk of recidivism, the societal interest in confining the Appellant outweighs his competing interest in liberty.⁸³

C. Section 7—Violation of the Principle of Fundamental Justice Prohibiting Punishment Twice for the Same Offence

Psychiatric gating under the *MHA* may also violate section 7 of the *Charter* in depriving the offender of liberty in violation of the principle of fundamental justice prohibiting punishment more than once for the same offence. Ordinarily, the protection against double jeopardy would be sought under section 11(h) of the *Charter* but section 11 is only available to individuals "charged with an offence." In *R. v. Wigglesworth*, the Supreme Court of Canada held that "[p]roceedings of an administrative nature instituted for the protection of the public [are not] . . . the sort of 'offence' proceedings to which section 11 is applicable."⁸⁴ Nevertheless, the Court held that the protection against double jeopardy could be pursued under section 7 of the *Charter*. And, in *Lyons*, the Supreme Court of Canada held that it would indeed be a violation of the principles of fundamental justice to punish an individual twice for the same offence—that is, plucking an individual "off of the street because of his past criminality."⁸⁵ In the case of dangerous offender proceedings, the Court held that the

83. *Stock*, *supra* note 7 at 555. See note 39 and accompanying text.

84. [1987] 2 S.C.R. 541 at 560, 45 D.L.R. (4th) 235.

85. *Lyons*, *supra* note 73 at 328.

statutory provisions do not violate section 7 because rather than punishing the offender twice, the individual is subject to an indeterminate sentence *in lieu* of the sentence he or she would ordinarily serve.⁸⁶

Psychiatric gating under the *MHA* or any future statutory regime could not be saved in this way. For one, the offenders have already been sentenced and have effectively completed their punishment for their predicate offences when the civil commitment proceedings are initiated. Second, the offender's past criminal history plays a prominent role in the determination of the offenders' risk. For example, in *Stock*, the determination of the Appellant's risk was based entirely on past history, given the absence of any symptoms or behaviour contemporaneous to the assessment that could constitute a triggering event. The offenders' risk of recidivism—and therefore, in effect, their past criminal history—is in turn used to incapacitate the offenders in the civil mental health system.

It is prudent to add that not all restrictive measures on offenders, founded on psychiatric diagnoses and past criminal history, would necessarily violate section 7 of the *Charter*. For example, section 810.1 of the *Criminal Code* allows a judge to order that an offender enter a recognizance if there are reasonable grounds to believe the offender will commit a sexual offence against a person under the age of fourteen—the recognizance could prohibit its target from contacting certain persons and attending particular locations. This provision survived *Charter* challenge in *R. v. Budreo*.⁸⁷

However, it should also be noted that the Court of Appeal in that case upheld section 810.1, in part, because the provisions are not overbroad—they are sufficiently tailored to meet their objective. The provisions only restrict the offender's ability to contact persons under the age of 14 and restrict the offender's ability to attend locations where children would likely be present. Therefore, the restrictions are linked to the Defendant's risk of recidivism, and in so far as the restrictions only minimally impair the Defendant's ability to lead a normal life, the restrictions are proportional to the societal interest in protecting children from sexual predators.⁸⁸ The Court held:

[T]he restrictions stop short of detention or imprisonment. I think it fair to conclude that detention or imprisonment under a provision that does not charge an offence would be an unacceptable restriction on a defendant's liberty and would be contrary to the principles of fundamental justice. But as then J. observed, the restrictions contemplated by s. 810.1 permit a defendant to lead a reasonably normal life.⁸⁹

In contrast, psychiatric gating does involve the indefinite detention of offenders based primarily on diagnoses of psychosexual and/or personality disorders and based on their past criminal history. Even though the offenders are detained

86. *Ibid.*

87. (2000), 46 O.R. (3d) 481, 183 D.L.R. (4th) 519 (C.A.) [*Budreo* cited to O.R.].

88. *Ibid.* at paras. 39, 40.

89. *Ibid.* at para. 39.

in a mental health facility rather than in prison, the effects are the same—psychiatric gating does not permit offenders who have already served their time to lead reasonably normal lives.

To conclude, psychiatric gating under the *MHA* constitutes a second period of detention with punitive effects based primarily on the offenders' past criminal conduct. This is a violation of section 7 as suggested by the language and reasoning in *Budreo*. This is also a violation of the *Charter* as expressly prohibited by the Supreme Court in *Lyons*—the only difference is that rather than plucking the offenders off the street based on their past criminality, the offenders are picked up at the prison gates.

D. Section 12—Violation of the Prohibition Against Cruel and Unusual Punishment

In *R. v. Currie*,⁹⁰ the Supreme Court of Canada considered whether the indeterminate sentences flowing from a designation as a dangerous offender violate section 12 of the *Charter* in being grossly disproportionate sentences constituting cruel and unusual punishment. Following *Lyons*, the Court held that the dangerous offender provisions do not violate section 12 of the *Charter* because their substantive and procedural safeguards protect against the imposition of sentences grossly disproportionate to the predicate offence.⁹¹ For one, designation as a dangerous offender requires a serious predicate offence that is either sexual in nature or carries a maximum sentence of at least ten years in prison. Together with the required pattern of past criminal history and the requisite likelihood of its continuation into the future, the indeterminate sentence is expressly proportionate to the gravity of the offender's behaviour and to the present risk of future recidivism.⁹² Likewise, in *Lyons*, the Court had previously held that the various safeguards in the dangerous offender provisions saved the provisions from potentially resulting in sentences grossly disproportionate to the offender's desert.⁹³

The absence of similar safeguards renders psychiatric gating under the *MHA* unable to escape this potential violation of section 12 of the *Charter*. Psychiatric gating circumvents the extensive substantive and procedural safeguards in dangerous offender designations by establishing the same indeterminate sentence through the civil commitment process. For example, in *Starnaman*, the Appellant's predicate offence for uttering threats carries a maximum sentence that is five years shy of the required maximum sentence that would have permitted the Crown to apply for dangerous offender designation. As such, it is highly probable that in the strict criminal context, sentencing the Appellant to an indeterminate sentence for uttering threats

90. [1997] 2 S.C.R. 260, 146 D.L.R. (4th) 688 [*Currie* cited to S.C.R.].

91. *Ibid.* at para. 28.

92. *Ibid.* at paras. 22, 26, 28.

93. *Lyons*, *supra* note 73 at 338-339.

would have been found to constitute a sentence grossly disproportionate to the offence. Moreover, the Crown could not appeal to the offender's past criminal history in justifying the disproportionate sentence as relying on this alone would be a violation of the principle of fundamental justice prohibiting punishment more than once for the same offence.

Dangerous offender proceedings may have gaps that do not allow for the indefinite detention of potentially dangerous sexual offenders such as Starnaman, but these gaps are intentional safeguards required for compliance with the *Charter*. As such, the State cannot seek to fill those gaps through the disingenuous application of civil commitment provisions in the *MHA* to gate sexual offenders at the completion of their sentences.

E. Section 7—*The Application of Collateral Estoppel to Psychiatric Gating*

Psychiatric gating also amounts to the re-litigation of an issue that has been judicially considered and decided by a court of competent jurisdiction. The sentencing judge had access to records of the offenders' past criminal conduct, had access to psychiatric and sociological evaluations, and the Court rendered a judgment on the sanctions necessary to deter the offender from future criminal conduct and the sanctions necessary to protect society from the offender.⁹⁴ In *Starnaman*, these factors were even subsequently reviewed and the sentence modified by the Court of Appeal. As such, confining sexual offenders at the completion of their sentences in the interest of protecting the public constitutes second-guessing of the Court's final decision on that issue. It is not only an intuitive affront to our sense of justice to allow this reconsideration to take place; this "collateral attack on a final decision of a criminal court of competent jurisdiction"⁹⁵ may also be legally prohibited by the doctrine of collateral estoppel.

The doctrine of collateral estoppel is an important principle in Canadian jurisprudence. For one, it prevents contradictory rulings on the same evidence, which would undermine public confidence in the administration of justice.⁹⁶ It is also intuitively unfair and a waste of resources to subject sexual offenders to multiple proceedings placing their liberty in jeopardy—the State had an opportunity to present evidence and arguments on the measures necessary to protect the public and it is unfair that the State get a second kick at the can through the civil commitment process.⁹⁷ Sexual offenders have a fundamental right to finality in the determination of their fates by the courts. It is for this reason that Canadian courts have recognized that the past litigation of an issue may estop parties from re-litigating the matter, and

94. Schneider, *supra* note 2 at 19.

95. *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 at 267, (1984), 48 O.R. (2d) 266 (C.A.) [*Demeter* cited to D.L.R.]

96. See *Roccos Construction Inc. v. Quebec Ready Mix Inc.*, [1990] 2 S.C.R. 440 at 449-50, 112 N.R. 241.

the doctrine of issue/collateral estoppel has been found to hold even where the two proceedings crossed over from criminal to civil or administrative proceedings.⁹⁸ It should also be noted that the Supreme Court of Canada has recognized the issue of estoppel to be a "fundamental principle of our system of justice," and therefore arguably a principle of fundamental justice under section 7 of the *Charter*.⁹⁹

1. *Morin v. National SHU Review Committee*

The decision of *Morin v. National SHU Review Committee* by the Federal Court of Appeal draws a remarkable parallel to psychiatric gating in its consideration of collateral estoppel.¹⁰⁰ The decision suggests that, as a question of law, it is an error to re-litigate the issue of an offender's danger to the public through the process of psychiatric gating.

In *Morin*, the Appellant was serving a life sentence in a medium security prison when he was charged with the first-degree murder of another inmate. While awaiting trial, the Appellant was transferred to a super-maximum security unit—the Special Handling Unit (SHU)—as permitted under the *Penitentiary Act*¹⁰¹ for the purpose of incapacitating dangerous inmates. The Appellant was subsequently acquitted of the murder at trial, but his request to be transferred back to a medium security prison was rejected by the SHU Review Committee. This denial was due to the continued fear by the Committee that the Appellant had in fact committed the murder, and the decision was based on the same information presented at trial.¹⁰²

For the purposes of this paper's argument on collateral estoppel, the similarities between the civil commitment provisions in the *MHA* and the directives established under the *Penitentiary Service Regulations*¹⁰³ to guide prisoner transfers to the SHU are remarkable. Commissioner's Directive 274 limits transfers to the SHU to "particularly dangerous inmates" who have been so designated based on "documented actions or demonstrated intentions while in custody" indicating that they "constitute a persistent and serious threat to staff, inmates or other persons."¹⁰⁴ The directive also requires that there be "[r]easonable and probable grounds for believing an inmate intends or is likely to commit a violent or dangerous act" before the prisoner can be transferred to the SHU.¹⁰⁵ These guidelines closely parallel the imminence and quantum of danger required to detain a person under the *MHA*. Furthermore, the intended purpose of the transfer to the SHU has a protective rather than a punitive focus that is shared by the civil commitment provisions in the *MHA*.¹⁰⁶

97. Schneider, *supra* note 2 at 21.

98. Demeter, *supra* note 95; Morin, *Supra* note 77.

99. *R. v. Van Rassel*, [1990] 1 S.C.R. 225 at 238, 105 N.R. 103.

100. *Supra* note 77.

101. R.S. 1985, c. P-5.

102. *Supra* note 77 at 33.

103. C.R.C., c. 1251.

104. *Supra* note 70 at 12.

105. *Ibid.* at 34.

106. *Ibid.* at 35.

The Federal Court of Appeal applied the two-part test of collateral estoppel in considering whether the Review Committee could re-litigate the issue of the Appellant's guilt in the murder, in reaching its administrative decision to keep the Appellant in the SHU. The first part of the collateral estoppel test is in establishing the *identity of matter*—that is, whether the substantive issue at play and the bulk of the evidence used to decide the issue are the same in both proceedings. Establishing this part of the test was simple enough in *Morin*, since the Court found that the Appellant's guilt in the murder was the central issue in both proceedings and that all of the evidence that formed the basis of the administrative decision was presented at his trial.¹⁰⁷

The *identity of matter* requirement could similarly be established in the case of psychiatric gating. As noted earlier, the sentencing judge in criminal proceedings considers the incapacitation and deterrence necessary to establish the protection of society, and the sentencing judge has access to the offender's records of past criminal history and to extensive psychological evaluations in reaching the decision. In the civil commitment process, the psychiatrists and the Ontario Review Board use that same evidence to reconsider the measures necessary to protect the public from the offender.

The second part of the test to establish collateral estoppel is the *criminal sanctions test*—that is, whether the offender is twice exposed to a penal consequence for the same legal issue. In *Morin*, the Federal Court of Appeal considered various factors in determining whether the administrative placement in the SHU constitutes a criminal sanction despite its non-punitive intent. First, the Court considered the language of the directive's test for transferring an inmate to the SHU and found that the following language: "intends or is likely to commit a violent or dangerous act", is the language of criminal law.¹⁰⁸ Second, the Court considered the purpose of the detention and found that even if a punitive intent is absent, the purpose of confining dangerous persons is similar to the purpose of sanctions under criminal law.¹⁰⁹ Lastly, the Court considered the effect of the sanction on the life of the Appellant, and the Court again found that despite the preventative and risk-based focus of the administrative transfers, the deprivation of liberty through the intensification of imprisonment makes the transfer analogous to a criminal sanction.¹¹⁰

These three sub-requisites can also be established in considering whether the psychiatric gating of sexual offenders constitutes a criminal sanction. First, the language of the *MHA* targeting dangerous mental disorders "that likely will result in . . . serious bodily harm" is no less criminal in language than the administrative guidelines for transferring inmates to the SHU. Second, the purpose of civil commitment when

107. *Ibid.* at 33-34.

108. *Ibid.* at 34.

109. *Ibid.* at 35.

110. *Ibid.*

applied specifically to sexual offenders is the protection of the public by confining purportedly dangerous persons in psychiatric facilities—a purpose analogous to sanctions in criminal law. And third, the effect on the lives of sexual offenders that are involuntarily committed to a psychiatric facility is an even greater comparative deprivation of liberty than in *Morin*, as the gated sexual offenders would otherwise be at complete liberty in the community.

The conclusion of the Federal Court of Appeal in *Morin* was that collateral estoppel was established and that the SHU Review Committee erred in law in undertaking an administrative reconsideration of the Appellant's guilt. Therefore, the Committee had no legal basis on which to continue to hold the Appellant in the SHU.¹¹¹ A similar result would be expected if psychiatric gating were challenged on the basis of collateral estoppel.

F. Section 7—*Psychiatric Gating as an Abuse of Process*

It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.¹¹²

Even if the practice of psychiatric gating under the *MHA* is unable to fit the strict requisites of collateral estoppel, sexual offenders also have recourse to its close relative, the doctrine of abuse of process. This principle is also of great importance in Canadian jurisprudence because the doctrine guards both private and public interests in the administration of justice since "one often cannot separate the public interests in the integrity of the system from the private interests of the individual accused."¹¹³ It is for this reason that in considering abuse of process the courts must not only examine the prejudice to the particular accused but also consider the threat to the integrity of the judicial system.¹¹⁴

Even if it could be said that civil committals of sexual offenders fit the strict legal requisites of the *MHA*, an intentional violation of the spirit of the law or an attempt to circumvent more appropriate proceedings for achieving the same effect would constitute an abuse of process that the courts have the jurisdiction to remedy. While the courts can only intervene in the "clearest of cases",¹¹⁵ this paper argues that psychiatric gating—in circumventing the safeguards of dangerous offender proceedings in the *Criminal Code* and in its duplicitous motives—constitutes a clear case of abuse of process.

111. *Ibid.* at 36.

112. *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 63, 130 D.L.R. (4th) 235 [*O'Connor* cited to S.C.R.].

113. *Ibid.* at para. 62.

114. *Ibid.* at para. 64.

115. *Ibid.* at para. 68.

Parliament has established the dangerous offender proceedings under the *Criminal Code* to protect the public from "habitual criminals who are dangerous to others."¹¹⁶ Psychiatric gating circumvents the dangerous offender proceedings and its robust substantive and procedural guidelines by taking advantage of mental diagnoses that are little more than labels for habitual criminal behaviour. In effect, psychiatric gating ultimately achieves the same indeterminate sentence of a dangerous offender designation through the mental health system.

This argument was attempted in *Starnaman*. The Appellant argued that the certification for involuntary admission into a psychiatric hospital was a disguised attempt to extend incarceration and achieve *de facto* dangerous offender designation without having to contend with the safeguards that would have rendered the Appellant ineligible for the designation.¹¹⁷ The Court of Appeal side-stepped the issue by refusing to deal with the interaction between the penal and civil commitment systems, satisfying itself with the fact that—although the involuntary admission process was initiated by a psychiatrist in the penal system—the ultimate certification was situated squarely in the mental health system.¹¹⁸

Officials seeking to extend prisoners' incarceration through civil commitment cannot ignore the fact that Parliament has established a comprehensive regime for dealing with dangerous repeat offenders and for obtaining the resulting indeterminate sentence. In establishing this regime, it can be reasonably inferred that Parliament sought to foreclose efforts outside of that process to obtain the same sanction. As such, circumventing the dangerous offender provisions in using the civil commitment process in the *MHA* to obtain an indeterminate sentence for habitual sexual offenders constitutes a clear abuse of process.

An interesting analogy to support this argument can be drawn from the decision of the Supreme Court of Canada in *Seneca College of Applied Arts & Technology v. Bhadauria*.¹¹⁹ In that case, the Court considered the comprehensive legislative regime for protecting human rights in Ontario that was created by the Legislative Assembly. Despite the fact that the statutory regime included a mechanism for launching complaints, the Respondent sought to achieve the same result outside of that process. In rejecting this move, the Supreme Court of Canada held that the comprehensive enforcement regime in the *Ontario Human Rights Code*¹²⁰ forecloses any civil action for a similar remedy outside of the established process. Since the Respondent did not see fit to use the internal procedures set out by the *Code*, her cause of action was dismissed.¹²¹

116. *Lyons*, *supra* note 73 at 323.

117. *Starnaman*, *supra* note 6 at 704.

118. *Ibid.* at 704-05.

119. [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 [*Bhadauria* cited to S.C.R.].

120. R.S.O. 1990, c. H.19 [*Code*].

121. *Bhadauria*, *supra* note 119 at 194-95.

An argument can be made that the decision in *Bhadauria* at the very least supports the validity of the inference that in creating the comprehensive dangerous offender provisions, Parliament intended to foreclose the pursuit of an indeterminate sentence for habitual offenders outside of that regime. As such, if the Crown does not seek to designate habitual sexual offenders as dangerous offenders, or if the requisites for designation cannot be met in a particular case, the courts should dismiss, as an abuse of process, attempts to achieve the same sanction under the *MHA*.

Establishing the duplicitous motivation in committing habitual sexual offenders under the *MHA* would also go a long way towards establishing an abuse of process. In this respect nothing speaks greater volumes of the duplicitous motive than the timing of the psychiatric assessment initiating the civil committals in the test cases. In *Starnaman* and in *Stock*, the civil commitment proceedings were respectively started five and three days previous to the completion of the offenders' sentences. Stock's psychiatric assessment was not triggered by any new symptoms or problematic behaviour, and the supposed triggering event for Starnaman occurred nine months previous to the assessment. Because the assessors waited until the end of the offenders' criminal sentences, a reasonable inference can be drawn that when the certification proceedings were commenced, the proceedings were not motivated by a genuine interest in the mental health of the Appellants.¹²² If the sexual offenders were so mentally disordered that they required indeterminate incapacitation, it would have been unconscionable to delay granting them access to the treatment they purportedly required.¹²³ As such, the timing of the certification reveals its true purpose and the pungent abuse of process in achieving that result. Any attempt to justify the civil committals of sexual offenders by reference to the offenders' need for treatment constitutes nothing more than "dressing up a criminal wolf in a civil sheep's clothing."¹²⁴

As noted earlier, in *R. v. O'Connor*, the Supreme Court of Canada held that a consideration of abuse of process should look beyond the prejudicial effects on the interests of the particular person to the potential prejudice to the whole of the system.¹²⁵ One alarming consequence that could be expected to flow from the widespread use of psychiatric gating is its potential for corrupting the plea bargaining process. Proving sexual offences in court is notoriously difficult and the trial process is traumatic to victims. If utilising the *MHA* to achieve the criminal law purpose of lengthy incarceration continues unchecked, it would motivate the Crown to offer light sentences in plea bargaining, knowing that the offender could be nabbed at the end of the sentence by the civil commitment process.¹²⁶ Competent defence counsel would soon after be expected to adapt, advising clients with a lengthy history of

122. Schneider, *supra* note 2 at 19-20; Henry, *supra* note 1 at 247-48.

123. Hammel, *supra* note 44 at 801.

124. Friedland, *supra* note 9 at 115.

125. *O'Connor*, *supra* note 112 at para. 64 and accompanying text.

126. Friedland, *supra* note 9 at 132-33.

sexual offences to refuse all deals and take their chances in court. This would ultimately hurt the victims of sexual predators who would then have to endure the traumatic trial process.

It should also be noted that the potentially harmful effects of psychiatric gating do not leave the mental health system unscathed. Since there is no effective treatment for psychosexual and, in particular, for personality disorders, it should be expected that sexual offenders subject to involuntary admission will remain in the civil system indefinitely.¹²⁷ Not only is psychiatric detention an expensive way to warehouse offenders with behavioural problems, it is a waste of valuable psychiatric resources that are in short supply—each psychiatric bed occupied by a sex offender is one less bed available for persons with treatable mental disorders.¹²⁸

The combined effect of psychiatric gating on private interests in being deprived of liberty through a duplicitous process, on the administration of justice in dissuading plea bargains and on the mental health system in depleting its scarce resources, establishes a clear need for court intervention to put a stop to this abuse of process.

G. Can the Violations of Section 7 and Section 12 be Saved by Section 1 of the Charter?

Some brief comments should be made pertaining to whether the violations of sections 7 and 12 can be saved by section 1 of the *Charter*. To begin, it should be noted that for a violation of the *Charter* to be saved by section 1, the violation must first be “prescribed by law.” For a limit on a *Charter* right to be prescribed by law within the meaning of section 1, the limit must be “expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.”¹²⁹

However, Part III of this paper argues that psychiatric gating is invalid under the *MHA* because the five criteria for civil commitment under the *Act* cannot be satisfied in such cases. In other words, even though the courts have purported to apply the civil commitment provisions in the *MHA*, I argued that the five criteria for civil committals cannot be met in cases of psychiatric gating—as a result, those involuntary civil committals are not permitted under the *MHA* and, therefore, are not prescribed by law within the meaning of section 1. Consequently, section 1 arguments have difficulties getting off the ground.

Even assuming psychiatric gating can be legitimately accomplished under the *MHA*, it should be noted that the vast majority of arguments in this part of the paper set out violations of section 7 of the *Charter*. The Supreme Court of Canada con-

127. Schneider, *supra* note 2 at 21.

128. *Ibid.*; Friedland, *supra* note 9 at 132.

129. *R. v. Therens*, [1985] 1 S.C.R. 613 at para. 56, 18 D.L.R. (4th) 655.

firmed in *R. v. Ruzic* that violations of section 7 can likely only be justified under section 1 in "exceptional circumstances, such as the outbreak of war or a national emergency..."¹³⁰ These exceptional circumstances are absent in cases where psychiatric gating is pursued. Furthermore, it is open to Parliament to reconsider the dangerous offender provisions in the *Criminal Code* to better protect public safety if psychiatric gating is prompted by such concerns.

As for the potential violations of section 12 of the *Charter*, they may or may not be saved by section 1 of the *Charter*. Unfortunately, any section 1 argument must be considered in the precise factual context of those cases where the indefinite detention amounting to punishment under the *MHA* is grossly disproportionate to the index offence. In any event, it is difficult to find any cases where courts have upheld cruel and unusual punishment, under section 1 of the *Charter*. The Supreme Court for one has never held that a violation of section 12 is saved by section 1 of the *Charter*.

V. CONCLUDING COMMENTS

This paper argued that the psychiatric gating of sexual offenders cannot establish the legal requisites for civil commitment under the *MHA* and does not comport with the philosophical objectives of the involuntary admissions process. Furthermore, even if the legal requisites for civil commitment could be met by offenders with psychosexual and/or personality disorders, psychiatric gating under the civil commitment provisions of the *MHA* may violate the *Charter* because using the *MHA* in this way effectively side-steps the substantive and procedural safeguards of the dangerous offender provisions in the *Criminal Code*—safeguards that the courts have deemed necessary for the provisions to survive *Charter* scrutiny. Psychiatric gating under the *MHA* could constitute a violation of the principles of fundamental justice prohibiting punishment for future crimes, prohibiting punishment more than once for the same offence and could constitute an abuse of process with wide-ranging effects on the administration of justice. The indefinite civil committal of sexual offenders under the *MHA* could also violate section 12 of the *Charter* by resulting in indeterminate sentences grossly disproportionate to the predicate offences.

Psychiatric gating under the *MHA* is a simplistic and ultimately ineffective solution to a complex psychological and social problem. The medicalization of sexual offenders artificially reduces that problem into one of individual pathology and, in so doing, neglects the social and environmental sources of violent sexual crime. The illusory solution in psychiatric gating, therefore, does the legal community a disservice in shifting our focus away from the continuing need to develop more effective means to deal with sexual offenders.¹³¹ In the end, a serious commitment to eliminating sexual offences will require real and honest solutions that focus on prevention and are as multilayered as the problem they address.

130. [2001] 1 S.C.R. 687 at para. 92, 197 D.L.R. (4th) 577, 2001 SCC 24. See also *R. v. Heywood*, [1994] 3 S.C.R. 761 at para. 69, 120 D.L.R. (4th) 348.

131. Schneider, *supra* note 2 at 21.

